

REFORMATION OF TELECOMMUNICATION LAW IN INDONESIA

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ABSTRACT

The reformation in the management of telecommunication related to competition and the “breaking-up” of monopoly system surely brought about consequences of government roles. At first, government had a role as the service operator which provides telecommunication service. That role has changed now that the government’s position is more like a referee which is hoped to be able to facilitate and to offer fair management to all of telecommunication operators within telecommunication industry, both the government enterprises and private enterprises. In this matter, the government has an obligation to ensure the establishment of healthy competition, non-discriminative, and pro-market. Besides that, the government also acts as the fort and the protector for the public need which is related with telecommunication service.

Keywords: Reformation, telecommunication law in Indonesia, in order of globalization

Introduction

In *World Telecommunication Development Report 2002*, ITU (*International Telecommunication Union*)¹ describes today telecommunication sector within four key words, namely “private”, “competitive”, “mobile”, and “global”. This means that telecommunication sectors worldwide are becoming more privatized, more open for competition, more mobile, and global in all of its aspects; its operational aspect, its regulations, and also its services.

The important notion to be considered here is the term of “private” and of “competitive”. In practice, those two terms have become the main triggers for the reformation in this sector everywhere, including in Indonesia. The governments from almost all of the members of ITU started to change the paradigm of its management from monopolistic approach to market-based approach. By 2002, more than half of all of the states in the world had privatized its telecommunication sectors by selling some or even all of the shares of their incumbent operators to the private sectors. Viewing from a revenue side, the incumbent operators which is now owned by private sectors that has dominated more than 85% of the world telecommunication markets. Meanwhile, the incumbent operators which are fully owned by the government have only dominated 2% of the whole market.²

The same phenomenon also occurs in the closing of monopoly era and in the opening of competition in telecommunication market. By 2004, for instance, approximately 50% of all state members of ITU had opened their local call services for a competition. The open competition for long-distance call and international call had only a lower percentage of approximately 40%. However, for a cellular phone and an internet service, the percentage was even higher, which were up to 80% and 90% respectively.³

Indonesia had made an appropriate anticipation of the trend by establishing telecommunication network which had wider coverage and offered various services. Infrastructures for telecommunication have also improved impressively from year to year, both quantitatively (affordability, accessibility, and capacity) and qualitatively (the sophisticated technology support, efficiency, and service quality). However, along with those improvements, the hope and the demand of telecommunication users is for better capacity, quality, and the availability of various services that is, provided by the private sectors and the government which, also increase. Within the last few years, the users’ needs in telecommunication sector have shifted not only from focusing only on quantitative aspects that also the qualitative aspects.

Research Methods

This study uses the non doctrinal law approachment. This paper studies in Socio-Legal approach which describes and analysis telecommunication law in Indonesia.

¹ World Telecommunication Development Report 2002, International Telecommunication Union, March 2002. At the beginning, ITU is the abbreviation of International Telegraph Union formed in 1865 as an inter-government organisation which had a purpose to improve the harmony in each state’s telegraph network. Danrivanto Budhijanto, *Hukum Telekomunikasi, Penyiaran, dan Teknologi Informasi: Regulasi dan Konvergensi* (Bandung: Refika Aditama, 2010), p. 9.

² World Telecommunication Development Report 2002, *Ibid*

³ *Ibid*

Reformation of Telecommunication Law in Indonesia

The changes of the management in telecommunication business in Indonesia started with the implementation of Law No. 3 of 1989 on Telecommunication as the substitution of Law No 5 of 1964. At first, telecommunication management was based on monopolistic approach,⁴ anti-competitive, and operator oriented,⁵ which meant that telecommunication sector was managed by the government through PT Telkom and PT Indosat. With the implementation of Law No. 3 of 1989 government made the policy to offer opportunities to the private sectors and cooperation to conduct telecommunication business by collaborating with PT Telkom and PT Indosat.⁶

Due to there have been many phenomena occurred, for example the establishment of PT Satelindo as the international telecommunication service operator, PT Ratelindo as local radio telecommunication operator, and other telecommunication service operators, for instance the operator for radio call for public, telecommunication kiosk, and operators for Cellular Mobile Telecommunication System (CMTS) such as PT Telkomsel, PT Excelcomindo, PT Satelindo, PT Bakrie Telecom, dan PT Lippo Telecom.

