



The Establishment of State-Owned-Holding-Company: A State's Controlling Rights Perspective Based on Radbruch's Theory

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Abstract

The constitutional basis for the state's role in implementing the national economy is Article 33 of the 1945 Constitution of the Republic of Indonesia. The mandate of Article 33 of the 1945 Constitution regarding the State's Controlling Rights, one of which is realized through the existence of state-owned enterprises ("SOEs") as one of the business actors in the economy. 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. Through normative juridical research methods, the approach taken 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 by the state. 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 Theory; State-Owned-Holding-Company; State's Controlling Rights

A. Introduction

As stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution"), Indonesia is a state of law (*rechtstaat*). The law will serve as both the commander-in-chief and the limiting sign for all government and people actions in administering the country and state.¹ In addition to serving as an instrument for government action, the law may also defend or protect human interests; where these interests can be protected, the law must be implemented.² One aspect that gets protection is economic activity, namely the enactment of laws and regulations as the foundation³, 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.⁴ One of the objectives of establishing the Indonesian government, as stated in the fourth paragraph of the preamble to the 1945 Constitution, is "to advance the public welfare" This objective 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.⁵ Article 33 of the 1945 Constitution justifies the state's exploitation of natural resources.⁶ It

¹ Janpatar Simamora, "Tafsir Makna Negara Hukum dalam Perspektif Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Jurnal Dinamika Hukum* 14, no. 3 (2014): 556, <https://doi.org/10.20884/1.jdh.2014.14.3.318>.

² Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 4th ed. (Yogyakarta: Liberty, 2002), 160.

³ Ida Hanifah and Andryan Andryan, "The Rights to Review Policy Rules in the Perspective of Rule of Law," *Jurnal Penelitian Hukum De Jure* 21, no. 3 (2021): 321, <https://doi.org/10.30641/dejure.2021.V21.321-330>.

⁴ Antoon Spithoven, "The Role of Governments in Aligning Functional Income Distribution with Full Employment," *Journal of Economic Issues* 51, no. 3 (2017): 690, <https://doi.org/10.1080/00213624.2017.1359035>.

⁵ Imam Koeswahyono, "Hak Menguasai Negara, Perspektif Indonesia Sebagai Negara Hukum," *Jurnal Hukum & Pembangunan* 38, no. 1 (2008): 59, <https://doi.org/10.21143/jhp.vol38.no1.165>.

⁶ Andreas Tedy Mulyono and Rudy Pramono, "Updating Public Legal Awareness of Restricting Carbon Emissions in Indonesia," *Law Review* 22, no. 2 (2022): 40, <https://doi.org/10.19166/lr.v0i2.5714>.

relates to many people's livelihoods for public utilities and public services through the State's Controlling 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. The economic theory supports the creation of SOEs as a government tool to promote national development and manage people's wealth in their best interests.⁷ According to Article 1 of the SOE Law, an SOE is "a business entity in which all or most of the capital is owned by the state through direct participation from the segregated state assets." SOEs in the form of Limited Liability Companies, with state ownership of at least 51%, are referred to as Persero. Persero, which has made a public offering on the capital market, are referred to as Persero Terbuka.

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 ("LLCs"). On the one hand, according to Law Number 17 of 2003 concerning State Finance ("State Finance Law"), the state's share ownership of SOE, the so-called "segregated state asset," is 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 Companies ("LLC Law"). This clause implies that SOEs are regarded as autonomous and separate legal entities. This separate-legal-entities principle raises concerns that the state can no longer use its public authority over SOEs.

To increase the efficiency and productivity of SOEs, the government of Indonesia conducts restructuring steps, whereby the restructuring method being intensified is the establishment of a State-Owned-Holding-Company (SOHC). The basic idea of establishing a SOHC is to optimize SOEs' management and increase company flexibility.⁸ 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

⁷ Rahayu Hartini, *BUMN Persero Konsep Keuangan Negara dan Hukum Kepailitan di Indonesia* (Malang: Setara Press, 2017), 35.

