

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

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ABSTRACT

The Government of Indonesia (GoI) recently has enacted the Government Regulation Number 72/2016 concerning Shares Subscription and Arrangement of State Capitals in the State-Owned Enterprises (BUMN) (hereinafter referred as “PP Holding BUMN”). The Indonesian Ministry for BUMN (“Meneg BUMN”) proposes, that the Holding BUMN will cover six core economic sectors: (1) Energy, (2) Mineral extraction, (3) Financial service, (4) Highway infrastructure/construction, (5) Property (real estate), (6) Food. For example, Inalum (Persero) has been a Holding BUMN for 3 (three) other BUMNs, namely: Aneka Tambang (Persero), Timah (Persero) and Bukit Asam (Persero) by virtue of Government Regulation Number 47/2017. The BUMN is principally regulated in the Article 33 paragraphs 1, 2 and 3 of the Indonesian Constitution 1945, which provides a legal basis for the state-owned monopolies by BUMN. Article 33 para. 2 of the Indonesian Constitution confers the right of state monopoly to BUMN in the economic or business sectors vitally for the life sustainability of people. Respectively, BUMN has the concentration of economic/business power, enabling it to determine prices of goods and/or services. Moreover, the Indonesian nationalizations in late fifties led to the ownership transfers of “essential-facilities” by the existing BUMN, such as transport and distribution networks of energy by Indonesian Electricity Company (PLN). On one hand, the GoI argues that Holding of BUMN is necessary because it would bring beneficial impacts, such as: First, strengthening of corporate performance by creating synergies and economies of scale and reducing inefficiencies in operations and financing; Secondly, the GoI aimed to professionalize the management system by distancing BUMN from unreasonable politics. Thereby granting more business independency to BUMN. Third, through Holding of BUMN, the Government will be relieved of its direct responsibilities of overseeing all the BUMN dispersed across various industries. Instead, the Government hoped to use this energy and budget elsewhere more efficiently. On the other hand, there are public’s pervasive concerns, whereas PP Holding BUMN would lead to unlawful privatization of BUMN. Firstly, there was Appeal for the Judicial Review to the Indonesian Constitutional Court (“MKRI”) against the Holding of BUMN on Mining Sector by Government Regulation Number 47/2017 (“PP Number 47/2017”) *juncto* Law Number 19 year of 2003 on BUMN (“Case Number 14/PUU-XVI/2018”). The appealing Parties argued that the Holding of BUMN by PP Number 47/2017 and PP Number 72/2016 will decrease the value of the State’s assets. Secondly, the appealing Parties argued that the Holding of BUMN through the injection of State’s share capital (*inbrenng*) in the Aneka Tambang (Persero) and two others BUMNs to PT Inalum (Persero), as the Holding BUMN, will cause the elimination of BUMN status of Aneka Tambang (Persero) and two other BUMN as the new subsidiary companies. The appealing parties argued that this would be “a new form of

privatization” because of transformations of BUMN to be subsidiary companies of Holding BUMN (Inalum), without the mechanism of Indonesian State Revenue and Expenditures Budget (“APBN”) and a consent of the House of Representatives. Accordingly, this research attempts to analyze the Holding of the Indonesian State-Owned Enterprises (BUMN) pursuant to the Government Regulation Number 72/2016 (“PP 72/2016”) and the Constitutional Law Analysis of Judicial Review over the Government Regulation Number 47/2017 and Law Number 19 year 2003 on BUMN.

Keywords: *holding of Indonesian State-Owned Company (BUMN), Government Regulation Number 72/2016, Judicial Review, Indonesian Constitutional Court (MKRI)*

1. INTRODUCTION

1.1. Background

The Government of Indonesia (GoI) recently enacted the Government Regulation Number 72/2016 concerning Shares subscription and arrangement of state capitals in the state-owned companies (BUMN) (hereinafter referred as “PP Number 72/2016”). The Indonesian Ministry for BUMN (“Meneg BUMN”) envisages that the Holding BUMN (“State-owned holding companies or SOHCs”) will cover 6 strategic economic sectors: (1) Energy, (2) Mineral extraction, (3) Financial service, (4) Highway infrastructure/construction, (5) Property (real estate), (6) Food.

