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Radbruch's Legal Theory on the State's Controlling Rights in the Establishment of a State-Owned-Holding-Company

Abstract

The constitutional basis for the state's role in implementing the national economy is Article 33 of the Republic of Indonesia's 1945 Constitution. Article 33 of the 1945 Constitution mandates the state's right to control, exercised through the economic exploitation of state-owned enterprises ("SOEs"). The expansion of the global economy necessitates the improvement of SOEs, and the government's strategic policy choice is establishing a state-owned holding company ("SOHC") to strengthen value and efficiency. This research aims to determine how the state's controlling rights in the SOHC scheme relate to three basic legal values identified by Gustav Radbruch, namely *Justice*, *Certainty*, and *Benefits*. The approach taken by normative juridical research methodologies is a conceptual approach and a statutory approach, conducted by researching theory or doctrine and relevant laws and regulations, including Supreme Court and Constitutional Court decisions. The results of this study show that the establishment of a SOHC has, in theory, met Gustav Radbruch's legal objectives of justice, certainty, and benefits. State's controlling rights must be widely understood with authority to formulate policies and actions for regulation, control, management, and supervision. In the management function, state control in the SOHC structure can be protected through special share ownership. However, state control based on a sense of social justice, legal certainty and benefit-oriented must still respect the principles of GCG in SOEs and do not mean monopolizing all national economic activities.

Keywords: Gustav Radbruch, Holding Company, State's Controlling Rights, State Owned Enterprises.

1. Introduction

As stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution"), Indonesia is a constitutional state (*rechtstaat*), and law will serve as both the commander in chief and the limiting sign for all actions taken by the government and the people in administering the country and state. In addition to serving as an instrument for government action, the law may also defend human interests. One aspect that gets protection is economic activity, namely the enactment of legal rules in the form of a sequence of laws and regulations as foundation, that underlies government activities, included in economic development. The state uses the law to attain its goals of justice, legal certainty, and benefits.

In his theory, John Maynard Keynes positioned the state as having a vital economic role through government intervention policies to ensure economic stability and growth. One of the objectives of forming the Indonesian government, as stated in the fourth paragraph of the preamble to the 1945 Constitution, is "*to promote public welfare*." This purpose is then stipulated in Article 33 of the 1945 Constitution, which legitimizes the involvement of the state in the national economy, specifically paragraphs (2) and (3), which read:

- (2) *Production sectors important for the state and vital for the livelihood of the people at large shall be controlled by the state.*
- (3) *The land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people.*

There is a term or phrase "*controlled by the state*" in the provisions of Article 33, paragraphs (2) and (3) described above, which contains the idea of the state's controlling rights and where the state plays a vital role in regulating the country's wealth for the people's welfare. Article 33 of the 1945 Constitution justifies the state's exploitation of natural resources related to many people's livelihoods for public utilities and public services through state or state control rights.

The implementation of the state's controlling rights, one of which can be conducted by SOEs acting as an extension of the government in managing important production sectors for the state, or in other words, acting directly as economic agents, is based on Law Number 19 of 2003 concerning State-Owned Enterprises ("SOEs Law"). SOEs develop the economy by chasing profit and giving public benefits. Economic theory supports the creation of SOEs as a government tool to promote national development and manage people's wealth in their best interests.

The financial status of the SOEs itself is frequently debated in disputes concerning the role or control of the state, particularly in SOEs in the form of limited liability companies ("LLC"). On the one hand, according to Law Number 17 of 2003 concerning State Finance ("State Finance Law"), SOEs' are under the scope of state finances. Meanwhile, Article 11 of the SOEs Law subjects SOEs to the regulations and principles that apply to Law Number 40 of 2007 concerning Limited Liability Corporations ("LLC Law"). This clause implies that SOEs are regarded as autonomous, separate legal entities. This principle raises concerns that the state will no longer be able to use its public authority over SOEs.

To increase the efficiency and productivity of SOEs, the government conducts restructuring steps, whereby the restructuring method being intensified is the establishment of a SOHC. The basic idea of establishing a SOHC is to optimize SOEs' management and increase company flexibility. The legal basis for establishing a SOHC was originally based on Article 2 Paragraph 2 of Government Regulation Number 44 of 2005 and then refined through Government Regulation Number 72 of 2016 ("PP 72/2016"). Since 2016, there have been at least eleven SOHCs, following the other four formed before the stipulation of PP 72/2016.