⁸ Toto Pranoto and Willem A. Makaliwe, *Restrukturisasi BUMN Menjadi Holding Company* (Jakarta: Lembaga Management Fakultas Ekonomi Universitas Indonesia, 2013), 2.

72/2016"). Before PP 72/2016 was enacted, four holdings were established, and the remaining eleven were formed afterward.⁹

The criticism that emerged was the opinion that the establishment of this SOHC could be equated with privatization¹⁰ because the status of a subsidiary company that was formerly an SOE became not an 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 on judicial review of Law No. 20 of 2002 concerning Electricity, which was previously sued by the PT PLN (Persero) Workers' Union, related to the business of providing electricity and control by the state, 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 (*toezichthoudensdaad*).¹¹ The management role is conducted through the mechanism of share ownership or direct engagement in the management of SOEs as a state institutional tool¹² that employs its control over the sources of wealth to maximize the people's prosperity.

The relationship between the state's controlling rights and the SOHC can be an interesting topic for research, especially regarding the objectives of having regulations governing new mechanisms for managing state companies (in this case, PP 72/2016). Particularly noting that the mechanism for establishing a SOHC has consequences for companies that later become members of SOHC to lose their special status as SOEs. In contrast,

⁹ Huta Disyon and Elisatris Gultom, "Critical Review of SOE Holdingization Implementation from Anti-Monopoly and Unfair Business Competition Perspective," *Jurnal Penelitian Hukum De Jure* 22, no. 2 (2022): 195, <http://dx.doi.org/10.30641/dejure.2022.V22.191-204>.

¹⁰ Satya Arinanto and Dian 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," (3rd International Conference on Law and Governance (ICLAVE 2019), Solo, October 30-31, 2019), 255, Proceeding, <https://doi.org/10.2991/aebmr.k.200321.034>.

¹¹ Nina Amelia Novita Sari, et al., "Implikasi Penafsiran Hak Menguasai Negara oleh Mahkamah Konstitusi terhadap Politik Hukum Agraria pada Pulau-Pulau Kecil di Indonesia," *Law Review* 19, no. 2 (2019): 172, <https://doi.org/10.19166/lr.v0i2.1874>.

¹² Julizar Idris, et al., "The Political Process in the Preparation of Public Policy A Case Study on the Preparation of the Constitution of Oil and Gas in the Republic of Indonesia's House of Representatives," *HOLISTICA – Journal of Business and Public Administration* 10, no. 1 (2019): 96, <https://doi.org/10.2478/hjbpa-2019-0008>.

the status of SOEs is a concrete form of state control, as stated in Article 33 of the 1945 Constitution. According to Gustav Radbruch, in terms of legal objectives, three basic values become the *idee des recht*, namely: justice (*gerechtigkei*t), legal certainty (*rechtssicherheit*), and benefits (*zweckmassigkeit*).¹³ Some believe justice is the most important objective of the three legal objectives.¹⁴

The different demands from each aspect of justice, legal certainty, and benefits described by Radbruch are not meant to contradict each other but to determine priorities 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."¹⁵

As a legal system, the law on the management of SOEs as a concrete form of state-controlling rights is regulated by the government as an authoritative institution by preparing policies, laws, and regulations. Lawrence M. Friedman says every legal system contains substance, structure, and culture.¹⁶ Friedman defines legal substance in this context as substantive rules, legal structure as a skeletal framework, and legal culture as social attitudes and values.¹⁷ Friedman's theory, together with Radbruch's theory, which has been explained in the previous paragraph, will be used as the basis for the analysis in this study.

Departing from the backgrounds above, the focal points that will be discussed in this paper are the conception of the state's controlling rights in its correlation to the three legal objectives according to Gustav Radbruch's Theory. The research objectives are to understand the concept of "state's controlling rights" in SOHC and analyze the legal consequences it causes.

