RIVISTA DI
DIRITTI COMPARATI

The emerging trends of the modernization of state-controlled economy in the ASEAN space. The case of Indonesian State-Owned Enterprises[*]

Gianmatteo Sabatino

TABLE OF CONTENTS: 1. The legalization of ASEAN. – 2. Indonesian enterprise law and the paths of its «*reformasi*». - 2.1 The ASEAN context. - 2.2. Following. An example of integration pattern in the field of Corporate Social Responsibility – 3. Rationalisation and diversification in the legal regime of Indonesian SOEs in comparative perspective. – 4. The establishment of state-holding companies in Indonesia. – 5. Indonesian SOEs in the ASEAN economic space.

1. The legalization of ASEAN

Among the experiences of regional economic integration, that of ASEAN displays features which are particularly challenging for comparative lawyers. Indeed, its Member States represent a variety of ideological, constitutional and economic backgrounds which is not detected, at least to such wide extent, in other macro-regional organizations[1].

Recently deepening experiences of economic integration, such as that of Mercosur or that of the Eurasian Union, rely, among other factors, on common features pertaining to their MSs' legal traditions as well as on their affinity in upholding a relatively akin development vision[2].

The same discourse cannot be wholly upheld for ASEAN. Since its post-colonial inception in the wake of the Bandung's discourse upon development, Southeast Asian regional integration has always encompassed a wide range of socio-economic and legal systems, reflecting the competing, when not conflicting, stance of the Member States. In the 1950s and early 1960s, the confrontation between, on the one hand, socialist countries and countries implementing socialist-inspired development models and, on the other hand, former colonies still deeply linked to their capitalist motherland (such as Malaysia) prevented any serious attempt at regional integration. The first organization involving

[*] L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a *double-blind peer review*.

[1] D.A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, in *International Journal of Legal Information*, 36(3), 2008, p. 387-431; ID., *ASEAN' S Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*, in *Columbia Journal of Transnational Law*, 49, 2011, p. 269-320.

[2] M. Toscano et al., *The Law of Mercosur*, Portland, 2010; G.I. Osadchaya, *СТАНОВЛЕНИЕ ЕВРАЗИЙСКОГО ЭКОНОМИЧЕСКОГО СОЮЗА: ИДЕИ, РЕАЛЬНОСТЬ, ПОТЕНЦИАЛ* (The formation of the Eurasian Economic Union: ideas, reality, potential), Moscow, 2019.

Southeast Asian countries – i.e. the Southeast Asia Treaty Organization (SEATO) launched in 1954 – was, by all means, an anti-communist instrument promoted by the United States[3].

However, after the change of leadership in Indonesia, with the establishment of Suharto's strongly anti-communist regime, the confrontation (*konfrontasi*) between Indonesia and Malaysia came to an end and in 1967 the Bangkok Declaration founded the Association of Southeast Asian Nations, which was later confirmed through the Treaty of Amity and Cooperation (TAC) of 1976.

Under the impulse of the then non-aligned members (especially Indonesia and Malaysia), ASEAN paved the way for distancing its members from the cold war bipolar engagement[4].

The founding members – i.e. Indonesia, Malaysia, Philippines, Thailand and Singapore – conceived a comprehensive and, at the same time, quite general and vague cooperation agenda, essentially building up loose intergovernmental structures to promote consultation between each other. The enhancement of mutual assistance and cooperation was (and still is) counterbalanced by the general and fundamental principle of the «respect for the independence, sovereignty, equality, territorial integrity and national identity»[5].

The gradual enlargement of the organization towards countries with different legal backgrounds – Brunei in 1984, Vietnam in 1995, Laos and Burma in 1997 and Cambodia in 1999 – reinforced the idea that the loose approach to political concertation was the most suitable one to pursue stability and economic growth in the region. This meant that regional integration was built upon strictly intergovernmental institutional *fora*, whose legal outcome was an ensemble of documents and declarations of high political significance but lacking formal legal value[6]. Such documents were (and are) supported by bilateral cooperative instruments such as investment treaties[7]. As such, ASEAN law was fully framed within the domain of classic public international law; its aspiration to a common economic space loosely based on low trade barriers did not, nor could, amount to the creation of a *corpus* of rules cutting transversally through the Member States' legal systems, thus altering their stance toward market freedom and state interventionism, as it happened with the European Economic Community.

The establishment, in 2008, of the ASEAN Charter, while not changing the formal structures of integration, stimulated a new round of debates about the evolution path of ASEAN itself. Apparently addressing the arguments of those who doubted it could ever move beyond the point of a mere «free trade area»[8], ASEAN, through its Charter, establishes three fundamental pillars of integration, somewhat echoing images we are used

---

[3] D.A. Desierto, *Postcolonial International Law Discourses*, cit.

[4] *Id.*

[5] The principle is now enshrined in Art. 2(2)(a) of the ASEAN Charter of 2008.

[6] D.A. Desierto, *Postcolonial International Law Discourses*, cit.; Id., *ASEAN' S Constitutionalization of International Law*, cit.

[7] *Id.*

[8] L. Hong Tan, *Will Asean Economic Integration Progress beyond a Free Trade Area?*, in *The International and Comparative Law Quarterly*, 53(4), 2004, p. 935-967.

to linking to the Maastricht Treaty[9]: i) political and security cooperation; ii) economic cooperation; iii) socio-cultural cooperation. Each one of these pillars finds its institutional counterpart in a Community Council, composed by representatives of the Member States and called to implement relevant policies in the respective fields[10].

Indeed, the commitment to a shared vision of sustainable development is now enshrined in several provisions outlining the objectives of the integration effort[11].

On the other hand, non-interference in internal affairs of the Member States and the respect of national sovereignty continue to be fundamental principles of ASEAN law. Furthermore, the supreme policy-making body – i.e. the ASEAN summit – remains a purely intergovernmental body consisting in the reunion of Member States' heads of state and government[12]. The summit is complemented by a coordinating council which is composed by national ministries of foreign affairs[13].

Those authors who have indeed detected, in the Charter, a distinction among legislative, executive and judicial functions, have also clearly pointed out that the degree of «supranationality» reached by ASEAN law is deeply affected by the persistent and heavy reliance of all decision-making upon consensus[14].

In the second place, the Charter raises doubts with regard to its direct effect in national legal systems. Officially, such effect is clearly lacking, while the general obligation for all Member States to take any measure in order to implement the Charter obviously does not amount to a recognition of its self-executing value[15]. Therefore, the legal status of the Charter depends on the stance that each Member States takes with regard to international treaties and, as it has been noted, the comparative analysis seems to indicate that there is very little space left for self-executing treaties[16].

Ultimately, hasty comparisons with other experiences of regional integrations are discouraged. Indeed, the preference towards a «less adversarial and litigious» decision-making, also transposed into diplomatically-shaped dispute settlement mechanisms in the Charter, may be easily interpreted as a response – both legal and cultural – to the wide diversity of legal systems involved[17]. As a consequence, the processes of legalization, relying on flexible and policy-like instruments is essentially aimed at ensuring the establishment of common ensembles of socio-economic interests, so to pursue a coordinated harmonization effort. Such idea of integration necessarily makes use of «variable geometries», including a multi-pattern approach to legal reforms, for instance promoting economic liberalization through the coordinated choice of only few Member

---

[9] M. Ewing-Chow, T. Hsien-Li, *The Role of the Rule of Law in ASEAN Integration*, EUI Working Paper RSCAS 2013/16.

[10] Art. 9 of the Charter.

[11] See in particular Art. 1 of the Charter outlining the objective of ASEAN.

[12] Art. 7.

[13] Art. 8.

[14] D.A. Desierto, *ASEAN' S Constitutionalization of International Law*, cit.

[15] *Id.*

[16] *Id.*

[17] S. Cho, J. Kurtz, *Legalizing the ASEAN Way*, in *The American Journal of Comparative Law*, 66(2), 2018, p. 233-266.

States while refraining from imposing obligations to liberalize onto other MSs, whose economic systems may be deemed «not ready» for reforms[18].

This road to the integration, which has already been acknowledged as a connoting trait of the ASEAN experience, leads the comparative lawyer to investigate, in concrete, how the harmonization effort may function, also assessing the achievements and the limit of such process.