The criticism that emerged was the opinion that the formation of this SOHC could be equated with privatization because the status of a subsidiary company that was previously a SOE became not a SOE and fully complied with the LLC Law regime. The issue of SOE subsidiaries' status raises legal problems concerning the legal certainty of state authority in SOEs and its conformity with the notion of state control.

On several occasions, the Constitutional Court's views on the state's controlling rights in the authority framework over SOEs have been used as the foundation for judicial review rulings. The Constitutional Court Decision Number 001021022/PIUI/2003 has determined that the state control power established by the 1945 Constitution gives the state the authority to implement policies (*beleid*) and management actions (*bestuursdaad*), regulate (*regelendaad*), manage (*beheersdaad*), and supervise (*toezichhoudensdaad*)¹. The management role (*beheersdaad*) is conducted through the mechanism of share ownership and/or direct engagement in the administration of SOEs as a state institutional tool that employs its control over the sources of wealth to maximize the people's prosperity.

When viewed from the standpoint of the existence of laws that regulate this matter itself, the position of the right to control the state and the SOHC can be an interesting issue to study. According to Gustav Radbruch, in terms of legal objectives, three basic values become the *idee des recht*, namely:

¹ Judicial review of Law no. 20 of 2002 concerning Electricity related to the business of providing electricity and control by the State, Leadership Council PT PLN (Persero) Workers' Union Center, Association of State Electrical Retired Families 334 (Constitutional Court 2004).

justice (*gerechtigheit*), legal certainty (*rechtssicherheit*), and benefits (*zweckmassigkeit*). The establishment or existence of a SOHC should be oriented towards justice, legal certainty, and utility.

From this, the topic to be explored is the conception of the state's right to control in its correlation to the three legal objectives: justice, certainty, and benefits; and how is the application of state's right to control in the SOHC scheme. This research objectives are to be able to understand the concept of "state's controlling rights" in SOHC and analyze the legal consequences it causes.

2. Method

This research was carried out using a normative-juridical method whose study was based on literature research sourced from primary, secondary, and tertiary legal materials to then be analyzed to see how the concept of protecting the state's controlling rights in the establishment of a SOHC in terms of three legal objectives according to Gustav Radbruch, namely: justice, legal certainty, and utility. In this study, a conceptual approach and a statutory approach were used. The conceptual approach was conducted based on views, theories, or doctrines that were relevant to the legal issues discussed, while the statute approach is conducted by studying related laws and regulations, including those regarding SOEs, LLCs, and state finances and related decisions of the Supreme Court and the Constitutional Court.

3. Findings and Discussion

3.1. Justice Aspects of the State's Controlling Rights in SOHC

Justice has been considered the highest human interest since ancient Greece. Plato emphasizes harmony or alignment, while Aristotle emphasizes balance or proportion, which entails equal rights but also unequal rights. Aristotle then contrasts distributive justice, which requires everyone to get what is due, from commutative justice, which treats everyone equally.

John Rawls defines justice as fairness, emphasizing social justice, with three principles: the greatest equal liberty principle, the difference principle, and the equal opportunity principle. The construction of justice is based on two main principles: 1) Everyone has equal rights to the broadest fundamental freedoms, and 2) Social and economic inequality must be regulated so that social and economic aspects (a) provide proper benefits for everyone and (b) are open to every position and position of every person.

The view of justice in the Indonesian national law is focused on the Fifth Precept, which reads "*Social justice for all the people of Indonesia*". The spirit and ideals of social justice were then drafted into the 1945 Constitution, which became the guideline for making laws, including in the economic field.

Indonesian social justice debates normative issues, such as how authoritative structures create policies and laws that define the legal system. Lawrence M. Friedman says every legal system contains substance, organization, and culture.

3.1.1. Substance

Several statutory regulations in the form of sectoral regulations have been drafted and formed as part of the implementation of Article 33 of the 1945 Constitution, where the concept of the state's controlling right is contained. The term "*controlled by the state*" can be interpreted as the right to conduct important production sectors, including regulation, control, and supervision.