¹³ Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies* 26, no. 1 (2006): 6, <https://doi.org/10.1093/ojls/gqi041>.

¹⁴ Zulianto Chairul and Veby Juniarti, "Keadilan Bagi Kelompok Minoritas dalam Perspektif Hak Asasi Manusia Menurut Filsafat Hukum (Contoh Kasus Meliana di Medan Dituduh Melakukan Penodaan Agama)," *Law Review* 18, no. 2 (2019): 231, <https://doi.org/10.19166/lr.v18i2.1258>.

¹⁵ Frank Haldemann, "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law," *Ratio Juris* 18, no. 2 (2005): 162, <https://doi.org/10.1111/j.1467-9337.2005.00293.x>.

¹⁶ Henny Saida Flora, Mac Thi Hoai Thuong, and Ratna Deliana Erawati, "The Orientation and Implications of New Criminal Code: An Analysis of Lawrence Friedman's Legal System," *Jurnal IUS Kajian Hukum dan Keadilan* 11, no. 1 (2023): 119, <https://doi.org/10.29303/ius.v11i1.1169>.

¹⁷ Erwin Syahrudin et al., "Impact of Failure of Alternative Dispute Resolution between Samin Indigenous Movement and PT Semen Indonesia (Persero) Tbk," *International Journal of Multicultural and Multireligious Understanding* 8, no. 8 (2021): 233, <https://doi.org/10.18415/ijmmu.v8i8.2893>.

For example, some previous studies related to the state's controlling rights in establishing a state-owned holding company have been conducted by Giso Christianto in 2022 and Baruga Ermond in 2019. Both studies have quite similar focuses but different objects. Christianto's research is about the meaning of the state's controlling rights toward mineral and coal resources,¹⁸ while Baruga studies the parent-subsidiary relationship and state control of subsidiaries via Dwiwarna Series A shares.¹⁹ The main conclusion regarding the state's controlling rights conception is "that state control can be exercised through the function of carrying out policies, management, regulation, management, and supervision by the state."

The novelty of this study in comparison to previous studies is that it takes a more in-depth theoretical or philosophical analysis by using Gustav Radbruch's theory of the legal objectives (justice, legal certainty, and benefits), which is then deepened by using Lawrence M. Friedman's theory of the legal system (substance, structure, and culture)²⁰ in analyzing the conception of the state's controlling rights in establishing a state-owned holding company.

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 be then 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 benefit. In this study, a conceptual approach and a statutory approach were used. The conceptual approach was based on views, theories, or doctrines relevant to the legal issues discussed. In contrast, the statutory approach studies related laws and regulations, including those regarding SOEs, LLCs, and state finances and related decisions of the Supreme Court and the Constitutional Court.

¹⁸ Giso Christianto, "Ratio Legis Asas Hak Menguasai Negara Terhadap Sumber Daya Mineral aan Batubara" (Thesis, Universitas Borneo Tarakan, Tarakan, 2022), 8, <https://repository.ubt.ac.id/repository/UBT14-06-2022-084606.pdf>.

¹⁹ Baruga Ermond, "Status Hukum Anak Perusahaan Grup Badan Usaha Milik Negara Persero Sebagai Separate Legal Entity di Indonesia" (Thesis, Universitas Indonesia, Depok, 2019), 12, <https://lib.ui.ac.id/detail.jsp?id=20494121>.

²⁰ Mulyono and Pramono, 249.

B. Discussion

B. 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, 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, with commutative justice, which treats everyone equally.²¹

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.²² 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 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.

B. 1. 1. The substance of Justice Aspects of the State's Controlling Rights in SOHC

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.²³

According to W. Friedmann, a welfare state has four functions, namely: 1) provider of social services; 2) regulator of private economic activity through the licensing of investment, the management of exchange controls, and the like; 3) entrepreneur of a nationalized public

²¹ Roberta Troisi and Luigi Enrico Golzio, "The Aristotelian Commutative Justice and The Management of the Firm's Stakeholder Relations," in *Philosophy and Business Ethics*, ed. Faldetta, G., Mollona, E., Pellegrini, M.M. (Palgrave Macmillan, Cham, 2022), https://doi.org/10.1007/978-3-030-97106-9_19.