The main purpose of this paper is to carry out such an effort, an effort which implies, from the methodological point of view, the proper selection of a subject field of analysis and of a geographical scope of the analysis.

As far as the subject is concerned the paper will concentrate on the economic dimension of Southeast Asian integration and, more specifically, on the legal reform of state-owned enterprises (SOEs). The choice is motivated in the first place by the long-standing significance of SOEs reform for the transition of development models from interventionist to neo-liberal to state[19]. In the second place, the role of enterprise and company law in the ASEAN area reflects the growing importance of the management of supply-chains, another connoting trait of the economy of the region as well as of the integration effort, relevant also from the perspective of international commerce[20].

With regard to its geographical scope, the analysis will focus mainly on Indonesia. In such case, the choice is supported by the historical role of this country in the whole process of Southeast Asian integration, as well as from the inherent (and widely-known) pluralism of Indonesia law, which renders it, to some extent, a manifesto of the cultural issues underlying the effort of legal harmonization, which in Indonesia, by the way, also involves the intra-national legal discourse. Furthermore, against the background of a regional integration which, at least apparently, advocates greater economic freedom and liberalizations, Indonesian economic law has been heralded, in the past decade, as an example of «return» to state capitalism – implying a rejection of neoliberal tendencies also supported by international organizations as a response to crisis – and a gradual rapprochement to state control and coordination over the economy and, especially, over strategic goods and resources[21].

The aforementioned features make Indonesia a particularly significant example for the comparative analysis to test the evolution, in concrete, of the «ASEAN way» of legalization, also functioning as an innovative perspective to observe and compare legal innovations in other ASEAN countries.

---

[18] This happened, for instance, with the Protocol to Amend the ASEAN Framework Agreement on Services of 2003. On the topic, see S. Cho, J. Kurtz, *Legalizing the ASEAN Way*, *op. cit.*

[19] R.S. Milne, *The Politics of Privatization in the ASEAN States*, in *ASEAN Economic Bulletin*, 7(3), 1991, p. 322-334.

[20] P. Mattiolo, *Il ruolo dei Paesi asiatici nelle supply chains "democratiche"*, in https://www.itasean.org/il-ruolo-dei-paesi-asiatici-nelle-supply-chains-democratiche/ (last access: 28 February 2023); D.A. Desierto, *Postcolonial International Law Discourses*, cit.

[21] J. Kurlantzick, *State Capitalism: How the Return of Statism is Transforming the World*, Oxford, 2016.

2. Indonesian enterprise law and the paths of its «*reformasi*»

It is relatively easy, for comparative lawyers, to identify Indonesian law as one of the epitomes of legal pluralism[22]. Its legal stratification reflects the complex interactions of indigenous, Asian (Indo-Chinese), Muslim and colonial (Portuguese and Dutch) influences over the development of Indonesian culture, language and law[23].

However, when discussing the development of enterprise law in Indonesia, we are able to isolate and highlight more precise patterns of evolution.

The positive legal regulation of business entities, in Indonesia, was essentially a product of the Dutch colonial rule, which already in the 18th Century had brought to Indonesia the first «example» of a limited liability company, i.e. the Dutch East India Company[24].

In the 19th Century, with the reorganization of the colonial power, Indonesia (*rectius*, the East Dutch Indies) became a recipient of Dutch civil and commercial law, which was in turn, at the time, a reception of the French *code civil* and *code du commerce*[25]. Therefore, as the *Burgerlijk Wetboek* (*Kitab Undang-Undang Hukum Perdata*) and the *Wetboek van Koophandel* (*Kitab Undang-Undang Hukum Dagang* – KUHD) were enacted in the East Dutch Indies in 1848, the business system revolved essentially around: i) the civil law partnership (*perseroan perdata – maatschap*) modelled upon the *société* regulated in articles 1832 and following of the *code civil*; ii) two types of commercial partnernship, the *vennootschap onderfirma* (*perseroanfirm*), based on the *société en nom collectif*, and the *commanditaire vennootschap* (*perseroan komanditer*), based upon the *société en commandite*; the *naamloze vennootschap* (*perseroan terbata*), based on the French *société anonyme* and thus enforcing limited liability[26].

Notably, on the basis of the social distinctions enforced by the colonial rule, the codes were initially applied to Europeans, while both indigenous people and non-European foreigners retained their customary laws[27]. Such approach, however, clearly hindered the uniform and rational application of the law, an issue which paved the way for the gradual extension of the subjective scope of the commercial code. The first non-

---

[22] M. Mazza, *Indonesia*, in Id. (ed), *I sistemi del lontano oriente*, Milano, 2019, p. 416-418; U. Kischel, *Comparative Law*, Oxford, 2019, p. 773 f.

[23] T. Hannigan, *A brief history of Indonesia*, Rutland, 2015; J. Gelman Taylor, *Indonesia. Peoples and histories*, New Haven, 2003.

[24] M. Teguh Pangestu, N. Aulia, *Hukum perseroan terbatas dan perkembangannya di Indonesia* (The law of limited liability companies and its development in Indonesia), 1(3), 2017, p. 21-39.

[25] I. Soerodjo, *The Development of Indonesian Civil Law*, in *Scientific Research Journal*, IV(IX), 2016, p. 30-35; G.F. Bell, *Codification and Decodification: The State of the Civil and Commercial Codes in Indonesia*, in W.Y. Wang (ed), *Codification in East Asia,* Cham, 2014, p. 39-50; F. Hidayat, *Mengenal hokum perusahaan* (Knowing company law), Banyumas, 2020, p. 1 f.; E. Praptono, S. Idayanti, *Hukum Perusahaan* (Company Law), Jakarta, 2020, p. 12 f.; H. Wijaya, Y. Firmansyah, Y. Sylvana, M. Angelika, *History of Burgerlijk Wetboek in Indonesia*, in *Jurnal Indonesia Sosial Sains*, 2(4), 2021, p. 535-542.

[26] B.S. Tabalujan, *The new Indonesian company law*, in *U. Pa. J. Int’l Econ. L.*, 17(3), 1996, p. 883-908.

[27] M. Teguh Pangestu, N. Aulia, *op. cit.*

Europeans to be subjected to the KUHD were Chinese merchants[28]. Afterwards, it was provided that through a deed of *penundukan diri* (submission), non-Europeans could subject themselves to Dutch law when carrying out a certain activity. Therefore, Indonesian people started constituting business entities according to the KUHD and, in particular, limited liability companies[29].

After the independence, the formal legal status of the civil and commercial code was retained and for many decades – until the mid 1990s – the legal regime of Indonesian enterprises continued to be rooted in the relatively scarce provisions contained in the codes. However, since the immediate aftermath of the independence, the industrial landscape of the country changed accordingly to the emergence of a new post-colonial development philosophy.

Such philosophy, modelled upon the adaptation to the Indonesian context of statist tendencies of the then soviet state socialism, is embodied by the figure of president Soekarno and is rooted in the 1945 Constitution, in particular Art. 33, whose § 2 states that «Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State»; § 3 subjects to state powers water and natural resources, while § 4 upholds the idea that the «organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency»[30].

Upon such constitutional premises, an entrepreneurial system still vastly based on foreign-controlled (especially Dutch) companies and economic conglomerates could not last long. The process of «*nasionalisasi*» of the Indonesian economy, however, took different paths. On the one hand, the reforms were aimed at increasing domestic enterprises and assets, for example by establishing companies in sectors previously closed off for Indonesians or by increasing domestic assets in private foreign companies; on the other hand, the government assumed direct control over strategic foreign enterprises (by direct transfer of ownership) and established new SOEs[31]. The process, which has been ongoing during the 1950s, found its legal basis in Law no. 86 of 1958 concerning the nationalisation of Dutch companies. In 1959, the implementing Regulation no. 2 defined the subjective scope of the nationalisation, including all assets located in Indonesia which directly or indirectly were controlled by Dutch citizens or legal entities[32].