In its development, the management of telecommunication system based on Law No. 3 of 1989 within the ten year period was no longer able to meet the demand of the market condition and the development of technology in telecommunication, and therefore it is necessary to substitute it with Law No. 36 of 1999 on Telecommunication.

The followings are few things that encouraged the need for conducting telecommunication deregulation in 1999⁷ :

- 1) The changes of global environment and the development of telecommunication technology which occurred rapidly had initiated a basic change that create new environment in telecommunication and there are changes of point of view in using telecommunication, including telecommunication convergent along with technology of information and broadcasting.
- 2) The adjustment in the management of telecommunication in national level had become a necessity, considering that there had been a rapid improvement in private sectors which were competitive in fulfilling the public needs.
- 3) The development of telecommunication technology in international level followed by its role as one of the trading commodities, which had high commercial values, had encouraged the establishment of multilateral agreement.

The changes in the management of telecommunication include the changing aspect which is very fundamental. According to Field and Kurt Lewin,⁸ the changes occur because there is pressures towards organizations, individual, or groups.

From all of those reasons, almost all of the state members of ITU, including Indonesia, are motivated to form an Independent Regulation Board which is separated from telecommunication operators. This board is hoped to ensure that this industry will always be in healthy and conducive competition. The board is also hoped to be able to prevent anti-competitive practices from incumbent operators, to issue permission for new operator to manage telecommunication service, and to bring the most of the benefit from the conducive market structure for the need of the society widely.

Those three phenomena, privatization, monopoly breaks-up, and the establishment of Independent Regulation Board are the bases for reformation in global telecommunication sector.⁹ At present, reformation in telecommunication sector is conducted by almost all of the states in such a faster acceleration by focusing on those three aspects. It should be admitted then, that it is still difficult to predict its success. However, it is hoped that the management of global telecommunication sector will be more dominated by private enterprises that its market will be more competitive and more open for any operator. The establishment of transparent, credible and fair regulation will be achieved when the government plays its role as the regulator, and no longer as the operator.

First, it is a fact that telecommunication service which is managed and owned fully by the government which does not always derive good contribution. There has been enough records to say that liberalized market can even give positive effects so as to make the market develops better, to develop innovation and faster service, and that those are used to make better service for the society.¹⁰

Experiences show that almost all of the state members of ITU who conducted liberalized telecommunication market have generated a lot of benefit not only for the customers or users but also for the telecommunication operators. In those states, competitions have proven to be able to give more options of the various telecommunication operators, wider range of types of telecommunication service, much better telecommunication service, and cheaper tariff.

Naturally, competition will encourage incumbent operator (in this case is PT Telkom) to continuously improve efficiency, to improve the effort in product innovation, and finally to make a better service for the customers. Creating competition followed by proper regulation has proven to ensure the establishment of what ITU calls as "universal access", that is the availability of telecommunication service widely for the public and "universal service", that is the availability of telecommunication service at the homes.¹¹

Cellular Mobile Telecommunication System (CMTS) is a very clear proof on how the right changes in telecommunication management structure have generated a lot of benefit. From the beginning the CMTS is a segment in telecommunication market which is liberalized and is opened for competition, is opened for private ownership, and has allowed foreign company to invest as

⁴ Article 2 and Article 3 of Law No. 5 of 1964 on Telecommunication

⁵ Danrivanto Budhijanto, *op. cit.*, page. 37

⁶ Article 12 and Article 13 Law No. 3 of 1989 on Telecommunication

⁷ See the blue print of Indonesia Telecommunication Policy, 1999

⁸ Rhenald Kasali, *Change*, 2005, p. 98

⁹ World Telecommunication Development Report 2002. *Loc. cit*

¹⁰ Privatization is one of the means used to change the relation between regulator (government) with private sectors. This is so because privatization process has opened an opportunity for private sectors to participate in providing service for the public.

¹¹ Trends in Telecommunication Reform 2003: Promoting Universal Access to ICTs, International Telecommunication Union, September 2003

part of its investment strategies. The combination of those three steps which then creates conducive business environment which enables this sector to grow revolutionary.¹²

The competition in CMTS has proven to bring positive effects, such as the more affordable tariff, and the development of product innovations, from SMS (Short Message Service), game, music, and handset camera, till MMS (Multimedia Message). The innovations resulted in these new features in turns are able to boost the demand for such services which in the end creates a bigger market.