²² M. Yasir Said and Yati Nurhayati, "A Review on Rawls Theory of Justice," *Journal of Law, Environment, and Natural Resources (INJURLENS)* 1, no. 1 (2021): 29, <https://doi.org/10.51749/injurlens.v1i1.7>.

²³ Anna Triningsih, "Penguasaan Negara Atas Sumber Daya Air sebagai Upaya Mendukung Ekonomi," *Jurnal Legislasi Indonesia* 17, no. 3 (2020): 350, <https://doi.org/10.54629/jli.v17i3.610>.

sector; and 4) the state as the umpire, which has the authority to formulate laws.²⁴ The purpose of the state is to provide social rights to the citizens and not solely rely on the market for welfare.²⁵

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*),²⁶ whose capital is divided into shares, with the State of Republic of Indonesia owning at least 51% of its shares. Therefore, SOEs served as an extension of the government in conducting its constitutional tasks and Article 33 of the 1945 Constitution for controlling and exploiting 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 governmental authority rests in setting rules to accelerate the development of the economy.²⁷ 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 could impair the idea of justice, which Plato's definition of justice emphasizes harmony.²⁸

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, state that Persero is subject 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

²⁴ Aktieva Tri Tjitrawati, "The Just Drug Distribution in the Perspective of Welfare State," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 25, no. 3 (2013): 530, <https://doi.org/10.22146/jmh.16083>.

²⁵ Debora Debora, Haposan Siallagan, and Michelle Lucky Madelene, "Creating Welfare for Micro, Small, and Medium Enterprises During the Covid-19 Pandemic: Role of the State," *Law Review* 22, no. 2 (2022): 147, <https://doi.org/10.19166/lr.v0i2.5948>.

²⁶ Persero is an SOEs in the form of Limited Liability Companies, with state ownership of at least 51%.

²⁷ Mohammad Hatta, *Penjabaran Pasal 33 UUD 1945*. (Jakarta: Mutiara Sumber Widya, 1977), 28.

²⁸ Chenyang Li, "The Ideal of Harmony in Ancient Chinese and Greek Philosophy," *Dao* 7, no. 1 (2008): 95, <https://doi.org/10.1007/s11712-008-9043-3>.

shareholders in SOEs. The LLCs Law also requires SOEs to apply the principle of justice by guaranteeing equal treatment to shareholders through the General Meeting of Shareholders ("GMS") mechanisms, which ensure that minority 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 justification of procedures regulated in LLC Law through inputting (*inbreng*) state shares in SOEs as capital for SOHC. When an SOE 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.

B. 1. 2. Structure of Justice Aspects of the State's Controlling Rights in SOHC

Concerning the state's controlling rights, the Constitutional Court considered that state control constructed by the 1945 Constitution mandates 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 or direct involvement in managing SOEs as a state institutional instrument. Based on Government Regulation Number 41 of 2003 concerning Delegation of Position, Duty, and Authority of the Minister of Finance to State-Owned Limited Liability Company (Persero), State-Owned Public Company (Perum), and State-Owned Service Company (Perjan) to the Minister of State-Owned Enterprises, 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, limited liability doctrine in LLC Law, and shareholders have equal rights. State-

owned shares signify a legal shift from public to private finance.²⁹ 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 the right 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. Applying the principle of distributive justice is also found in implementing the government's golden share in the SOHC scheme.