---

[28] *Id.*

[29] *Id.*

[30] Suroto, *Construction of economic law development in the concept of Article 33 of the 1945 Constitution to a prosperous state*, in *South East Asia Journal of Contemporary Business, Economics and Law*, 24(2), 2021, p. 163-169. On the economic nationalism in post-independence Indonesia see also M. Syafuddin, *Nasionalisasi perusahaan modal asing* (Nationalisation of foreign capital enterprises), in *Jurnal Hukum dan Pembangunan*, 41(4), 2011, p. 660-695; F. Nofrian, *Développement et changement d'économie politique institutionelle en Indonésie (1950-2013)*, in *Marché et organisations*, 20(1), 2014, p. 119-137.

[31] Wasino, *From A Colonial to A National Company: The Nationalization of Western Private Plantation in Indonesia*, in *Lembaran Sejarah*, 13(1), 2017, p. 109-115.

[32] Wasino, *op. cit.*; M. Syafuddin, *op. cit.*

The *nasionalisasi* had a profound impact on the concrete evolution of enterprise law. Indeed, if enterprises controlled by Indonesian nationals or only partially controlled (through transferral of previously Dutch-owned shares) by the Indonesian government could still be subjected to the commercial code, the SOEs, either derived from nationalisation of Dutch companies or newly established, were to be directly managed through government rules[33]. From this moment on, that between privately owned companies and SOEs became a distinction reflected and upheld in the system of enterprise law.

A comprehensive definition of the legal regimes for such different categories of economic operators, however, did not occur until the 1990s, in a historical moment once again characterised by a profound upheaval of the Indonesian economy and society.

The 1995 Law on Limited Liability Companies (*Undang-Undang Tentang Perseroan Terbatas* – UUPT) introduced for the first time, on the one hand, a comprehensive legal regime on both limited liability companies and public companies, defining the criteria for their establishment and their inner organizational structure[34]; on the other hand, it also introduced two forms of SOEs, the *Badan Usaha Milik Negara* (BUMN) at the state level and the *Badan Usaha Milik Daerah* (BUMD), as enterprises partly or fully owned by local governments[35]. The regulatory effort, however, did not reflect a stable business environment and, in fact, clashed against corporate structures which were culturally distant from the liberal approach that the Suharto regime (which had overthrown the Soekarno rule since 1965) tried to pursue. Relational and familial ties among banks, enterprises and public authorities were among the main promoters of moral hazards, which ultimately led to the financial crisis of 1997 first in Thailand, then in Southeast Asia[36].

The subsequent readjustment of the economic environment, coupled with the end of Suharto's regime, paved the way for the process of *reformasi* of Indonesian law, conceived as a long-lasting historical phase building up not only new economic foundations but also an original model of development. Indeed, in spite of calls for privatization and liberalization coming also from international economic institutions (such as the IMF), the Indonesian *reformasi* has so far fuelled a complex debate upon the strengthening of both the economic democracy enshrined in the constitution and the coordinative role of the state in the economy[37].

Some of the products of such debate have shaped the current framework of Indonesian enterprise law, such as, in particular, Law no. 19 of 2003 on the State-Owned Enteprises and Law no. 40 of 2007 on the Limited Liability Companies, which replaces the 1995 Company Law. The two statutes are historically framed in different phases of the

---

[33] Wasino, *op. cit.*

[34] B.S. Tabalujan, *op. cit.*

[35] M. Teguh Pangestu, N. Aulia, *op. cit.*; F. Hidayat, *op. cit.*, p. 22 f.

[36] T. Oatley, *International Political Economy*, New York, 2019.

[37] H. Tegnan et al., *Indonesian National Development Planning System Based on State Policy Guidelines (GBHN): A Return to the Future?*, in *International Journal of Law Reconstruction*, II(1), 2018, p. 31-40; A.A. Patunru, *Rising Economic Nationalism in Indonesia*, in *Journal of Southeast Asian Economies*, 35(3), 2018, p. 335-354.

RIVISTA DI
DIRITTI COMPARATI

Indonesian *reformasi*, but, at the same time, they reflect the evolution of a common discourse which aims at collocating Indonesian law in the field of state capitalist countries (or heavily coordinated market economies) seeking to enhance their engagement in international cooperation. In parallel, both the external and the internal practice of enterprise law is subjected to a notion of economic democracy which emphasizes on the one hand the rationalization, under state control, of natural resources and, on the other hand, the adherence to the transnational philosophy of sustainable development[38].

The aforementioned approach is, most notably, proved by Chapter V of Law no. 40/2007 which subjects all the companies operating in the field of natural resources (or related to natural resources) to a general social and environmental responsibility (*tanggung jawab sosial dan lingkungan*). While the specific content of such responsibility is to be provided by specific regulations, its «ideology» revolves around the integration among good governance practice, environmental protection and social cohesion[39]. In the Indonesian context, it seems that such integration is also interpreted in the light of mutual cooperation between big-sized and medium and small-sized enterprises from the perspective of development fostering. Indeed, even if Law no. 19/2003 does not mention social and environmental responsibilities for SOEs, in practice one of the most significant implementation mechanisms of Chapter V of Law no. 40/2007 concerns the state-owned economy. In particular, through partnerships and environment-building programmes, some SOEs have been rendered agents of the development of specific economic sectors or local communities, so that a share of their profits is indeed invested either to promote SMEs or to improve living and social conditions and infrastructures of the communities involved[40].

2.1. The ASEAN context

Reasoning from a comparative perspective, with a focus on the ASEAN area, the Indonesian experience follows paths parallel (though not similar in the strict sense) to those of fellow countries such as Laos, Malaysia, Thailand and Vietnam. All these countries, especially in the 1990s, dealt with the balance between waves of privatization and improvement of state control over key economic operators. The background of these reforms differed from case to case. Two countries – Laos and Vietnam – are socialist and,

---

[38] Point a) of the preliminary considerations of Law no. 40/2007 states that «the national economy, which is implemented based on economic democracy with the principles of community, fair efficiency, sustainability, environmental awareness, independence, and safeguards for balanced progress and national economic unity, needs to be supported by a strong economic institutions in the context of creating prosperity for community»; point b) states instead that «in the context of increasing the national economic development and at the same time providing a strong foundation for the business world in facing the development of world economy and progress in science and technology in the coming globalization era, a support is needed to enact a law that regulates limited liability company which can assure the implementation of a conducive climate for the business world».

[39] E. Praptono, S. Idayanti, *op. cit.*, p. 44 f.; F. Hidayat, *op. cit.*, p. 56.

[40] E. Praptono, S. Idayanti, *op. cit.*, p. 45.

therefore, their enterprise law reform had to mirror the underlying property regime, thus distinguishing between state enterprises, collective enterprises and individual/private enterprises[41]; furthermore, the constitutional frameworks, revolving around the leading role of national communist parties ensure the inevitable political orientation of SOEs, also embedded in the presence of political organizations (e.g. party branches) within the corporate structure and under legal guarantee, as for instance laid out in the 2020 Vietnam enterprise law[42].

The gradual reform of the economic planning structures on the one hand opened up new spaces for autonomous management of enterprises, now benefiting from a contractual system not anchored on planning boundaries; on the other hand, it led to a rationalization and improvement of macro-economic coordination and control by public authorities. At the same time, the evolution of an Asian socialist constitutionalism made SOEs key actors for the conceptual balance between the achievement of economic rights and the restrictions to individual rights and liberties in the market justified by development purposes[43].

Malaysia and Thailand, though not constrained by a socialist constitutional background, underwent phases of privatization and rationalization of state control, with a greater degree of dismantlement of state-owned economy, especially after the 1997 financial crisis, while nevertheless retaining control over certain key enterprises[44]. The introduction of corporate-like structures, in these countries, was due first and foremost to outright privatization, while existing SOEs have maintained a political role as channels of implementation of development strategies. Therefore, their management is not immune to a corporate culture which relies on personal ties and exchanges between the government and the enterprise management[45].

In the light of the aforementioned considerations, as well as of the previous assessment of the Indonesian experience, the comparative analysis should avoid too simplistic patterns of legal change. While the Singapore model, due to its success, could

[41] Chen Zhibo (陈志波), Mi Liang (米良), 老挝经济法研究 (*Research on Lao economic law*), Kunming, 2004, p. 13-31; C.L. Gates, *Enterprise Reform and Vietnam's Transformation to a Market-Oriented Economy*, in *ASEAN Economic Bulletin*, 12, 1, 1995, p. 29-52; N. Van Thang, N.J. Freeman, *State-owned enterprises in Vietnam: are they 'crowding out' the private sector?*, in *Post-Communist Economies*, 21, 2, 2009, p. 227-247.