According to W. Friedmann, a welfare state has four functions, namely: 1) the state as a welfare guarantor; 2) the state as a regulator; 3) the state as an entrepreneur, where the state functions as an agent of economic activity through the state-owned enterprises; and 4) the state as the umpire, which has the

authority to formulate laws. The purpose of the State is for the general welfare, as only a vehicle for achieving the shared goal of universal prosperity and social justice.

In a national economic system where the state acts as an economic actor, it can form SOEs using its public authority. Article 1 of the SOEs Law defines an SOE as a business entity whose capital is wholly or mostly owned by the state through direct participation from separated state assets. Following the passage of the SOEs Law, the SOEs are divided into Public Companies (*Perusahaan Umum*) whose capital is entirely owned by the state and Limited Liability Companies (*Persero*) whose capital is divided into shares, with the State of Republic of Indonesia owning at least 51% of its shares.

SOEs, therefore, served as an extension of the government in conducting its constitutional tasks and Article 33 of the 1945 Constitution for control and exploitation of important production sectors. Nonetheless, the founding father, Mohammad Hatta, noted that the concept of "*controlled by the state*" for Article 33 of the 1945 Constitution does not indicate that the state becomes an entrepreneur, but that adequate governmental authority rests in setting rules to accelerate the development of the economy. The concern raised by Hatta may be appreciated by considering how, if the state participates as an economic actor, it might create a non-competitive economic climate owing to the state's enormous influence as a regulator who is also a business actor at the same time. Such circumstances can potentially impair the idea of justice, which Plato's definition of justice emphasizes harmony.

The existence of the state's controlling right in SOEs does not imply that it has the authority to act arbitrarily and violate existing regulations. As an illustration, SOEs in the form of a *Persero*, based on Article 11 of SOEs Law states that *Persero* subjects to the provisions and principles that apply to LLCs. This means that the position of SOEs is attached to the same rights and obligations as the private sector. Likewise with the protection of minority shareholders in SOEs. The LLCs Law also requires SOEs to apply the principle of justice by providing equal treatment guarantees to shareholders through the General Meeting of Shareholders ("GMS") mechanisms, which ensure that shareholders' rights are not violated. In more detail, these matters are outlined in applying the principles of good corporate governance ("GCG") in SOEs.

In the process of SOEs transforming into a holding company, PP 72/2016 becomes the legitimacy and justification of procedures regulated in LLC Law through infusing (*inbrenng*) state shares in SOEs as a capital for SOHC. When a SOEs becomes a SOHC, the substance of the state's controlling right is still placed in clear procedures and existing laws and regulations. This is, in principle, in line with the concept of justice, according to Rawls, which is fairness. From this idea, the determinant of John Rawls's theory of justice is the importance of a fair and impartial procedure that can guarantee the interests of all people.

3.1.2. Structure

Friedman defines legal structure in this context as "*the skeletal framework of a system*" or, in other words, a system is its framework. Concerning the state's controlling rights, the Constitutional Court considered that state control constructed by the 1945 Constitution gives a mandate to the state to conduct policies and management actions, regulation, management, and supervision. Whereas the state's controlling rights concept was ranked as follows: "First, *the state exercises direct control*. Second, *the state makes policies and management*. Third, *the state conducts regulatory and supervisory functions*."

The management function is conducted through a share ownership mechanism and/or through direct involvement in the management of SOEs as a state institutional instrument. Based on Government Regulation Number 41 of 2003, the Minister of SOEs are representatives of the government as shareholders or members of the GMS at *Persero* whose shares are owned by the state and representatives of the government at Public Companies.

SOHC and subsidiaries are separate and independent legal objects under the separate legal entity and limited liability doctrine in LLC Law, and shareholders have equal rights. State-owned shares signify a legal shift from public to private finance. In this position, the state's controlling right, manifested as a shareholder or even at a GMS, means the state has limited responsibility for capital invested in the company.

The provisions governing the LLCs Law that apply to Persero, including SOHC, are most visible in the protection of minority shares, for example, minority shareholders have rights to propose a GMS. This concept is based on Aristotle's principle of distributive justice, which states that justice is given to everyone based on their achievements, which are adjusted to the percentage of the number of companies. The application of the principle of distributive justice is also found in the implementation of government golden share in the SOHC scheme.