B. 1. 3. Culture of Justice Aspects of the State's Controlling Rights in SOHC

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.³⁰

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 the state takes 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.³¹ Justice, meanwhile, has its starting point in the principle of equality before the law and the principle of inequitable fairness.³² Formal justice, however, is insufficient because,

²⁹ Arifin P. Soeria Atmadja, *Keuangan Publik dalam Perspektif Hukum, Teori, Praktik, dan Kritik* (Jakarta: RajaGrafindo, 2010), 116–17.

³⁰ Jimly Asshiddiqie, *Konstitusi Ekonomi* (Jakarta: Kompas Media Nusantara, 2010), 273.

³¹ Asep Warlan Yusuf, "Artikel Kehormatan: Hukum dan Keadilan," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 2, no. 1 (2015): 5, <https://doi.org/10.22304/pjih.v2n1.a1>.

³² Rizwandi Adealmuqni, Marwati Riza, and Syamsuddin Muchtar, "Supervision by Supervisory Council and Supervisor of the Temporary Land Deed Official," *Daengku: Journal of Humanities and Social Sciences Innovation* 2, no. 5 (2022): 706, <https://doi.org/10.35877/454RI.daengku1229>.

later in the regulation, it not only strengthens the government's position in the SOHC scheme but also guarantees development patterns in the economic, financial, related industries, or infrastructure sectors. Fairness or justice in forming SOHC is expected to facilitate constructive collaboration, coordination, and control conducted by the parent company.

B. 2. Legal Certainty Aspects of the State's Controlling Rights in SOHC

Legal certainty is one of the constitutional rights in business, as stated in Article 28D paragraph (1) of the 1945 Constitution.³³ 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 Court's opinion as law enforcers, both the Supreme Court and the Constitutional Court.

B. 2. 1. The substance of Legal Certainty Aspects of the State's Controlling Rights in SOHC

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."³⁴ From these definitions, the concept of ownership and control by one company over another company is emphasized.

A holding company's legitimacy lies in taking over or owning shares in another company. There are two main reasons for forming a holding company: first, to accommodate statutory regulations,³⁵ and second, to gain more economic benefits by expanding its

³³ Miftahul Huda, "Hak Atas Memperoleh Kepastian Hukum dalam Perspektif Persaingan Usaha Melalui Telaah Bukti Tidak Langsung," *Jurnal HAM* 11, no. 2 (2020): 258, <https://doi.org/10.30641/ham.2020.11.255-267>.

³⁴ Henry Campbell Black, *Black's Law Dictionary 9th Edition*, ed. Bryan A. Gardner, Tiger Jackson, and Jeff Newman, 9th ed. (St. Paul Minnesota: West Publishing Company, 2009), 865.

³⁵ Sulistiowati, *Aspek Hukum dan Realitas Bisnis Perusahaan Grup di Indonesia* (Jakarta: Erlangga, 2010), 64.

business.³⁶ 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 (*vide.* Article 7 paragraph 1 of the LLC Law, that two or more people establish a company). What is meant by "people" is 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 (*vide.* Article 1 Number 11 of the LLC Law).
3. Separation, which is conducted with the existence of a company's legal action to separate the business, results in the transfer of all assets and liabilities due to law to another company (*vide.* Article 1 Number 12 of the LLC Law).

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.³⁷

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 the government's response to global economic developments.

B. 2. 2. Structure of Legal Certainty Aspects of the State's Controlling Rights in SOHC

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 share transfer is that the

³⁶ *Ibid.*, 69.

³⁷ Chintya Dewi Restyana S, Nikmah Mentari, and Sri Eka Wulandari, "Kepailitan Terhadap Anak Perusahaan dalam Holding Company Badan Usaha Milik Negara," *Jurnal Hukum Ius Quia Iustum* 26, no. 2 (2019): 357, <https://doi.org/10.20885/iustum.vol26.iss2.art7>.

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 as a parent.

In this construction of a SOHC, the subsidiary companies no longer fulfill the classification as SOEs; in other words, they lose their status as SOEs. To continue providing 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. These golden shares, known as "*Dwiwarna shares*," have a special right to the company's activities, namely: a) the appointment of members of the BOD and BOC; b) changes to the Articles of Association; c) changes in the 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 Aluminum (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.