Service standard and customer satisfaction rate also improve essentially because of the competition. Thus, it has overridden the telephone service which is still monopolized. In addition, the CMTS service is also able to achieve its mission for universal access/service, because it can reach the market from lower social status by providing relatively cheap services such as pre-paid service or SMS.

Second, there is a political will from the government to acquire capital from the private sectors so that it can be used to develop and up-grade the infrastructure of telecommunication network and also to develop new services.¹³ In this case, the main mission is to improve telecommunication services, both quantitatively (the number of telephone connection, and its range) and qualitatively (its reliability, speed, the variety of products and features, and so on). It is necessary for the government to do so because of the limited government financial budget.

Considering such limitation, generating capital from private sectors through privatization or through other forms of strategic cooperation becomes an appealing option. Survey conducted by Booz Alien & Hamilton and the World Bank shows that within 1995-2001, there have been 30 privatizations throughout the world and the capital generated from such practice reaches up to \$150 billion.¹⁴

Third, at least two new technologies, which have revolutionized telecommunication services, have developed; those are internet and mobile/wireless technology. These two services, since 'their birth', have been designed so that their market will not be distorted, nor even be monopolized by the incumbent operator. Based on ITU data, by 2003, there had been more than 80% of state members of ITU which had liberalized the market form internet and mobile services. By 1999, more than 67% of global cellular market and 72% of global internet market had been opened for competition.¹⁵

Fourth, international trading in telecommunication services has developed. The multilateral organizations such as International Telecommunication Union (ITU), World Bank, World Trade Organization (WTO) and Organization for Economic Cooperation and Development (OECD) are getting more powerful in encouraging the liberalization of telecommunication market throughout the world.

This conducive market structure brings about fantastic result, even a revolutionary one, both from the range of its service and from the quality of its service. In 1991,¹⁶ less than 1% of all of the world population had access to cellular phone and less than one-third of the world population had cellular telephone network. However, ten year afterwards, more than 90% of all of the states have cellular network, and one of six populations owns cellular phone, and more than a hundred states have customers of cellular phone, and this outnumbered the owner of fixed phone.

In this matter, it is necessary to put forth that Indonesia as one of the members of WTO has signed the General Agreement on Trade and Services (GATS).¹⁷ Due to that, Indonesia is bound by GATS regulations. The followings are new things related to the issues of deregulation and liberalization of telecommunication:¹⁸

- 1) Transparency principle that is the state which has signed the agreement is obliged to announce in its own state all of the rules and regulations of the agreement related to telecommunication sector.
- 2) The state which has signed the agreement is obliged to provide the same treatment to the entire trading partner in liberalized service sectors.
- 3) The guarantee of the monopoly holders in a service sector (for example, according to Law No. 3 of 1989, the monopoly holders in managing basic telecommunication service are PT Telkom and PT Indosat) is not able to develop anti-competition policy in competitive sector, for example in non-basic telecommunication service.
- 4) The tariff for telecommunication service must be based on cost-oriented pricing.
- 5) There is a guarantee which enables states to rent the domestic or the international lines and the freedom to connect those lines to public telecommunication network and other terminal network/ Customer Premise Equipment preferred by the customers, without any restriction. Such guarantee was not allowed in Indonesia and also in many other states.
- 6) There is a guarantee to utilize telecommunication network for intra-enterprise communication, both within the borders of any state and cross country coverage and to access the data base in foreign states.

¹² World Telecommunication Development Report 1999: Mobile Cellular, International Telecommunication Union, Oktober 1999.

¹³ The government's political will is realized by the implementation of Law No. 36 of 1999 on Telecommunication, that is by giving opportunities for foreign investors to invest in telecommunication sector.

¹⁴ Peter S. Adam, *Privatization in Telecommunication Industry*, Center for International Private Enterprise, 2001

¹⁵ *Trends in Telecommunication Reform 1999: Convergence and Regulation*, International Telecommunication Union, October 1999.

¹⁶ Liberalization of telecommunication market throughout the world becomes the demand for competition of international market.