3.1.3. Culture

Legal culture is a mindset or behavior that affects the law. The conception of the state's controlling right of Article 33 of the 1945 Constitution, is not specifically interpreted in the Constitution but is formed through its implementing regulations. What is meant by being controlled by the state includes the notion of ownership, including the power to regulate and manage directly or through institutions that are given assignments.

The state's efforts to defend the controlling right extend to the exploitation of important production branches concerning people's livelihoods. Likewise, in the case of the state becoming an economic actor in the national economic system with the SOHCs, SOEs are looking for profit and conduct social functions, both in providing community service needs and contributing to state revenues.

In principle, all laws, regulations, or actions taken by the state must contain the value of justice. According to John Rawls, the constitution and law are the basis of exercising rights and obligations in social interaction, guaranteeing minimum equality for all members of society. Justice, meanwhile, has its starting point in the principle of equality before the law and the principle of inequitable fairness. Formal justice, however, is insufficient because, later in the regulation, it is not only a strengthening of the government's position in the SOHC scheme, but also a guarantee for development patterns in the economic, financial, related industries, or infrastructure sectors. Fairness in forming SOHC is expected to facilitate constructive collaboration, coordination, and control conducted by the parent company.

3.2. Legal Certainty Aspects of the State's Controlling Rights in SOHC

The aspect of legal certainty is one of the constitutional rights in doing business, as stated in Article 28D paragraph (1) of the 1945 Constitution. Legal certainty is needed to create order between the norms that apply in society. The supremacy of law, in which the aspect of legal certainty becomes dominant, frequently leads to conflicts over what should take precedence between justice and legal certainty.

Legislation, as a guideline for creating order and regularity, normatively regulates clearly and does not raise doubts in the corridors outlined by the rule of law. The holding company arrangement and the state's right to control it can be viewed from the dimensions of the LLC Law and the opinion of the courts as law enforcers, both the Supreme Court and the Constitutional Court.

3.2.1. Substance

In the regulations of LLC Law, there is no specific definition of a holding company. A holding company is "a super-corporation which owns or at least controls such a dominant interest in one or

more other corporations that it is enabled to dictate their policies through voting power." From these definitions, the concept of ownership and control by one company over another company is emphasized.

The legitimacy of a holding company lies in the act of taking over or owning shares in another company. There are two main reasons for forming a holding company: first, to accommodate statutory regulations, and *second*, to gain more economic benefits by expanding its business.

The formation of a holding company is not regulated rigidly in the LLC Law, but there are corporate actions related to the holding company relationship, as follows:

1. The establishment of a company by another company, according to LLC Law Article 7 paragraph 1, that two or more people establish a company. What is meant by "*people*", namely that it can be in the form of a legal person.
2. The acquisition of shares is conducted through legal actions to acquire company shares, which result in a transfer of control over the company, according to LLC Law Article 1 Number 11.
3. Separation is conducted with the existence of a company's legal action to separate the business, which results in the transfer of all assets and liabilities due to law to another company, according to LLC Law Article 1 Number 12.

In terms of control arising from the formation of a holding company, it is necessary to understand in advance the existence of the principle of a separate legal entity and limited liability, which is adhered to Article 3 Paragraph 1 and Article 84 of the LLC Law.

Another form of involvement in a holding company is through the appointment of directors and commissioners by the holding company as a shareholder or through a contractual relationship, if this does not conflict with the company's articles of association.

The holding company concept, which became a reality in the legal aspects of the company's business, was later adopted by the government to establish a SOHC based on business sector grouping (clustering). Establishing a SOHC is considered a strategic step for increasing value, strengthening competitiveness, expanding business networks, and ensuring independent management of SOEs, as government's response to global economic developments.

3.2.2. Structure

The existence of SOHC based on PP 72/2016 provisions is conducted through state equity participation (*Penyertaan Modal Negara*) in SOE's shares without going through the mechanism of the State Budget. The legal consequence of this shares transfer is that the companies whose shares are used as equity participation have the status of a subsidiary company whose majority of their shares are still owned by the SOEs, which are the holding company.