[42] Art. 6 of the law states that: «1. The internal political organization, socio-political organization and employee representative organization of an enterprise shall operate in accordance with the Constitution, the law and the enterprise's charter.

2. Enterprises shall respect and not obstruct the establishment of internal political organizations, socio-political organizations and employee representative organizations; must not obstruct participation of their employees in such organizations.»

[43] On socialist constitutionalism in Asia see T. Duc-Nguyen, P. Viola, *Constitutional Rights in Socialist East Asia*, in *Nordic Journal of Human Rights*, 40, 2, 2022, p. 306-327.

[44] P. Wisuttisak, N. Bin Abdul Rahman, *Regulatory Frameworks for Reforms of State-Owned Enterprises in Thailand and Malaysia*, ADBI Working Paper Series, no. 1122, 2020.

[45] *Id.*

easily be regarded as a point of reference for subsequent reform attempts in the ASEAN area, the concrete solutions adopted display all their differences.

As known, Singaporean state capitalism revolves, for a substantial part, around the role of the state-holding company *Temasek*, whose status is also enshrined in the constitution, albeit indirectly, through the provisions concerning appointment and removal of members of boards[46]. In particular, Art. 22A of the constitution, by empowering the President of the Republic to refuse both appointments and revocations of chairmen, members and executive officers of statutory boards, indeed aims at limiting government control over such boards, since it is executive which usually recommends to the President the appointments and, in the case of *Temasek*, the Ministry of Finance[47]. It is indeed easy to observe how Singaporean law, since the establishment of *Temakes*, focuses on the guarantees of its independence much more than other ASEAN legal orders do with their SOEs. Such difference is not necessarily due to lack of modernization, but instead reflects original patterns of development which sometimes, such as is the case of Indonesia, are directly anchored to the interpretation of a constitutionally sanctioned economic doctrine.

A specific and diversified application of the Singaporean model is observed in the historical development of Malaysian enterprise law. As in other countries of the region, in Malaysia the emergence of an organized landscape for SOEs is linked to the dismantlement of British-dominated colonial economy[48]. However, differently from Indonesia, the nationalist connotation of Malaysian state capitalism, embodied by the doctrine of the New Economic Policy (*Dasar ekonomi baru*), was fuelled by racial tensions exploded in the late 1960s, especially between the Malay people (*bumiputera*) and the ethnic Chinese, who at the time (and partly still today) represent the bulk of business communities and of the class of merchants[49].

Therefore, the diffusion of state-led economy and of planning structures, now also constitutionally sanctioned[50], has served a historical purpose of facilitating a ethnic-

---

[46] C.J. Milhaupt, M. Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, in *Cornell International Law Journal*, 50, 2017, p. 473-542.

[47] *Id.*

[48] W. Khatina Nawawi, *Emerging Rules for State-Owned Enterprises: Chapter 17 of the CPTPP*, in P. Sauve (ed), *Malaysia's Trade Governance at a Crossroads*, Kuala Lumpur, 2018, p. 271-312.

[49] W. Khatina Nawawi, *op. cit.*; K.S. Jomo, Wee Chong Hui, *The political economy of Malaysian federalism: Economic development, public policy and conflict containment*, WIDER Discussion Paper, No. 2002/113, ISBN 9291903531, The United Nations University World Institute for Development Economics Research (UNU-WIDER), Helsinki, 2002; A.B. Shamsul, *The economic dimension of Malay nationalism – The Socio-historical Roots of the New Economic Policy and Its Contemporary Implications*, in *The Developing Economies*, XXXV-3, 1997, p. 240-261. On the role of Chinese business communities in Malaysia see Ching-hwang Yen, *Ethnic Chinese Business in Asia*, Singapore, 2013, p. 285-339; J.V. Jesudason, *Chinese Business and Ethnic Equilibrium in Malaysia*, in *Development and change*, 28(1), 1997, p. 119-141.

[50] Sec. 95 of the Constitution.

economic balance, with considerable results, especially if one ponders the relative stability of the Malaysian political environment compared with other neighbouring countries[51].

In terms of regulation, also in the light of its federal structure, Malaysian law favours a complex differentiation in the forms of state control over enterprises, with the lion's share now reserved to so-called Government-Linked Companies (GLCs), i.e. private law companies controlled, either through shares or through specific powers of appointment and control, by the government[52]. The overall coordination and control over state-owned assets are tasks of the Government Investment Companies Division of the Ministry of Finance[53].

An apparently decisive shift toward rationalization of state control came between 2004 and 2005, when the government of Abdullah Ahmad Badawi launched reforms touching the composition of the boards of GLCs and the implementation of performance indicators, with the underlying purpose of promoting self-regulation of GLCs[54].

2.2. Following. An example of integration pattern in the field of Corporate Social Responsibility

A general trend of reform towards de-bureaucratization of state-owned economy thus follows different concrete approaches.

Nevertheless, an interesting "ASEAN-style" integration pattern could still be detected with regard to specific issues. The promotion of Corporate Social Responsibility (CSR) is among them. Indonesian law, as regards this topic, mirrors a general awareness of the necessity to regulate CSR shared by fellow member states.

Indeed, the enhancement, in Southeast Asia, of cooperation among enterprises on social issues as well as between enterprises and civil society (especially NGOs) built up, starting from the early 2000s, a cultural environment which later promoted the establishment of the ASEAN Corporate Social Responsibility Network (ACN), a NGO accredited in ASEAN[55]. Furthermore, in 2017 ASEAN issued its Guidelines for Corporate Social Responsibility on Labour, incorporating several statements on social cohesion which also underlie the Indonesian legislation[56].

---

[51] A.B. Shamsul, *op. cit.*; K. AkbariAvaz, *Malaysia's Development Plans and Legal Policies*, in *Specialty Journal of Politics and Law*, 4(3), 2019, p. 37-51.

[52] W. Khatina Nawawi, *op. cit.*; H. Ahamat, *State-Owned Enterprises, Market Competition and the Boundaries of Competition Law in Malaysia*, in *Jurnal Pengurusan*, 51, 2017, p. 173-181.

[53] *Id.* Such division of the Ministry of Finance was originally called Incorporated and Privatization Division. The emphasis on privatization stemmed from a process of economic reorganization which had begun in the 1980s and was specifically aimed at promoting the advancement of the private sector in the national economy.

[54] *Id.*

[55] M. Husni Syam, E. An Aqimuddin, A. Nurcahyono, E. Setiawan, *Corporate Social Responsibility in ASEAN*, in *Advances in Social Science, Education and Humanities Research*, 409, 2019, p. 158-162. On the development of CSR in Asia see M.E. Contreras (ed), *Corporate Social Responsibility in the Promotion of Social Development. Experiences from Asia and Latin America*, Washington, 2004, p. 1-150.

[56] See no. 2 of the Guidelines.

Obviously, each country retains its own conceptual framework for CSR[57]. Some common elements have been traced, especially for contexts sharing a Buddhist background (e.g. Thailand, Vietnam) and thus familiar to duties of selflessness and benevolence[58]. An author has even focused on the direct use of Buddhist principles to interpret CSR-related obligations[59]. On the other hand, the ethical dimension of State-Owned Enterprises is, in some contexts, affected by Confucian institutional structures, attaching important to benevolence and reciprocity in familial and hierarchical relationships[60]. In socialist countries, such as Vietnam, this Buddhist-Confucian background is combined with the state-driven socialist legality, which tries to make social relations functional to the pursuit of state development goals and the governance of business practices according to party ideology[61]. As a consequence, the role of SOEs for the promotion of CSR is affected by the different importance that may attached to growth targets and, for instance, to environmental targets within state plans and directives[62].