Subsequently, to foster the Holding of BUMN process, the GoI enacted Government Regulation Number 47 year of 2017 concerning Holding of BUMN in the Mining and Extraction Sector (“PP 47/2017”). By virtue of PP 47/2017, INALUM (Persero) becomes the Holding Entity for PT Aneka Tambang (ANTAM) Tbk, PT Bukit Asam Tbk., and PT TIMAH Tbk. Accordingly, there have been injection of the State’s share capital (“inbreng”) from ANTAM in amount of 65 per cent, Bukit Asam in amount of 65,02 per cent, TIMAH in amount of 65 per cent and from PT Freeport Indonesia, in amount of 9,36 per cent.

Principally, according to a Indonesian corporate law scholar, under the Government of President Joko Widodo, the Indonesian State-Owned Enterprises (SOEs or hereinafter called as “BUMN”) has become the driving agent of national development. Thus, the Indonesian Government employs a BUMN-driven development strategy to stimulate national advancements and endeavor to create so-called “a cluster based Holding of BUMN”, which own and manage State Enterprises. The incumbent Government believes that BUMN is able to rectify market distortions and fiscally support the governmental constraints in Indonesia.

On the one hand, according to World Bank (2014), the Holding of BUMN would generate beneficial effects for the Indonesian Government, in particular:

“First, the government hoped to strengthen SOEs’ corporate performance by creating synergies and

economies of scale and reducing inefficiencies in operations and financing. Second, the government aimed to professionalize the management system by distancing SOEs from politics. After establishing SOHCs, the management role over groups of SOEs is centralized at designated holding companies that devise a strategy to maximize their group’s performance. This reorganization was expected to cause many SOEs to move away from the direct influence of politicians, as well as the technical ministries, thereby granting greater independence to SOEs. Third, with SOHCs, the government would be relieved of its direct responsibility of overseeing all the SOEs dispersed across various industries. Instead, the government hoped to use this energy and budget elsewhere. Due to these merits of creating holding companies, a number of countries, such as Malaysia and Singapore, which have company-type structures adequate for managing SOEs, have seen an impressive performance of their state enterprises.” [1]

On the other hand, the Holding of BUMN in the strategic sectors, has triggered pervasive objections from the stakeholders, who consist of scholars, politicians, practitioners and public in general. Firstly, there was an appeal for “a substantive review (Uji Materiil)” against PP Number 72/2016. Subsequently, there was an appeal for “Uji Materiil” against PP Number 47/2017. Lately, there has been a Judicial Review against the Law Number 19 year of 2003 on the Indonesian State-Owned Enterprises (“BUMN”) vis a vis the Indonesian 1945 Constitution. The objecting Parties argued that the Holding of BUMN would be a new form of privatization and would diminish the value of State’s assets as well as would jeopardize the supervising rights of Indonesian House of Representatives (“DPR”).

In the praxis of improvement of State-Owned Enterprises, two methods are available for the Government, namely: privatization and restructurization. On the one hand, according to Article 1 paragraph 2 of the Government Regulation Number 33 year of 2005, privatization refers to a sale of shares of Persero, either partially or wholly, to other parties in order to increase the performance and value of a company, to increase benefits for the society and to enlarge share-ownerships by the public. Whereas, on the other hand, restructurization, according to Article 1

paragraph 1 of the Law Number 19/2003 is defined as an effort carried out in order to improve the BUMN, which is one of strategic steps to improve a company's internal conditions for improving performance and increase the value of a company. Further, Article 72 provides that the restructurization is carried out to improve a company, so that the BUMN can operate efficiently and professionally. The Law Number 19/2003 distinguishes 3 (three) types of restructurization, namely: First, sectoral restructurization, through sectoral regulations; Second, corporate restructurization; Third, internal restructurization, such as a financial statement's improvement.