In this construction of a SOHC, the subsidiary companies no longer fulfil the classification as a SOEs; in other words, lose their status as a SOEs. To continue to provide certainty for state control over subsidiary companies, PP 72/2016 also stipulates the provisions for companies that become subsidiaries: the state owns golden shares with special rights, the provisions of which are regulated in the company's articles of association. This golden share known as "*Dwiwarna shares*," which have a special right to the company's activities, namely: a) the appointment of members of the BOD and/or BOC; b) changes to the articles of association; c) changes in shareholding structure; and d) mergers, consolidations, separations, and dissolutions, as well as company takeovers by other companies.

Article 2A paragraph 7 of PP 72/2016, states that SOHCs subsidiaries are treated the same as SOEs, such as getting assignments from the government, conducting public services, and getting special policies in managing natural resources.

Government regulations regarding procedures for forming a SOHC, for example, PP 47/2017 in the formation of the mining sector holding company, is a form of legal certainty from a positivistic point

of view. Through PP 47/2017, state-owned Series B shares that previously existed at PT Aneka Tambang Tbk (Persero), PT Timah Tbk (Persero), PT Bukit Asam Tbk (Persero), and PT Freeport Indonesia were transferred to PT Indonesia Asahan Aluminium (Persero), so that they which were previously SOEs, changed to become a “regular” LLCs, which are subject to the LLC Law, or in other words, they are no longer a SOEs status.

3.2.3. Culture

The procedure for forming a holding according to PP 72/2016 was once subjected to a judicial review at the Supreme Court because PP 72/2016 degrades the existence of the state in SOEs ownership and distances state control of SOEs so that it has the potential to become legitimate in privatization without going through the provisions stipulated in SOEs Law and State Finances Law and without the supervision of the House of Representatives. The Supreme Court then rejected the application in Decision Number 21 P/HUM/2017, with consideration that state ownership through SOHC is still recognized by granting special rights so that control (supervision) of SOHC subsidiaries is still conducted by the state through the parent company and does not reduce the purpose of state control².

A mining sector holding company formed based on PP 47/2017 was also subjected to a judicial review. The Supreme Court rejected the application in Decision No. 7 P/HUM/2018, with consideration that SOEs, which later became subsidiaries in the SOHC structure, still had the status of a state company based on Dwiwarna share ownership, referring to Article 1 Point 5 of the State Finances Law. The understanding in this Supreme Court decision is that the financial status of SOEs (including their subsidiaries) is included in the scope of state finance, even though there has been a separation of state assets through equity participation.

Regarding the status of SOEs subsidiaries, this is also the background to the application for a judicial review of Article 77 letters c and d of the SOEs Law, in case number 61/PUU-XVIII/2020. The request rests on the issue that the prohibition on privatization is only applied in a limited manner to SOEs and not applied to SOE's subsidiaries. Regarding establishing a SOHC, the Court considered that the parent company and subsidiary companies in a SOHC cannot be separate and can even compete in conducting business activities. The state can always use the golden share to secure the state's position in controlling subsidiary companies so as not to deviate from business objectives for the greatest prosperity of the people. With the existence of PP 72/2016 and the establishment of a SOHC, this remains consistent with the government's current legal politics.

In terms of legal certainty, the affirmation of the Supreme Court's decision and the Constitutional Court's decision above is a guarantee that even though a SOEs is later transformed into a holding company, the state' position can obtain its rights by adhering to the principle of legal certainty as a justifiable protection to obtain the expected rights, at least if: 1) the formation of a holding company is carried out in legal ways; and 2) the government's control over the state companies is not lost.

Both the Supreme Court's and the Constitutional Court's decisions also led to the conclusion that state control over SOEs and the SOHC structure still adhere to the notion of "the state's controlling right, " including policies, administrative act, regulation, management, and supervision. If there is no

² Judicial review of Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies, National Assembly of Alumni Corps Islamic Students (KAHMI), Foundation of Re-Ide Indonesia, dkk 42 (Supreme Court 2017).

abolition of these functions, state control remains with the parent company and its subsidiaries in the SOHC.