¹⁷ GATS recognizes two types of telecommunications, those are telecommunication bases and the value-added on telecommunication services. Telecommunication bases include the services of unmodified voice transmission. Danrivanto Budhijanto, *op. cit.*, p. 17

¹⁸ Dedi Supriadi, *op. cit.*, p. 91

Changes in Telecommunication Management Structure

The explanation of the Law No. 36 of 1999 on Telecommunication¹⁹ emphasizes, among others, that the changes of global environment and the development of telecommunication technology which occurred rapidly had initiated a basic change that created new environment in telecommunication and the changes of point of view in using telecommunication, including telecommunication convergent along with technology of information and broadcasting. Therefore, it is considered necessary to deregulate the management of national telecommunication.

The adjustment in managing telecommunication in national level has become a real need, considering that there is an increase on private sectors' ability in managing telecommunication, mastering telecommunication technology, and their competitive excellence in fulfilling public need.²⁰

It is necessary to mention that to adjust with the global environment changes and to be able to fulfil public need for telecommunication service a large amount of investment is needed, both from domestic private sector and foreign private sector, as the government has limited funds. The policy to call on investment in telecommunication industry and the increased role of private sectors in managing telecommunication affect, among others, the point of view and or the shift in interpreting the meaning of article 33 of 1945 Constitution (UUD1945), which basically says that the land, the water and all of the assets within are owned by the state and are utilized for the maximum benefit of the whole citizens. Likewise, any branch of industry which controls the living of most population is managed by the state for the maximum benefit of the citizens. As it is meant by Law No. 36 of 1999 on telecommunication, telecommunication is one of the branches of industry that is considered important and is controlled by the state.

It is important to highlight the assumption of the changes in the point of view in managing telecommunication, which at first was viewed as a service which controlled the living of the population, was considered vital and strategic, and also was using up the limited state natural resources, which was managed by government through its state enterprises (BUMN).²¹ At present, telecommunication which has become one of the traded commodities is surely related with the consumer protection and business competition. In Indonesia, business competition law,²² or whatever name it takes, such as *Antitrust Law* (United States), or *Antimonopoly Law* (*Dokusen Kinshibo* in Japan), *Restrictive Trade Practices Law* (Australia), or *Competitive Law* (European Union) is part of economic law. The basic policy for our national economic must refer to the 1945 Constitution. Article 33 of 1945 Constitution clearly states that the national economic must be built under democratic philosophy and realized in public economy.

The bigger opportunities given to the private sector to take part in managing telecommunication is targeted to increase telecommunication density, accessibility, and to improve service quality to the public. In addition to that, the maturity of telecommunication industry in Indonesia to face the pressure of global market and the readiness to face the competition are important factors. This consideration is relevant when it is related with Indonesia government's position in the negotiation of World Trade Organization (WTO) which is documented in Schedule of Commitment. The Schedule of Commitment comprises the telecommunication services which are open for foreign investors along with the schedule of investment. However, the opportunities for managing telecommunication business must be given proportionally not only to the enterprises which hold strong capital, but such opportunities must also be given to cooperation, small and medium scale of business, and the province/region enterprises (BUMD).

Then, there is a shift in understanding and interpreting the meaning of "owned by the state", from the earlier meaning of being owned and managed by the government into the meaning of being regulated by the government. Besides, foreign investors²³ can also hold the company shareholders in telecommunication business through direct placement.

The management of telecommunication in Indonesia under Law No. 5 of 1964 on Telecommunication can be called as monopoly era because it was only the state enterprises, PT Telkom and PT Indosat, which operated and managed telecommunication business.

The monopoly-based system in managing telecommunication business in Indonesia for about 43 years (since 1945 until 1988) has lost its existence as the system has been replaced by the new system which is more market-based approach under Law No. 3 of 1989, and afterwards it comes into the competition era as regulated by Law No. 36 of 1999 on Telecommunication.