From this perspective, the Indonesian examples appears particularly interesting, since, while not culturally grounded in Buddhism nor Confucianism, it embraces a fully relational business culture emphasizing social hierarchies, honour and rituality[63]. Such features on the one hand favour to some extent the integration, through the elaboration of SOEs-led projects, between social aims and economic development, especially at the local level. On the other hand, however, they may also hinder the development of generally accepted ethical standards for businessmen, since personal relations tend to shape the notions of "good" and "beneficial" differently from case to case. This issue could also explain why, at least legislatively speaking, Indonesia has been one of the first countries to regulate a form of more environmentally-oriented CSR. In a time when the ASEAN effort on CSR mainly aims at widening its scope from purely ethical or religious values to social and environmental sustainability, the Indonesian example has the potential to promote not only a supranational framework of rules but maybe also future changes in other ASEAN members[64].

---

[57] W. Chapple, J. Moon, *Corporate Social Responsibility (CSR) in Asia. A Seven-Country Study of CSR Web Site Reporting*, in *Business & Society*, 44, 4, 2005, p. 415-441.

[58] O.S. Mmbali, *Corporate Social Responsibility (CSR) in Thailand: Analyzing the application of Buddhist principles*, in *Southeast Bangkok Journal*, 3, 1, 2017, p. 99-116; M. Nguyen, J. Bensemann, S. Kelly, *Corporate social responsibility (CSR) in Vietnam: a conceptual framework*, in *International Journal of Corporate Social Responsibility*, 3, 9, 2018, p. 1-12.

[59] O.S. Mmbali, *op. cit.*

[60] T. Duc-Nguyen, P. Viola, *op. cit.*; T. Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, in *Stanford Law Review*, 52(6), 2000, p. 1599-1729.

[61] M. Nguyen, J. Bensemann, S. Kelly, *op. cit.*

[62] M. Nguyen, J. Bensemann, S. Kelly, *op. cit.*; S. Phamthihuyen, H. Tathithu, *Corporate Social Responsibility on Environmental Protection in Vietnam*, in *Journal of Legal, Ethical and Regulatory Issues*, 25, 5, 2022.

[63] M. Hough, *Understanding Indonesian Business Culture*, Marvin Hough International Research and Analysis, 2020.

[64] M. Husni Syam, E. An Aqimuddin, A. Nurcahyono, E. Setiawan, *op. cit.*

3. Rationalisation and diversification of the legal regime of Indonesian SOEs in comparative perspective

Whereas Law no. 40/2007 seeks to strengthen a process of rationalisation and socially-oriented development of corporate law already commenced, albeit much more lightly, in 1995, Law no. 19/2003 pursues the very same objective through the formalisation of a distinct legal regime for SOEs, the definition of corporate-like structures and, at the same time, the connotation of SOEs as agents of the national socio-economic development. Such complex interactions among approaches underlying different values raises issues concerning the effectiveness of corporate governance in SOEs, also in terms of adherence to the Code of Corporate Governance, a soft law instrument issued in 2000 in the wake of the Asian financial crisis, and later reformed[65]. The code, whose strong emphasis on transparency and accountability echoes some fundamental structures of Anglo-American corporate law, was meant to provide answers to the conditionalities imposed by the IMF on the loans granted to the country after the financial crisis[66]. Its scope is therefore broad and encompasses SOEs. At the same time, however, its failure to take into account political interferences in company management and the legitimization of companies' donations to political parties and members of the parliament/government (Part III, Sec. 3.3(c)) led to some criticism[67].

The Indonesian SOE – indeed not differently from SOEs of other state capitalist countries – is meant to pursue profit and social welfare at the same time[68] and is subjected to institutional connections with political authorities, which lead the enterprise to carry out unprofitable activities in order to address social instances coming from the electorate[69]. In the logic of Indonesian economic democracy, such approach is not necessarily negative nor discouraged; however, it implies the capacity of integrating different regulatory approaches which represent, inevitably, a great challenge.

Indeed, the incorporation, into Law no. 19/2003, of notions and definitions mirroring the common law corporate world channels the will to provide the governments (central and local) with legal tools not only to reorganize existing SOEs but also to gradually detach economic activities from the bureaucratic apparatus of ministries and departments[70].

---

[65] The latest version is from 2006.

[66] M. Kamal, *Corporate Governance and State-owned Enterprises: A Study of Indonesia's Code of Corporate Governance*, in *Journal of International Commercial Law and Technology*, 5(4), 2010, p. 206-224.

[67] *Id.*

[68] See Art. 2 § 1 of Law no. 19/2003.

[69] M. Kamal, *op. cit.*

[70] This intention is also confirmed by Regulation no. 45 of 2005 on the establishment, the management, the supervision and the dissolution of SOEs. See A. Baitullah, I. Cahyani, *Pengaturan Pengelolaan Dan Pengawasan Keuangan Negara Terhadap Badan Usaha Milik Negara (BUMN)* (Arrangements for the management and supervision of state finances in SOEs), in *Journal Inicio Legis*, 2(2), 2021, p. 153-163.

Such trend, however, must comply with a constitutional environment which emphasizes the role of SOEs and grants them, in essence, a monopoly over fundamental resources and economic sectors. These considerations are at the basis of the main regulatory choice of Law no. 19/2003, which provides for two different forms of SOE: the *Persero* and the *Perum*[71].

The *Persero* (*Perusahaan Perseroan*) refers, also in its name, to the general notion of limited liability company (*Perseroan Terbatas*) which, in turn, traces back to the Dutch *Naamloze Vennootschaap*[72]. Its basic form is regulated by Law no. 40/2007 which is applicable to SOEs constituted as *Persero*[73]. The *Persero*s are therefore state-owned companies enjoying limited liability, whose equity is divided into shares owned for at least 51% by the state[74].

The *Persero*s, which are established by a ministry[75], are organized upon a traditional corporate structure revolving around the General Meeting of Shareholders (GMS), a Board of Directors – with managing functions – and a Board of Commissioners – with supervisory functions. State power is channelled through the GMS where the indicated Ministry (or an entrusted agent) acts as shareholder for all the state-owned shares[76]. For several significant decisions, even the agent is required to seek prior approval from the Ministry[77].

While corporate-like structures are meant to promote the general rule according to which the *Persero* has for main objective that of making profit, the past two decades have fuelled debates about the concrete degree of efficiency and transparency in their management, also in light of some publicized cases and accuses of corruption[78].

In order to enhance the protection against mismanagement while preserving the operational efficiency of corporate-like structures, Indonesian enterprise law has gradually imported from the U.S. the so-called «business judgment rule»[79]. Pursuant to such approach, which was also confirmed by the Constitutional Court[80], the SOEs directors are exempted from liability for losses (which are, by all means, state losses) if the decision-making leading to such losses has followed a clear procedure and in presence of good faith. Such development, from a broader perspective, led some authors to advocate more

[71] Art. 9.

[72] E. Rajagukguk, *Badan Usaha Milik Negara (BUMN) dalam bentuk Perseroan Terbatas* (State-Owned Enterprises in the form of Limited Liability Companies), Jakarta, 2016, p. 2.

[73] Art. 11 of Law no. 19/2003. The Law, indeed, refers to the 1995 Company Law, which, however, has been entirely replaced by Law no. 40/2007. Even if the text of the law has not been updated accordingly, the applicability of Law no. 40/2007 to the *Persero* is undisputed. See E. Rajagukguk, *op. cit.*

[74] Art. 1 no. 2 of Law no. 19/2003.

[75] Art. 10.

[76] Art. 14.

[77] Art. 14 § 3.

[78] E. Rajagukguk, *op. cit.*, p. 16 f.; A. Baitullah, I. Cahyani, *op. cit.*

[79] T.S. Ansari, H. Sahrasad, I. Iryadi, *Indonesian State-Owned Enterprises (BUMN or SOEs) and the Urgency of Implementation of Principle of 'Business Judgment Rule'*, in *Jurnal Cita Hukum*, 8(1), 2020, p. 163-182.

[80] Cases no. 48 / PUU-XI / 2013 and no. 62 / PUU-X1/ 2013.

regulatory influences from the common law in order to enhance the globalizing trends of the Indonesian economy[81].