B. 2. 3. Culture of Legal Certainty Aspects of the State's Controlling Rights in SOHC

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 judicial review application on 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, which was sued by Korps Alumni Himpunan Mahasiswa Indonesia (KAHMI), Foundation of Re-Ide Indonesia, et al., with consideration that state ownership through SOHC is still recognized by granting special rights so that the state still conducts control of SOHC subsidiaries through the parent company and does not reduce the purpose of state control.³⁸

A mining sector holding company formed based on Government Regulation Number 47 of 2017 concerning Additional Investment of The State of The Republic of Indonesia's Equity into The Share Capital of The Company of PT Indonesia Asahan Aluminum (Persero) ("PP 47/2017"), was also subjected to a judicial review. The Supreme Court then rejected the judicial review application, which was sued by the Center for Energy and Mining Law Studies, Legal Defense Fund of Universitas Sahid Jakarta, et al., 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.³⁹

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, which the Pertamina Workers Union Federation sued. The application 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 to maintain 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.⁴⁰

³⁸ *Decision of Supreme Court No. 21 P/HUM/2017.*

³⁹ *Decision of Supreme Court No. 7 P/HUM/2018.*

⁴⁰ *Decision of Constitutional Court Number 61/PUU-XVIII/2020.*

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 an SOE is later transformed into a holding company, the state's 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.

The Supreme Court's and the Constitutional Court's decisions also concluded that state control over SOEs and the SOHC structure still adhere to the notion of "the state's controlling right," including policies, administrative acts, regulation, management, and supervision. Without the abolition of these functions, state control remains with the parent company and its subsidiaries in the SOHC.

B. 3. Legal Benefit Aspects of the State's Controlling Rights in SOHC

The theory of benefits from the existence of law must be discussed in Jeremy Bentham's point of utilitarianism theory, which advocates actions that foster happiness or pleasure and oppose actions that cause unhappiness or harm. 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.⁴¹

The legal, economic analysis approach can conflict with the state's role, which has the authority to regulate the law in economic activities. 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.

B. 3. 1. The substance of Legal Benefit Aspects of the State's Controlling Rights in SOHC

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,

⁴¹ Endang Pratiwi, Theo Negoro, and Hassanain Haykal, "Teori Utilitarianisme Jeremy Bentham: Tujuan Hukum atau Metode Pengujian Produk Hukum?," *Jurnal Konstitusi* 19, no. 2 (2022): 273, <https://doi.org/10.31078/jk1922>.

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 from several types of taxes, dividends, and non-tax revenues. Regarding contribution to the national economy, Figure 1 below shows the consistency and trend of increasing the fiscal contribution of SOEs to the state. In 2014, SOEs contributed IDR 303 trillion directly to the state budget, with a portion of taxes of IDR 176 trillion, dividends of IDR 37 trillion, and non-tax revenues of IDR 90 trillion. These numbers continued to increase slowly until, five years later, in 2019, the contribution of SOEs reached IDR 415 trillion, with a portion of taxes of IDR 200 trillion, dividends of IDR 50 trillion, and non-tax revenues of IDR 165 trillion. Referring to the Minister of SOEs of The Republic of Indonesia, SOEs have contributed to a third of the Indonesian economy. In 2021, the total assets of SOEs will reach IDR 9,000 trillion, or around 53% of the gross domestic product (GDP).⁴²

However, compared to other countries, Indonesian SOEs' fiscal contributions to the state need to be increased. In comparison, Singapore can contribute significantly to GDP with smaller assets. Table 1 shows that in 2019, the performance of 20 Indonesian SOEs with public company status still needed to be recovered compared to Temasek Singapore and Khazanah Malaysia, mainly from revenue and profit margins.