A clear explanation of such unconformity can be seen through the following data:

2014 data of telecommunication stock holders²⁴ for fixed telephone service is 51,19% owned by Indonesia government (PT Telkom) and 40,21% owned by public and 8,10% owned by The Bank of New York. For cellular telephone service (STBS), the data are as follows: PT. Telkomsel (65% is owned by PT. Telkom, 35% is owned by Sigtel mobile); PT. Indosat Q Tel Asia (65% is owned by Qatar, and 14,29% is owned by Indonesia government); Skagen As Entities (5, 57% is owned by Norwegia and Public 15,14%), PT XL Axiata, Axiata Group Berhad (66,549%), Public (33,451%); PT Axis Telkom Indonesia (80,1% is owned by Saudi Telkom Company, 14,9% is owned by Maxis (Malaysia), is owned by Indonesia local companies); PT Hutchison (60% is owned by Hutchison whampo (Hongkong), 40% is owned by Charoen Polephand Group Indonesia).

The transition process from monopoly-based system to market-based approach does not happen just like that. To make the transition process more effective, it is necessary to have legal instruments in the form of government regulations. Those legal

¹⁹ Law No. 36 of 1999 on Telecommunication is a juridical base in reformation frame of telecommunication sector targetted to urge the economic growth and national development.

²⁰ The adjustment of telecommunication policy in national level is a logic consequence of Indonesia's participation in international organisation such as ITU, WTO, and regional organisation (ASEAN).

²¹ State enterprise (BUMN) is one of the actors in economic activities which has significant roles in establishing the welfare of the population.

²² Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, Gramedia Pustaka Utama, 2004. p. 10-11.

²³ Regulated in Government Regulation No. 20 of 1994 on shareholder ownerships in an enterprises established for gaining foreign investors.

²⁴ www.google.com, last accessed 12 January 2015

instruments are needed, among others to prevent market failure, to improve the service quality for the public. According to Agus Dwiyanto,²⁵ transparency in service has a critical role in developing governance practice, because most of the problems in managing the government and service are resourced from poor transparency.

With the enactment of multi-operators telecommunication policy as it meant in Law No. 36 of 1999 on Telecommunication, it is important to study further on the implementation of good corporate governance in managing telecommunication in Indonesia.

Good corporate governance has five main purposes; first, to protect the rights and needs of the shareholders; second, to protect the rights and needs of stakeholders other than the shareholders; third, to improve the enterprise value which will benefit the shareholders; fourth, to increase the work efficiency and effectiveness of the Boards of Directors with the senior managers; fifth, to improve the relationship quality between the Board of Directors with the senior managers in the enterprise.

According to Satjipto Rahardjo,²⁶ the use of law or legal regulation as policy instruments is considered as a modern development in law history. To arrive at this development, some requirements are needed, such as the establishment of social organization which is getting more organized and perfect.

The next problem is concerning with the regulation on the management of radio frequency spectrum. Along with the increased need for telecommunication and the fast development of telecommunication technology, telecommunication operators in the future will be based more on the mobile telecommunication.²⁷

With mobile telecommunication, radio frequency spectrum is used as the main media for managing the telecommunication. That is way, the managements of radio frequency spectrum which include the plan of its use, its arrangement, the permission of its use, and the operational supervision definitely need support from legal policy which is clear, transparent, justice, and its use will still be targeted for the public need.

In the GATT-WTO agreement, especially the one which is related with capital trading or what is usually called as *Trade Related Investment Measure* (TRIMs)²⁸ it is determined that every state who signs the TRIMs agreement is not allowed to differentiate between domestic and foreign capital. The law on investment in every state member of GATT-WTO is not allowed to differentiate between the domestic and foreign capital.²⁹

The principles of international trade as ruled by GATT-WTO, which have become the principles of foreign investment, even are obliged to be elaborated in the regulation on investment in every host country, are *non-discriminatory principle*, *most favoured nation principle*, and *national treatment principle*.³⁰

In turn, market structure will affect the conduct of the market participants, especially in their manners toward price policy, strategy for business development, and their reactions towards regulation. Any action conducted in the form of strategic or operational action; either it is conducted individually or collectively will influence the performance of the enterprise or the performance of the economic condition in general. Within this context, it will be seen whether the market is efficient already or it is still in the condition of *dead weight lost* which is intentionally or not may be created by the market participants themselves. According to Johnny Ibrahim, the interactions among the behaviour, structure, and the market performance are considered to be strategic in determining the economic performance and the state's wealth level.³¹