De facto speaking, the Indonesian Supreme Courts ("MARI") has rejected both of the objections against PP Number 72/2016 as well as PP Number 47/2017. Ultimately, the Indonesian Constitutional Court ("MKRI") refused the appeal for Judicial Review against the Law Number 19/2003 in the Decision of Case Number 14/PUU-XVI/2018. [2]

Principally, Article 33 of the Indonesian 1945 Constitution provides the provisions on national economy and social welfare, in particular paragraph (2) which prescribes the regulating provision for the State-Owned Enterprises ("BUMN"), which states "Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state". Thus, this provision confers the right of State-monopoly in economic and business sectors to the BUMN. Therefore, the BUMN has economic power to determine prices of goods and services in Indonesia. Furthermore, according to the MKRI the meaning of "controlled by the State" refers to, as follows:

"The meaning of "controlled by the State" must be interpreted as to include a controlling by the State in a broad meaning, which is originated and derived from the concept of State Sovereignty of Indonesian people over the whole sources of wealth "earth, water and natural wealth resources contained within", including also the meaning of public by the people's collectivity over the wealth sources aforementioned. The people as a collective has been constructed by the Indonesian 1945 Constitution as to give mandate to the State to administer a policy ("beleid") and administrative act ("bestuursdaad"), and to regulate ("regelendaad"), and to manage ("beheersdaad") and to supervise ("toezichthoudensdaad") for the purpose of a highest benefit of people's welfare. Administrative act function ("bestuursdaad") by the State is carried out by the Government with its authority to issue and revoke Licensing facility ("vergunning"), License ("licentie"), and Concessions ("concessie"). Regulating function is carried out by the State through legislative authority by the Indonesian House Representatives with the Government, and regulation by the Government. Management function (beheersdaad) is carried out through the ownership mechanism of share-holding and/or through direct

involvement in the management of State Owned Enterprises shares (share-holding) and / or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as an institutional instrument, through which the State, *cadit quaestio* Government, make use of its control over wealth resources to be used for the highest benefit of people's prosperity."

Accordingly, in order to conduct comprehensive analysis and generate sound reasonable results, this research employs the functional comparative theory, whereby Kötz and Zweigert argues that the basic methodological principle of all comparative law is that of functionality. In the Kötz and Zweigert's analysis, there are two categories of comparative law analysis, Firstly, the comparative law in its 'theoretical-descriptive form', whose principal aim is to 'say how and why certain legal systems are different or alike'. Secondly, the comparative law in its 'applied version', whose aim is 'to provide advice on legal policy'. [3]

The doctrinal and non-doctrinal legal research method will be employed in this study. The doctrinal legal research includes (i) study of legal norm, (ii) study of systematic law, (iii) synchronism of law, and (iv) history of law. [4] Through non-doctrinal legal research, issues concerning Holding of Indonesian State Owned Enterprises (BUMN) are to be elaborated. Equally important, this research applies a juridical normative method, that is to say, an approach using "legis positivist" concept. Soemitro, underlines that the concept abovementioned views the law is an identical entity with written or codified norms, enacted by prevailing authorities, such as government officials. This concept views the law as a normative system which is independent, closed and separated from factual societal phenomena.

1.2. Our Contribution

This paper contributes new analysis concerning the implementation of Holding of BUMN pursuant to the PP Number 72 year of 2016 from the Indonesian Constitutional Law framework. On the one hand, existing scholarly works emphasized the material review of Holding of BUMN from the Indonesian Business law point of view as well as from the Indonesian Supreme Court (MARI) decision. On the other hand, the Holding of BUMN policy had been in contrary to the principles stipulated within Article 33 of the Indonesian 1945 Constitution (UUD 1945). Accordingly, this paper attempts to analyze the Government Regulation Number 72/2016 *juncto* the Government Regulation Number 47/2017 in conjunctions with the Law Number 19 year 2003 in the light of constitutional principles mandated by the Indonesian 1945 Constitution as well as in the light of

reasonable judicial review (“Uji Materiil”) by the Indonesian Constitutional Court (MKRI).

1.3. Paper Structure

In order to confer a structured and in-depth analysis concerning the research topic, this paper is divided as follows: Initially, the introduction provides the socio-legal backgrounds, which prompt the enactment of PP Number 72/2016 concerning Holding of BUMN as well as the PP Number 47/2017 concerning Holding of BUMN in Mining and Extraction sectors. Subsequently, the second part give expositions concerning the legal and operational aspects of Holding of BUMN. For example, *inbreng* of shares, models and structures of a holding company in the corporate law’s praxis. Furthermore, the original functions of BUMN, such as *PERSERO*, *Perusahaan Umum (PERUM)*, *Perusahaan Jawatan (PERJAN)* according to the Law Number 19/2003 as well as the “Public Service Obligation (PSO)” will be described. Ultimately, the case-study concerning Holding of BUMN in Mining and Extraction sector is to be analyzed. Thirdly, the third part of this paper elaborates the Judicial review concepts and praxis, both from the constitutional scholarly works and the Law Number 18 year of 2003 on Indonesian Constitutional Court (“MKRI”) perspectives. Particularly, this part will analyze the Decision of MKRI concerning the Judicial Review against the Law Number 19/2003 in relation to Holding of BUMN (“Decision Case Number 14/PUU-XVI/2018”). Ultimately, the last part of this paper endeavors to give a comprehensive analysis concerning the research theme respectively.