The second form of SOE regulated by Law no. 19/2003 is the *Perum* (*Perusahaan Unum*), whose capital is not divided into shares and is entirely owned by the state[82]. *Perum* is meant to pursue public welfare more directly than the *Persero* does. Its profit-seeking activity is complementary and ancillary to the supply of high-quality goods and services to the public[83]. Its management is also more closely integrated within the administrative structures of the state: the articles of association of *Perum* are established through governmental regulation[84] and the business strategies of the enterprises, albeit put forward by the directors, are subjected to government approval which must also confirm the business development policy[85].

In terms of corporate landscape, the Indonesia business environment, supported by its law, seems to favour, albeit gradually, the diffusion of the *Persero* and the transformation of *Perum*s into *Persero*s, even in highly strategic economic fields such as energy, following a trend already in place well before the enactment of Law no. 19/2003[86]. Such transformation and the adoption of liberal corporate paradigms must not necessarily be interpreted as a shift toward a purely liberal conception of the market, but as a complex effort to pursue an optimization of management models.

Indeed, in Indonesian law, as also confirmed by the Constitutional Court, the implementation of economic democracy (*ekonomi demokrasi*) is ensured through a broad duty of the state to assume direct control over those fundamental sectors of the economy pursuant to Art. 33 of the Constitution[87]. On such premises, the diversification of the forms of state ownership and its corporatization should not in principle be an issue, provided that it does not alter the nature of the public control over strategic assets.

The reality, however, is much more blurred. The interferences between private and public law in the legal regime of SOEs (and especially of *Persero*s) led some authors to wonder whether the management of such enterprises should conform solely to Law no. 40/2007 or also to the legal regime of the public authority which owns the state-owned shares[88].

Most of the legal literature seems to advocate the subjection to a private law regime. In more than once instance, courts have also followed this approach, in particular ruling that state assets that have been diverted to the equity resources of SOEs are not covered by the general prohibition to subject state resources to judicial enforcement procedures,

[81] T.S. Ansari, H. Sahrasad, I. Iryadi, *op. cit.*

[82] Art. 1 no. 4.

[83] *Id.*

[84] Art. 41.

[85] Art. 38.

[86] A. Siswanto, M. Janpieter Hutajulu, *State-Owned Enterprises (SOEs) in Indonesia's Competition Law and Practice*, in *Yustisia*, 8(1), 2019, p. 93-108. See also Government Regulation no. 23 of 1994.

[87] Case no. 36/PUU-X/2012.

[88] I. Ikhwansyah, A. Chandrawulan, P. Amalia, *Optimalisasi Peran Badan Usaha Milik Negara (BUMN) pada Era Masyarakat Ekonomi Asean (MEA)* (Optimising the role of State-Owned Enterprises in the era of ASEAN economic community), in *Media Hukum*, 25(2), 2018, p. 150-161.

and may therefore be disposed of by courts in disputes on unpaid debts[89]. Furthermore, it has been held that the legal regime of the *Persero* implies that the State must act solely as a shareholder, thus excluding the application of rules different from those laid out in Law no. 40/2007[90].

Such complex and even fragmented legal landscape has been confronted, on a political level, with an increasingly decisive stance in favour of an expansion, ramification and strengthening of the state-owned economy, advocated first and foremost by Indonesian president Joko Widodo, according to whom SOEs must become the «driving agent of national development»[91]. Indonesian law-makers and regulators have therefore engaged in a reform effort which, so far, seems to promote the *Persero* as the epitome of national state capitalism.

Such evolution, when framed within a comparative outlook, confirms on the one hand the ever-growing importance of SOEs in the ASEAN space. On the other hand, it highlights the legal instruments preferred by the ASEAN political leadership to attain such objective. The reform of the state-owned economy has for decades been a leading topic in Asian law and the development of legal frameworks for SOEs has followed, to a substantial extent, the path chosen by the Indonesian legislature.

In the socialist systems of Laos and Vietnam the enterprise laws dedicate a separate section to SOEs, whose category encompasses all enterprises whose capital is owned for more than fifty percent by the state. Interestingly, the 2020 Vietnam Law on Enterprises distinguishes between wholly-owned and partially-owned SOEs and provides for the two models of the limited liability company and the joint-stock company[92]. On the other hand, the Lao law distinguishes between state enterprise and state company, the latter being a SOE managed through a company vehicle[93]. It is therefore assumed that "traditional" SOEs in Laos are still a direct emanation of the owning administrative unit (e.g. a Ministry). Indeed, the whole structure of the Lao law is aimed at tying SOEs to the development objectives of the state and the ruling party, not only through the obligation to comply with such party's guidelines[94], but also through the affirmation of the binding value of socio-economic development plans upon SOEs[95], a bindingness which is also reflected by the regime of public property as laid out in the Lao civil code[96]. Furthermore, the Lao law also explicitly reserves certain economic activities to SOEs, due to their strategic or social value[97].

---

[89] *Id.*

[90] *Id.*

[91] S. Arinanto, D. Parluhutan, *Holding of the Indonesian State-Owned Enterprises and Analysis of the Judicial Review Over the Government Regulation Number 47/2017 Juncto Law Number 19 Year 2003 on the BUMN*, in *Advances in Economics, Business and Management Research*, 130, 2019, p. 254-261.

[92] Art. 88 of the Law on Enterprises of 2020.

[93] Art. 196 of the Enterprise Law as revised in 2013.

[94] Art. 198(1).

[95] *Id.*

[96] Art. 262 (2) of the Lao civil code.

[97] Art. 197 of the Enterprise Law states that: «A State owned enterprise shall be established for operating the following business sectors: 1. Important and crucial business sectors for the nation, which

What is worth noting, from the comparative point of view, is that the Indonesian model, also in the light of the decisions of the Constitutional Court, is nearer to the "state-oriented" Lao model than to the "company-oriented" Vietnamese model, not only because of the distinction between *Perum* and *Persero*, but also because of the legally-sanctioned guarantee of the role of SOEs as national development agents. This is not to say that SOEs in the Vietnamese economy are not managed according to political or party guidelines – which they are indeed – but to point out the different legal dimension and legal guarantee of such connection.

Notwithstanding its socialist nature, Vietnamese law retains, also due to its constitutional roots and to the political doctrine of its founding father Ho-Chi-Min, an overall positive attitude towards combination of liberal approaches, rights' universalism and state economic planning[98]. By partially mirroring Chinese choices, Vietnamese law appears to value the use of conceptual categories of capitalist commercial law also in order to reinforce the rational legitimacy of its own form of market socialism.

The same process appears to be ongoing in Laos, albeit so far still in its early stages.

Non-socialist countries as Indonesia did not have to deal to such a wide extent with theoretical intricacies caused by formal adherence to doctrines of comprehensive planning. Therefore, they could shape the regime of their SOEs according to broad interventionist principles and structures of indicative planning.

Such observation is all more interesting if one considers the peculiar features of development planning law in the Indonesian democracy, a law which regulates the planning cycle – and therefore, potentially, the change in directives given to SOEs – in correspondence with political elections[99].

Indeed, that between SOEs and planning is a connection which seems to be gaining momentum within the legislative frameworks of the ASEAN space. In other words, the legislative innovations of the past fifteen years in some ASEAN countries are very hesitant to embrace a fully "corporate" notion of SOE and instead they maintain, as in Indonesia, a binary approach to SOEs' classification. Such choice is beneficial to a stronger functionalization of state-enterprise law to the implementation of socio-economic development plans.

Thai law is a clear example. The 2019 Development of Supervision and Management of State Enterprises Act defines "State Enterprise" as either a government organization/state-owned undertaking/government-owned business organization or a private or public limited company in which the ministry of finance owns more than fifty

---

are not opened to other economic sectors [other types of enterprise] to conduct business activities, namely activities that are considered strategic and concerned to national security; 2. Business activities offering public utilities, which are not provided by other economic sectors [another types of enterprise]; 3. Business activities that are financially sound, economically viable and provide opportunity for capital accumulation».

[98] T. Duc-Nguyen, P. Viola, *op. cit.*; Son Ngoc Bui, *Anticolonial Constitutionalism: The Case of Ho Chi Minh*, in *Japanese Journal of Political Science*, 19(2), 2018, p. 197 f.