⁴² Fin Harini, "Kontribusi BUMN Sepertiga Perekonomian Indonesia," Validnews, August 8, 2022, <https://validnews.id/ekonomi/kontribusi-bumn-sepertiga-perekonomian-indonesia>.



Figure 1. Financial Performances of Indonesian SOEs of 2014-2019⁴³

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%

Table 1. Performance of Indonesian SOEs with Temasek and Khazanah⁴⁴

The establishment of SOHC is part of the strategic arrangement of SOE 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.

⁴³ Limandoro Paksi Aji, "Kinerja Keuangan dan Kontribusi BUMN," BUMNINC., October 19, 2020, <https://bumninc.com/kinerja-keuangan-dan-kontribusi-bumn/>.

⁴⁴ "Membandingkan Kinerja BUMN RI dengan Temasek dan Khazanah," Merdeka.com, March 4, 2021, <https://www.merdeka.com/uang/membandingkan-kinerja-bumn-ri-dengan-temasek-dan-khazanah.html>.

B. 3. 2. Structure of Legal Benefit Aspects of the State's Controlling Rights in SOHC

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 SOEs to be professional, healthy, and competitive with private companies.⁴⁵

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 Director's 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 Article 7, paragraph 5 of the LLC Law. As the majority shareholder in a Persero and a Dwiwarna shareholder in a SOHC, the state must respect this independence and the 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.⁴⁶

In conducting activities, the government should also provide full autonomy and not intervene in a way that could distort the goals of SOEs. One entity or a coordinating body should conduct state ownership in effectively implementing SOE's tasks centrally. 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.

⁴⁵ M Beni Kurniawan, “Redefinisi Tanggung Jawab Negara dalam Kasus Kepailitan PT Istaka Karya Ditinjau dari Three Keywords Theory,” *Jurnal Ilmiah Kebijakan Hukum* 11, no. 3 (2017): 258, <https://doi.org/10.30641/kebijakan.2017.V11.249-261>.

⁴⁶ Agung Wicaksono, “Indonesian State-Owned Enterprises: The Challenge of Reform,” *Southeast Asian Affairs*, (2008): 162, <https://www.jstor.org/stable/27913357>.

Suppose it is associated with the principle of utilitarianism, which is based on applying the law. In that case, it must 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.

B. 3. 3. Culture of Legal Benefit Aspects of the State's Controlling Rights in SOHC

Establishing a SOHC can benefit the state because a parent company 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.⁴⁷ 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 under 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.

On the other hand, in recent years, the public has responded to the dominant position of SOEs in national development, including special treatment from the unfair business competition as a condition that can weaken market competition. In addition, for an SOE that receives an assignment from the government, dissatisfaction will likely arise from minority

⁴⁷ Karen Agustawan, *Transforming the BUMN Into an Indonesian State Holding Company* (Cambridge: Ash Center for Democratic Governance and Innovation Harvard Kennedy School, May 2015), 6, <https://ash.harvard.edu/publications/transforming-bumn-indonesian-state-holding-company>.

shareholders regarding the commercial aspects of the assignment. What is most worrying is the potential for political intervention in the operations of state-owned companies.⁴⁸

C. Conclusion

In principle, the establishment of SOHC has fulfilled the legal objectives of Gustav Radbruch, namely justice, certainty, and benefits. In principle, the conception of the state's controlling right does not always have to be in the form of direct ownership, because it can also be in the form of the authority to formulate policies, administrative actions, regulation, management, and supervision. In the context of a SOHC, the state's controlling right is manifested in the form of a golden share, namely Series A Dwiwarna Share, which has special rights that other shareholders do not have. 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 the Ministry of SOEs has prepared.

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⁴⁸Organisation for Economic Co-operation and Development, *OECD Economic Survey of Indonesia 2021: Overview* (Paris: OECD, 2021), 44–45, <https://www.oecd.org/economy/surveys/indonesia-2021-OECD-economic-survey-overview.pdf>.

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