2. HOLDING OF BUMN PURSUANT TO THE GOVERNMENT REGULATION NUMBER (PP) 72/2016: THEORIES AND PRAXIS

2.1. Objective of Holding of BUMN pursuant to the Government Regulation (PP) Number 72/2016

Principally, the Holding of BUMN has been prompted by the “Nawacita” objective, whereby the Government under the current Presidency is eager to strengthen the economic competitiveness through an optimization of the Indonesian State-Owned Enterprise or BUMN. As the “agent of national economy”, BUMN is expected to be competitive and flexible, whereby the establishment of the Holding of BUMN, sectoral consolidation of BUMN and acceleration of an economic development in Indonesia could be realized.. Equally important, according to the National Medium-Term Development Plan 2015-2019, the State Ministry for BUMN in the Roadmap 2015-2019, stipulated three main objectives respectively, which are: Firstly, to support for increasing of public services to the public. Secondly, to consolidate the structure of BUMN, which is competitive and effective through the establishment of a Holding company. Thirdly, to build the capability of BUMN and foster cooperation and synergy between the BUMN [5] Put differently, the current Government’s objectives through the Holding of BUMN can be portrayed in the following chart:

Table 1 Structure and Objective of the Holding of BUMN

To Support Improvement Public Service to the Public		To Strengthen the Structure of BUMN Competitively and Effectively through the Formation of a Holding Company (Holding BUMN)		To Build the BUMN Capabilities and Increasing Cooperation (Synergy) between the BUMN	
Agent of Development and Value Creator					
Independency		Welfare		Sustainability	
<i>Synergy between the BUMN</i>		<i>Downstreaming and Local contents</i>		<i>Development of Local Economy Integrally</i>	
Economic Equality					
<i>Financial independency and Value creation</i>					
Infrastructure and Connectivity					
Capacity of Human Resources and Productivity					
Good Corporate Governance					
Law (Legislation) and Policy					

2.2. BUMN within the Indonesian Legal System

Furthermore, with respect to the prevailing corporate law mechanism for the formation of Holding of BUMN is subject to the provisions of Law Number 40 year of 2007 as well as of Law Number 19 year of 2003 concerning BUMN. Accordingly, an Indonesian State Own Enterprise or BUMN refers to an entity, the capital of which is in part or in whole owned by the state through direct participation that is derived from the State's separated assets. Moreover, according to the Law Number 19/2003, the BUMN can be classified into three types, as follows:

First, "State-Owned Limited Liability Company," hereinafter called "State-Owned Limited Liability Company (Persero)," means a (BUMN) in the form of a limited liability company, the capital of which is divided into shares in which all or at least 51% (fifty-one percent) of its shares. Second, "Publicly-Held State-Owned Limited Liability Company," hereinafter called "Persero Terbuka," means a State-Owned Limited Liability

Company (Persero), of which the capital and the number of shareholders meet the specified criteria, or a State-Owned Limited Liability Company (Persero) that makes a public offer under laws and regulations concerning capital markets. Third, "Public Enterprise," hereinafter called "Perum," means a BUMN, the entire capital of which is state owned and is not divided into shares, for the public benefit purposes through the supply of high-quality goods and/or services, and also in the pursuit of profits under the principles of corporate management [6]

2.3. Corporate Praxis for the Holding of State-Owned Company

In the prevailing corporate practices, according to the Indonesian investment BUMN, (Danareksa, 2019), the Holding of BUMN's processes could be implemented through several "holding or parenting styles", which is portrayed as follows:

Table 2 Holding or Parenting Styles of BUMN

	Hands-off owner	Portfolio manager	Strategic leader	Synergy 'coach' ^(a)	Functional specialist	Hands-on operator
Core business processes	Processes for standard Board oversight	Processes supporting financial control (lean)	Processes for strategy development & review (lean)	Processes to enable cross-BU collaboration	Processes for development of functional expertise & knowledge sharing	Processes for complex planning & decision making
Op. & tech infra.	Not key	Focus on formalized & standardized financial reporting	Supporting tools for strategy development and standardized reporting	Shared system to improve synergy	Central shared system to support BUs	Focus on detailed & centralized operational steering
Governance structure & risk	Very lean Centre	Lean Centre, Finance and M&A are sometimes centralized	Lean Centre, strategy / BD and sometimes performance-control functions at Centre		Shared services & support functions at Centre (or outsourced)	Central functions (incl. operational) at Centre (can be outsourced)
Reporting line illustration legend: → Direct						
People & culture	Senior & experience Board	Strong financial expertise, high performers	Strong strategy expertise, communicators	Strategy & industry expertise, process-oriented	Functional expertise, service culture	Operational expertise with extensive proven execution experience
Measures & incentives		Financial	Financial, strategic, change		Financial, strategic, execution	

Note: (a) Refers to an organization that encourages synergy as a strategy rather than providing central functions to realize it.

Hence, in the global corporate practices there are 6 (six) parenting or holding styles for the implementation of Holding of BUMN, which are: First, 'Hands-off owner'; Second, 'Portfolio manager'; Third, 'Strategic leader';

Fourth, 'Synergy coach'; Fifth, 'Functional specialist'; Sixth, 'Hands-off operator'. [7]

Furthermore, from the Law Number 19 year of 2003 in conjunctions with Government Regulation Number 43/2005 on Consolidation, Merger, Acquisition and

Modification of Legal Entities of the BUMN there are currently two involving mechanisms for the Holding of BUMN's process: First, 'injection of the GoI's shares to target company' ("Inbreng"). In this scenario, the GoI decided that INALUM (Persero) to be the Holding for Mining and Extraction Sector. Thus, the Government's share-ownership in Aneka Tambang (ANTAM), Timah Tbk, Bukit Asam Tbk and Freeport Indonesia ("FI"), will be injected to the shares of INALUM (Persero) as an increase of capital into the equity capital of INALUM (Persero). As a legal consequence, there will be a change of controlling ownership in ANTAM, Timah Tbk., Bukit Asam Tbk. and Freeport Indonesia, from the Indonesian Government into INALUM (Persero) as the Holding company, which acts as the controlling shareholder. Hence, the BUMN status of ANTAM, Timah Tbk., Bukit Asam Tbk. will disappear (dissolved) into a Limited Liability company (Perseroan Terbatas). Secondly, the acquisition of shares, whereby the share-ownerships within ANTAM, Timah Tbk., Bukit Asam Tbk. and FI will be restructured, in which INALUM (Persero) will be the controlling shareholder in ANTAM, Timah Tbk., Bukit Asam Tbk, replacing the Indonesian Government.

2.4. BUMN and "Public Services Obligation" (PSO)

Equally important, it must be bear in mind that the BUMN has a duty to perform "Public Services Obligation (PSO)" pursuant to Article 34 of the Indonesian Constitution 1945 in conjunctions with Article 66 of the Law Number 19/2003 on BUMN. Accordingly, the GoI must carry out public services obligations (PSO) as the organizer of State power, as Article 34 stipulates: "The State is responsible for the provision of health service facilities and appropriate public service facilities." Moreover, according to an Indonesian corporate law scholar, "PSO" refers to the following thoughts:

"The obligation of public services is basically the obligation that must be done by the government as the organizer of state power. The 1945 Constitution expressly states that " The State is responsible for the provision of health service facilities and appropriate public service facilities." The provision is the basis for the government in carrying out public service obligations in the oil and gas sectors"[8]

3. ANALYSIS AND DISCUSSION: THE MKRI'S JUDICIAL REVIEW OVER THE HOLDING OF BUMN POLICY (CASE NUMBER 14/PUU-XVI/2018)

According to the first Chairperson of MKRI (Asshiddiqie, 2009, p.270-273), the Judicial powers in Indonesia has

been assumed by the Supreme Court ("MARI") as well as the Constitutional Court ("MKRI"), as Article 24 paragraph (2) of the 1945 Constitution sets forth:

"Judicial power shall be implemented by a Supreme Court and its subordinate judiciatures, in the general judicature, the religious judicature, the military judicature, the state administration judicature, and by a Constitutional Court"

Equally important, Article 24C paragraphs (1) and (2) of the 1945 Constitution empower the MKRI to carry out 5 (five) adjudicative authorities, which are: First, adjudication in reviewing the constitutionality of a law; Second, adjudication of disputes on the constitutional authority of State institutions; Third, adjudication of disputes on the results of general elections; Fourth, adjudication in the dissolution of political parties; Fifth, adjudication in violations by the President and/or the Vice-President in accordance with the Constitution.

Furthermore, the Judicial review puts the law or an Act as the object of adjudication. Hence, whenever the law at hand is proven to be contradictory to the 1945 Constitution, consequently a part of the entire substances of the law at hand will be declared as no longer legally binding. In praxis, there are two categories of the Judicial review, namely in the form of substantive review ("materielle toetsing") as well as procedural review ("formele toetsing") [9]

Equally important, by learning from the European continental constitutional praxis, the term "Judicial review" frequently also be referred as to the "Constitutional review" (Sekretariat Jenderal dan Kepaniteraan MKRI, 2010). In the practice of constitutional law, there are 3 (three) ways whereby the MKRI could perform the judicial review over a law according to their Constitutions: First, Abstract judicial review; Secondly, Concrete judicial review; Thirdly, Constitutional complaint (Verfassungsbeschwerde). These discrepancies basically can be traced from the European Continental legal traditions, whereby the term Judicial Review comprises not only the review over a legislation but also the revocation of a legislation. Because in this context the Judicial Review is performed by MKRI thus it shall be referred as the Constitutional Review.

Equally important, in the theories and praxis of constitutional law, there are two categories of the Judicial review (Kleintjes, 2010), that is to say, First, the formal judicial review ("formele toetstingsrecht"): the right to review whether a legislative product such as Undang-Undang existing through the correct procedures as required by the prevailing laws and regulations; and Substantive judicial review ("materiele toetstingsrecht"), meanings the right to review whether a legislative product such as Undang-Undang or the Law, namely its contents are consistent and coherent with the higher laws as well as whether a state institution is authorized to issue a legislative product based on the prevailing laws and regulations.

Nevertheless, it must be borne in mind that the MKRI in performing the Judicial review over a Law (Undang-Undang or UU) must comply with the Procedural laws.

There are two categories of procedural laws, which are: Initially, the General Procedural law. In this respect, the MKRI as integral part of judicial power in Indonesia shall consistently adhere to following judicial principles: Firstly, *ius curia novit*. Secondly, the adjudication proceedings shall open to public. Thirdly, independent and impartial judiciary. Fourthly, the adjudication is conducted in a rapid, simple, and cost-efficient manners. Fifthly, *audi et alteram partem*. Sixthly, the proactivity of Judges in adjudication. Seventhly, *praesumptio iustae causa*. Subsequently, the Specific Procedural law. Accordingly, in the Judicial review concerning the constitutionality of a Law (“UU”), the MKRI Regulation Number 06/PMK/2005 stipulates, as follows: First, Eligible Parties: the allowed parties having the legal standing are individuals of the Indonesia citizens or having the common constitutional interests. Secondly, the Substances of petition: the petition substances comprise the formal judicial review (*formele toetstingsrecht*) as well as the substantive judicial review (*materiele toetstingsrecht*).

In the Case Number 14/PUU-XVI/2018, the objecting Parties challenged the provisions of Article 2 paragraph (1) alphabet (a) and (b) as well as Article 4 paragraph (4) of the Law Number 19/2003 concerning BUMN *vis a vis* or towards Article 20 para (1), Article 28C para (2), Article 28D para (1), Article 28H para (1) and Article 33 paras. (2) and (3) of the Indonesian 1945 Constitution. Specifically, the objecting Parties argued that the Holding of BUMN, that is regulated in the PP Number 72/2016 in conjunctions with PP Number 47/2017 (Holding of BUMN in Mining Sector), which are the derivative of Law Number 19/2003 on BUMN, are in contradiction with the aforementioned provisions of Indonesian 1945 Constitution. Furthermore, the Appellant maintained that there are causality connections between the PP Number 72/2016 and the Law Number 19/2003 with the impairment of their constitutional rights.