[99] G. Sabatino, *La pianificazione per lo sviluppo in Indonesia e il suo diritto. Osservazioni comparate*, in *Annuario di Diritto Comparato e di Studi Legislativi*, 2022.

percent of the capital[100]. Acting upon such distinction, the Act mostly revolves around the composition and the function of the State Enterprise Policy Committee, an essentially political body, chaired by the Prime Minister and nominated by the government[101], which is in charge of the elaboration of a five-year state enterprise development plan[102]. Such plan must be in line with the directive principles of state policy of the Thai constitution, as well as national policies and the national socio-economic development plan[103]. At the same time, the Committee also assesses the performance of state enterprises, not only on the basis of financial stability, efficiency and effectiveness of business operations, good governance practices, risk management, satisfaction of users and disclosure of information to the public, but also in the light of the actions take to achieve the objectives laid out in the aforementioned plan[104].

A similar approach, though with less emphasis on the enterprise-planning connection is displayed by the Philippines Government-Owned or Controlled Corporations (GOCC) Act of 2011. The Act follows the Indonesian solution when defining GOCCs as «any agency organized as a stock or nonstock corporation» that is «owned by the Government of the Republic of the Philippines directly or through its instrumentalities» and whose is capital is either fully government-owned or «where applicable as in the case of stock corporations, to the extent of at least a (government-owned) majority of its outstanding capital stock»[105]. The GOCCs, similarly to the 2019 Thai Act, also focuses on the operations of a Governance Commission for GOCCs, in charge of elaborating "ownership and operations manuals" as well as corporate governance standards[106]. The standards, on the one hand, are based on those applicable to the Stock Exchange, to Listed Companies and to Banking Institutions as laid out by the Philippines' Central Bank; on the other hand, the operation manuals have to comply with the socio-economic development plans[107].

Philippine SOEs law, furthermore, displays a further criterion of enterprise classification which appears to follow the rationale underlying Indonesian law. Indeed, the GOOCs Governance Commission, according to the 2011 Act, is also responsible for classifying GOOCs according to their function, on the basis of five different categories: developmental and social corporations; proprietary commercial corporations; government financial, investment and trust institutions; corporations with regulatory functions; other corporations[108]. The legal regime which conceives SOEs as either stock or nonstock corporations and also distinguishes "commercial-oriented" SOEs and "developmental and social" SOEs echoes the logic of the distinction between *Perum*s and *Persero*s.

---

[100] Sec. 3 (1-2).
[101] Sec. 6.
[102] Sec. 10.
[103] Sec. 22.
[104] Sec. 29.
[105] Sec. 3 (o).
[106] Sec. 5 (c).
[107] *Id.*
[108] Sec. 5 (b).

A broad connection between SOEs' regulatory frameworks and development planning is also detected in Malaysian law where, as already noted, planning and state capitalism acquired a connotation of ethnic pacification factors[109].

After waves of privatizations starting in the 1980s and, as happened in several other countries of the region, a reorganization and entrenchment of state-led economy, currently Malaysia adopts several forms to categorize SOEs. Wan Khatina Nawawi identifies seven different types of SOEs, spanning from bureaucratic SOEs directly owned by ministries to government-linked companies, state-holding companies and sovereign-wealth funds[110]. The vast majority of these SOEs are therefore regulated by the Companies Act of 2016 (repealing the previous Act of 1965).

From the regulatory perspective, Malaysian appears to favour, way more than other ASEAN countries, an approached rooted in differentiation and specialty. While to SOE is not isolated as a conceptual model, complex networks of sector regulations provide special powers for the government, as well as specific forms of financial support for SOEs, such as guarantee funds[111]. On the one hand, SOEs are subjected to specific obligations in terms of audit and publicity; on the other hand, SOEs must pay mandatory annual dividends to the government[112].

To sum up, when framing Indonesian SOEs' law within the legal innovations in the ASEAN space, at least three considerations come to mind. In the first place, the Indonesian model, in the early 2000s, has been one of the first models to be renovated, according to a logic combining pursuit of efficiency and guarantee of state control and coordination, also in light of development policies. In the second place, the Indonesian path is consistent with the choices of several fellow ASEAN countries, whose SOEs' law openly and actively seeks reorganization rather than gradual dismantlement.

In the third place, from a broader perspective, the comparative analysis shows that the influence of the Singaporean model – heavily focused on corporatization – is in reality much more diluted than what it may seem at a first glance. Each ASEAN country is pursuing its own SOEs management model relying, to a substantial extent, on a difficult integration between corporate strategies and public policies. It is worth noting that a country whose socialist legal background ensures a higher degree of political presence within SOEs – i.e. Vietnam – the latest reforms push toward a formal regulatory framework more oriented toward corporatization[113]. On the other hand, countries whose traditional state capitalism did not rely on socialist legality and was indeed disrupted by the 1997 financial crisis are now keen on "rejuvenating" SOEs by pursuing limited corporatization and emphasizing their role as agents of national development.

A third alternative is embodied by countries, such as Malaysia, which seem to combine the corporate aspirations of the Singaporean model with a coordinative approach

[109] W. Khatina Nawawi, *op. cit.*; K. AkbariAvaz, *op. cit.*; H. Ahamat, *op. cit.*

[110] W. Khatina Nawawi, *op. cit.*

[111] *Id.*

[112] *Id.*

[113] D. Sejko, V. Hoang, *Vietnam's Reform of State-Owned Entities: Domestic and External Drivers*, in J. Chaisse, J. Gorzki, D. Sejko (ed), *Regulation of State-Controlled Enterprises*, Singapore, 2022, p. 565-583.

rooted in development planning and mirrored by the complex structure of the SOEs environment. Such peculiar connotation is undoubtedly induced – to a considerable effect – by the social instances underlying the Malaysian state capitalism. However, in the light of such considerations, the Malaysian example could represent a useful testing field for developments also in Indonesian law, considering that, in terms of pluralism (social, cultural, religious) as well as entrenchment in economic nationalism, the two countries share more than an element to reflect upon.

In all these instances, the *Temasek* model functions as a driving force and a general reference, but does not fuel proper and comprehensive legal transplants for the reform of general SOEs' law. There is, however, at least a specific field of the recent reforms where indeed Singaporean solutions are more closely followed, though always adjusted and adapted elsewhere: the creation of state-holding companies.

4. The establishment of state-holding companies in Indonesia

Within ASEAN, the establishment of state-owned holding companies is not a novelty and has indeed connoted the development experience of countries such as Malaysia and, most notably, Singapore, where the *Temasek* has been, for decades, the flag-carrier of developmental state capitalism in Southern Asia and has been a model for economic reforms even in China[114].

In Indonesia, holding companies, in the form of *Persero*, have received a considerable boost and are increasingly viewed as an efficient instrument to coordinate business strategies of SOEs in strategic sectors such as energy, mineral extraction, banking and financial services, infrastructures, real estate and food production[115].

Such solution is managed through sectoral regulations, such as Government Regulation no. 47 of 2017, which establishes a holding company (*Inalum*) in the mining and extraction field[116]. A more comprehensive legal framework is instead provided by Government Regulation no. 72 of 2016 (amending Regulation no. 44 of 2005) about the participation and administration of state equity in SOEs and Limited Liability Companies. Such regulation seems to uphold the idea of a separate management of state assets forming SOEs' equity.

However, especially in a context of increasing economic and resource nationalism, the adoption of corporate models for the SOEs and, in particular, of the holding company

[114] Sun Jingzhang (孙景嶂), Liu Zhuibao (刘隹宝), 新 加坡 经验对 中 国 改革开放 的 影响 (*The influence of the Singaporean economic experience on the Chinese process of reform and opening up*), in *bijiao zhengzhixue yanjiu*, 17(2), 2019, p. 20-42; K. Völgyi, *A Successful Model of State Capitalism: Singapore*, in M. Szanyi (ed), *Seeking the Best Master: State Ownership in the Varieties of Capitalism*, Budapest-New York, 2019, p. 275-296.

[115] S. Arinanto, D. Parluhutan, *op. cit.*; A. Prasetiyo, *Restrukturisasi Badan Usaha Milik Negara Perbankan Melalui Pembentukan Holding Company Di Indonesia* (Restructuring state-owned banks through the establishment of holding companies in Indonesia), in *Lex Renaissance*, 4(2), 2019, p. 285-302.