3.3. Legal Benefit Aspects of the State's Controlling Rights in SOHC

The theory of benefits from the existence of law cannot be discussed apart from Jeremy Bentham's point of view or theory of utilitarianism, that the application of law can benefit the larger community. According to the adage "*The greatest happiness of the greatest number*," the establishment of law is determined by the measuring level of happiness of the majority.

In conflict with the state's role, which has the authority to regulate the law in economic activities, the legal economic analysis approach can be considered. The theory developed by Richard Posner is rooted in the spirit of utilitarianism: regulation of legal pressure must provide three main values: value, utility, and efficiency. The use of the discipline of economics, in this case, is a rational choice to see the effectiveness and efficiency of regulations and legal regulations that are made to increase the widest possible public interest.

3.3.1. Substance

In the formulation of Article 33, paragraph 4, of the 1945 Constitution, when linked to Article 33, paragraphs (2) and (3) of the 1945 Constitution, the meaning of state control over important production sectors cannot be separated from the framework of economic democracy, including the position of state control referred to when the state itself participates as an economic agent. SOEs and SOHCs, as an extension of the government in conducting Article 33 of the 1945 Constitution, play a strategic role as a double agent: executor of public services and a counterweight to large private economic forces.

The utilitarian approach is visible in the intention behind the existence of SOEs as economic actors and an extension of the state. The concept attempted here by granting privileges to SOEs is to provide people's prosperity in a broader sense in which the economy is not dominated by a certain group of people with greater capital.

SOEs are expected to contribute to the state through returns in the form of several types of taxes, dividends, and non-tax revenues. In comparison, with smaller assets, Temasek Singapore and Khazanah Malaysia can perform better in the aspect of revenue and profit margins compared to 20 Indonesia's Public Listed SOEs, with the following details:

Table 1. Performance of Indonesian SOEs with Temasek and Khazanah

Comparison (2021)	Indonesian SOEs	Temasek Singapore	Khazanah Malaysia
Revenue	4,06	6,7%	35,4%
Assets	7,65%	6,79%	0,70%
Net Profit	7,14%	-45,6%	-NA-
Profit Margin	7,46%	10,3%	19,3%

The establishment of SOHC is part of the strategic arrangement of SOEs management, so it is hoped that SOE's performance will be more optimal. The main objective is to right size SOEs to generate greater benefits than contributions to the existing State Budget. In its establishment, SOHC can increase the company's market value creation, improve its capital structure, and increase its competitive advantage because it provides a more economic focus and strengthens SOEs' constructive collaboration and strategic role in supporting government programs to achieve national goals.

3.3.2. Structure

The paradigm of state asset management in SOEs refers to business judgment rules (BJR) and the implementation of GCG. The applied GCG principles include transparency, accountability, responsibility, independence, and fairness. The application of GCG principles, therefore, aims to encourage the management of state-owned companies to be professional, healthy, and competitive with private companies.

The principles of BJR are derived from the principles of GCG, in which the meaning of the responsibilities of the board is contained. According to Article 5 of the SOEs Law, the management of SOEs is conducted by directors, who are supported by other organs in SOEs, consisting of GMS, Directors, and Commissioners. The principle of BJR protects the Directors and the company's management's independence. If the directors have made decisions carefully, in good faith, and as business decisions, they cannot be held responsible. According to corporate legal norms, this principle is also accommodated in the provisions of Article 7 paragraph 5 of the LLC Law. The state, as the majority shareholder in a Persero, and a Dwiwarna shareholder in a SOHC, needs to respect this independence and principles of BJR. The challenge for the state is how to define its role in SOEs and SOHC about the socio-political paradigm in Indonesia, where it is difficult to distinguish the government, or even the political elite, can intervene in the process of determining SOE policies with the excuse of protecting the interests of the state.

In conducting activities, the government should also provide full autonomy and not intervene in a way that could distort the goals of SOEs. State ownership in effectively implementing SOE's tasks should be conducted centrally by one entity or a coordinating body. The importance of establishing SOEs consolidation, which can be conducted through SOHC, is considered to increase the efficiency and effectiveness of the management of production branches. This could be in line with the aims of economic democracy with the principles of fair efficiency and economic unity, which are stated in Article 33, paragraph 4, of the 1945 Constitution.