Because of that, good government will not disturb the market structure when it finds that the market structure has been established spontaneously and that the market has created a natural or even an optimal efficiency. The condition and the mechanism of healthy competition, though it is not naturally should not be intervened. On the contrary, the government should make any intervention or any preventive action in the form of good regulation when it sees that the market does not function well or is being distorted due to the power of imbalance transactions. Government's intervention in this case is considered appropriate as long as it is targeted to repair the market failure.³²

In line with the era of globalisation and competition, standardization is crucial in establishing quality, inter-connectivity, and the reliability of the network as well as to protect telecommunication sector. ITU has anticipated this problem by restructuring its institutions and establishing Bureau of Telecommunication Standard. The government has issued a statement which regulates that all of the equipments used in Indonesia must have the standard certification and label. With all of those policies and strategies, it is hoped that telecommunication in Indonesia will be able to serve all of the population with the world class service and will be able to fulfil all of the population need for various telecommunication services.

²⁵ Agus Dwiyanto. *Mewujudkan Good Government melalui Pelayanan Publik*, Gadjah Mada University Press 2005. p. 3

²⁶ Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti, 1991 p. 85 and p. 90.

²⁷ See further regulation on radio frequensy spectrum in Radio Regulation which is insepareble part of conventions in telecommunication of ITU.

²⁸ TRIMs is a form of pressure from the developed countries so that the developing countries are willing to negotiate an agreement which limits government right to implement an investment regulation which may create distorsion in international trade. For the developing countries, this is a very sensitive problems because it is related with larger economic policy, in fact it is related with a very delicate matter of policy in social-economic areas, and it can not be viewed as the matter of trading only. (H.S. Kartadjoemena, *Substansi Perjanjian GATT/WTO dan Mekanisme Penyelesaian Sengketa*, UI, Press. 2000, p. 220

²⁹ *Ibid*

³⁰ *Ibid*, p. 159. based on *most favoured nation principle*, the states must give the same treatment as what they treat the thrid countries. For example, if based on a multilateral agreement, State A charges 5% of teriff for imported product frm State B, then the same tariff must be charged to the third state which also signed the agreement. *National treatment principle* enforces the same treatment in any state, and therefore the treatment for the foreigners should be the same as the treatment for state's own citizens. Hata, *Perdagangan Intemasional dalam Sistem GATT dan WTO: Aspek-aspek Hukum dan Non-hukum* (Bandung: Refika Aditama, 2006), p. 55

³¹ Johnny Ibrahim, *Hukum Persaingan Usaha, Filosofi, Teori dan Implikasi Penerapannya di Indonesia*, Banyumedia, 2006. p. 96

³² *Ibid*, p. 94

KPPU as it is ruled in Law No. 5 of 1999 on the Prohibition of Monopoly Practice and Unhealthy Business Competition has established Indonesia Telecommunication Regulation Board (BRTI)³³, which functions, among others, to regulate and to supervise the management of telecommunication. The establishment of the board is aimed at ensuring the transparency, independency, fair principles in managing telecommunication, and also acts as the realization of Law No. 36 of 1999 on Telecommunication.

Conclusion

First, the management of telecommunication in Indonesia under monopoly-based on Act No. 5 of 1964 concerning Telecommunication new replaces by a market-based system under Act No. 3 of 1989, which marks the beginning of competition era as regulated by Act No. 36 of 1999 concerning Telecommunication. The transition process from monopoly system to competitive system requires political law in the from of regulation made by the government. This regulations are important to make the transition process effective, to prevent the market, and to improve the quality of service.

Second, it is worth noted that telecommunication plays a strategic roles as one of the media of communication for the benefit of population in Indonesia as well as it is used as “the service” which is traded. Competition in managing telecommunication business should be based on the legal frame of Law No. 36 of 1999 on Telecommunication and Law No. 5 of 1999 on Prohibition of Monopoly Practice and Unhealthy Business Competition. It is about time to consider the other side effect of telecommunication management. Telecommunication technology which is based on humanity principles seems to be one of the alternatives worth to be considered. Regulation which regulates the management of telecommunication in Indonesia, since early on, should consider the human need and their environment. The law must be dedicated for human’s need.

³³ BRTI is established as the realization of Article 4 (2) in Law No. 36 of 1999 on Telecommunication.

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