[116] S. Arinanto, D. Parluhutan, *op. cit.*

raised some doubts concerning the compatibility of such solution with the Indonesian Constitution and, first and foremost, with its Art. 33.

The Constitutional Court of Indonesia had dealt with the issue already in 2003 when, in essence, advocated a broad notion of state control over vital resources, echoing the diversification of management models embraced by Law no. 19/2003[117]. The Court had pointed out that the management function of state-owned assets may very well be conducted through direct involvement, by the government, in the management of SOEs but also through indirect management, *via* state-owned shares in limited liability companies[118]. The debate about SOEs' corporatisation, however, did not placate and in 2018 the Constitutional Court was called once again to assess the constitutionality of both Regulation no. 72/2017 and Regulation no. 47/2017, since doubts were raised about their compliance with, among others, Articles 28C (right to development), 28D (right to equal treatment, to work, to equal opportunities and to citizenship status), 28H (right to physical and spiritual prosperity, to equal opportunities, to social security and to personal property) and 33 of the Constitution[119]. The general objection raised against the aforementioned regulation lies in the alleged conflict between the «privatisation» of the SOEs' management regime and the public purpose SOEs are called to pursue. Furthermore, the injection of state capital into the holding companies without prior approval of the People's Representative Council would amount to a violation of both the principle of legality as laid out in the constitution and the budgetary legislation (in particular, Law no. 17 of 2003).

The Court's response – which stated that the regulations challenged were indeed an implementation mechanism for principles already laid out in Law no. 19/2003, and as such not subjected to constitutional review – did not thoroughly resolve the issue, though it seems to have implicitly upheld its own case law of 2003.

What seems to be at stake, in this debate, is indeed not the confrontation between a market-oriented and a state-oriented management of state-owned assets, but rather the confrontation between two models of state capitalism: the first one aimed at empowering bureaucratic corporatisation of SOEs in order to strengthen both their role in international markets and their ability to pursue development policies; the second one, inspired by a more «humanist» interpretation of the Indonesian economic democracy, therefore assessing public control over strategic assets also in the light of «people's control» both through parliamentary supervision and through judicial review, in order to emphasize the circumstance that, according to such stance, SOEs are subjected to a special regime to pursue public welfare and not to operate on market while pursuing private gains.

As the Indonesian enterprise law continues to evolve, such issue is likely to persist, fuelling new debates and, hopefully, fostering new research.

---

[117] Case no. 002/PUU-I/2003.

[118] *Id.*; S. Arinanto, D. Parluhutan, *op. cit.*

[119] Case no. 14/PUU-XVI/2018.

5. Indonesian SOEs in the ASEAN economic space

How should an external observer assess the relation between Indonesian enterprise law and Southeast Asia integration? The first impression may be that of growing ambivalence. On the one hand, the restructuring of the SOEs system and the promotion of corporatisation are seen as a way to adjust the Indonesian economy to the challenges of regional cooperation and to foster further opening up to the international markets. On the other hand, the establishment of stronger SOEs, even in the form of holding companies, in strategic fields such as banking and finance is meant to enhance the competitiveness of Indonesian enterprises within the ASEAN space. Simultaneously, in a country which is seeking to ensure more adherence of business and investment strategies to macroeconomic development policies, the legislature is also debating on the low level of FDIs compared to other ASEAN countries and looking for regulatory reforms to remove obstacles to investments.

In this context, the idea of an advancing state capitalism vis-à-vis a retreating economic integration is balanced by political and scholarly commitment to further opening up.

How to reconcile these apparently conflicting views?

Indeed, when framing the Indonesian example within a comparative analysis, the combination of corporatization and enhancement of state control is shown to be quite a distinctive trait of the development of SOEs' law in Southeast Asia. Contrarily to what it may appear, the influence of the successful Singaporean model is only partially accepted and several ASEAN countries still accept the distinction between purely bureaucratic SOEs and "corporate" SOEs, while also emphasizing their subjection to development plans. The idea that SOEs should be managed solely according to strictly commercial standards is mostly viewed with scepticism, either because of strongly relational business cultures also involving ties between governments and enterprises or because of constitutional doctrines of economic nationalism, be they socialist or not.

From the premises laid out in the introduction, it is easy to see that the ASEAN path to legalization, in enterprise law as in other fields, does not pose substantial obstacles to the differentiation of state control over the economy, but rather aims at promoting mutual understanding and coordination (not harmonization) within its economic space. Even if ASEAN has not enacted comprehensive documents on SOEs, its vocation may be easily inferred from other relevant broad coordination efforts, such as with the Guidelines for Special Economic Zones Development and Collaboration, issued in 2016. It is worth noting that, while identifying potential regulatory obstacles to enterprise activity (e.g. lack of enforcement of property rights; strict licensing regulations; inefficient custom procedures), the guidelines highlight that any common effort for the design of a SEZs' regime tackling such issues should ensure coherence between the rules of the special zones and the policy framework of each Member State.

Also, the example of integration patterns in the field of Corporate Social Responsibility (§ 2.2) displays legal dynamics akin to a mutual transfusion of values, principles and regulatory settings rather than standard transplants.

The ASEAN integration model is therefore specifically designed for state capitalist economic laws. Indonesia is very far from being the odd one out. Therefore, to read such experiences as proofs of a "weak" or "incomplete" integration process would be misleading. By echoing comparative assessments about the notion of "rule of law", it seems better to employ instead the most appropriate concept of "thin" integration, in contrast with the "thick" integration experienced, at least in some fields, by the economic laws of EU countries.

Indeed, even Indonesian legal studies refer to ASEAN as one of the driving forces behind the country's corporate landscape reform. The comparative analysis has revealed that, notwithstanding the already mentioned variety in legal traditions, a tendency to elaborate and enact operational models of state capitalism is a constant of ASEAN countries, also from the historical point of view. The promotion, through ASEAN, of a certain degree of economic nationalism is therefore less of a paradox than it seems. It is worth noting, indeed, that such nationalism, at least in the main object of our analysis (i.e. Indonesia) is implemented through the adaptation of both foreign and modern corporate models, as to achieve, through economic cooperation in the ASEAN area, the enhancement of the technical capabilities and the international orientation of the state-managed economy.

The same logic is detected at the level of specific regulatory trends. The paper presents at least four main areas where some ASEAN countries appear to be following parallel paths: a) the legal definition and subjective scope of SOEs; b) the legal connection between SOEs and development plans; c) the subjection of SOEs to legally and judicially enforced doctrines of state capitalism (the ekonomi demokrasi or the constitutionally significant directive principles of state policy in Thailand); d) the creation and regulation of state-holding companies.

With regard to these four topics, as well as many other ones, future legal developments in the ASEAN area are likely to show important innovations and regulatory solutions. Indonesian law will fit within these developments by maintaining a cultural dialogue with other ASEAN economies and will continue representing a "legal laboratory" for future reforms.

From a broader perspective, the overview of the emerging trends of integration of enterprise law in a highly pluralistic and state-capitalist legal area should promote a methodological shift the comparative analysis within regional integration zones. The "ASEAN way" should not be considered "weak", but rather a flexible approach to cooperation among states whose economic laws are grounded in development planning, relational business cultures and a key role for state-owned enterprises not only in traditional but also in innovative fields.

Only through this change of approach, the degree of integration among ASEAN countries will be fully understood, at the same time promoting the usefulness of comparative regional integration with other experiences all over the world.

***

Abstract: The paper aims at outlining the most significant trends concerning the modernization of the legal regulation of State-Owned Enteprises (SOEs) within the context of the economic integration in Southeast Asia, within the ASEAN area. In doing so, the paper takes Indonesian enterprise law as an example in order to assess how the evolution of post-colonial commercial law led to the diversification of legal regimes for SOEs in close connection with their function as agents of national development.

Keywords: ASEAN – state-owned enterprises – post-colonial commercial law – economic nationalism – Asian regional integration

***

Gianmatteo Sabatino – Lecturer and Researcher in Comparative Law, Law and Economics School, Zhongnan University of Economics and Law. PhD, University of Trento. (z0005232@zuel.edu.cn; sabatinogianmatteo@gmail.com)