If it is associated with the principle of utilitarianism, which is based on the application of law, it must be able to provide the greatest happiness of the greatest number. The SOHC construction implies that there is legitimacy given to the state with rights and authority, which can guarantee the existence of control and PSO to subsidiaries for the welfare of the people, even though there are principles of BJR that must still be maintained.

3.3.3. Culture

Establishing a SOHC can benefit the state because there is a parent company that will manage the subsidiaries in the holding structure so that the state can focus more on its role as a regulator and not get trapped in the operational duties of shareholders. The lack of direct involvement of the state in SOEs operations can avoid the emergence of conflicts of interest, which hinder the effective functioning of companies. Establishing a SOHC can also result in a coherent national strategic direction that can result in the establishment of a SOEs ecosystem that is linked to one another, producing benefits for the growth of SOEs and the national economy. Establishing a SOHC can also prevent duplication of services or waste of SOEs engaged in the same sector and help save costs.

The existence of SOHC will also result in its dilemma. On the one hand, control will increase state control over SOEs to ensure that all operational directions of SOE activities are in accordance with state policy. Furthermore, the exploitation of significant industrial branches by SOEs as government extensions can be maximized. If private parties outside the state manage natural resources or the economy, the rewards to the state will be divided, potentially reducing the benefits to the people.

The different demands from each aspect of justice, legal certainty, and benefits described by Gustav Radbruch are not meant to contradict each other but to determine priorities from among them. The opinion of Gustav Radbruch stated: *"First of all, the conflict between justice and legal certainty really cannot be resolved, so only conditional priority is allowed. Second, this conditional priority operates in support of legal certainty; and third, the primacy of legal certainty is revoked when injustice becomes unbearable."* For Gustav Radbruch, law is the bearer of the value of justice, which is normative and constitutive of law. The aspect of justice and benefit is an integral part of justice, so legal certainty and just benefit exist. The same thing applies to the application of the state's controlling right in SOHC; the participation of the state in economic activities is not expected to strengthen economic ethics, where in this case the state controls as many branches of production as possible, which will kill the economic creativity of the wider community. Justice from the state's controlling right should return to Article 33 of the 1945 Constitution: the greatest prosperity of the people.

4. Conclusion

In principle, the establishment of SOHC has fulfilled the legal objectives as stated by Gustav Radbruch, namely justice, certainty, and benefits. Applying the principles of justice in SOHC can be seen from the equal treatment in rights and obligations of the LLC Law between SOHC and private companies. In addition, the establishment of SOHC can be seen as a form of strengthening performance and operations aimed at protecting state assets oriented towards creating social justice for all the Indonesian people. From the legal purpose of Legal Certainty, the SOHC's establishment has followed legal principles, and government legal politics and the golden share ensure the state's controlling right. The final legal objective of Benefit can be assessed from the formation of economic value as an optimization of the value of SOEs with strong competitiveness; economic utility, in increasing the contribution to the national economy; and efficiency, in cutting the SOEs' internal decision-making process.

Generally, the construction of state's controlling right in SOEs should not be fully equated with ownership. Referring to the meaning of the several Constitutional Court's decisions, the interpretation of the state's controlling right includes the authority to formulate policies, administrative actions, regulation, management, and supervision. In the management function, the state's controlling right is implemented through a mechanism of share ownership and/or through direct involvement in managing SOEs. Specifically, to provide legal certainty for the state's controlling right in a SOHC scheme, the state can use the golden share to secure the state's position in controlling subsidiaries so as not to deviate from business objectives. The implementation of state control over SOEs and SOHCs must respect the principles of companies' GCG. As described in Article 33 of the 1945 Constitution, economic activities are not monopolistically controlled by the state but also encourage cooperative and private participation. Therefore, the government can pay attention to implementing state power based on a sense of social justice, legal certainty, and public benefit.

5. Suggestion

As a suggestion, to clarify and guarantee the position of the state and the exercise of the state's controlling right in the formation and implementation of SOHC operations, the government needs to develop a Standard Operating Procedure that can be integrated with the implementation of GCG, which has been prepared by the Ministry of SOEs. In addition, SOHC need to always involve the participation of the community, both in economic activities in the form of exploiting state assets and improving people's welfare.

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