Moreover, the objecting Parties argued that, after the implementation of Holding of BUMN, the corporate management of BUMN under the Law Number 19/2003 on BUMN does not fulfill the 5 (five) aspects of the concept that “the whole wealth resources: earth, water and natural resources contained therein are controlled by the State” as mandated by the MKRI’s Decision Number 002/PUU-I/2003. The Decision, stipulates as follows:

“The meaning of “controlled by the State” must be interpreted as to include a controlling by the State in a broad meaning, which is originated and derived from the concept of State Sovereignty of Indonesian people over the whole sources of wealth “earth, water and natural wealth resources contained within”, including also the meaning of public by the people’s collectivity over the wealth sources aforementioned. The people as a collective has been constructed by the Indonesian 1945 Constitution as to give mandate to the State to administer a policy (“beleid”) and administrative act (“bestuursdaad”), and to regulate (“regelendaad”), and to manage (“beheersdaad”) and to supervise (“toezichthoudensdaad”) for the purpose of a highest benefit of people’s welfare. Administrative act function (“bestuursdaad”) by the State is carried out by the

Government with its authority to issue and revoke Licensing facility (“vergunning”), License (“licentie”), and Concessions (“concessie”). Regulating function is carried out by the State through legislative authority by the Indonesian House Representatives with the Government, and regulation by the Government. Management function (*beheersdaad*) is carried out through the ownership mechanism of share-holding and/or through direct involvement in the management of State Owned Enterprises shares (share-holding) and/or through direct involvement in the management of State-Owned Enterprises or State-Owned Legal Entities as an institutional instrument, through which the State, *cadit quaestio* Government, make use of its control over wealth resources to be used for the highest benefit of people’s prosperity.” [10]

Furthermore, in the subsequent argument, the objecting Parties argued, the Holding of BUMN regulated by the PP Number 72/2016 in conjunctions with the PP Number 47/2017 is contrary to the provisions of the Law Number 17 year of 2003 concerning the State Budgetary, which is the implementing Law of Article 33 paragraph (2) of the Indonesian 1945 Constitution. Arguably, Article 2 of the PP Number 72/2016 which mandates the injection of State’s share-capital (“inbreng”) to the Holding BUMN, without the prior consent of the DPR would violate the provisions of Article 2 alphabet (g) of the Law Number 17/2003 concerning State Budgetary. The provision of PP Number 72/2016 also violated Article 20A paragraph (1) of the Indonesian 1945 Constitution concerning the supervisory and budgetary functions (“checks and balances mechanism”) of the DPR.

Ultimately, the objecting Parties emphasized that the Holding of BUMN through the PP Number 72/2016 in conjunctions with the PP Number 47/2017 has jeopardized the “Public Services Obligation (PSO)” of the BUMN as the State’s proxy in the economic and strategic industry sectors. Accordingly, the GoI must carry out public services obligations (PSO) as the organizer of State power, as Article 34 stipulates:” The State is responsible for the provision of health service facilities and appropriate public service facilities.” Arguably, based on the Law Number 19/2003, BUMN has the functions to contribute to the national developments as well as the State’s revenues. Particularly, BUMN serves the functions to provide high quality goods and services, with the affordable prices, for the fulfillment of needs of the public, notably the Indonesian citizens. Moreover, BUMN has an obligation to become frontier for economic and business sectors that are important for the public, but the private and cooperatives are not capable to become the pioneer on that sectors.[11]

Accordingly, in the Case Number 14/PUU-XVI/2018, the Judges of MKRI adjudicate this constitutional quarrels by employing both of the formal judicial review (“*Formele toetstingsrecht*”) as well as the substantive judicial review (“*Materiele toetstingsrecht*”) with regard to the PP Number 72/2016 *juncto* PP Number 47/2017 in conjunctions with the Law Number 19/2003 on BUMN. Equally important, the Judges of MKRI deliberate this

case by using the *concrete Judicial review* („*Konkretes normenkontrollverfahren*“). Hence, as regards the concrete judicial review or “*a posteriori*” Judicial review, a constitutional law scholar, O’Brien, explains, as follows: “*Concrete judicial review arises from litigation in the courts when ordinary judges are uncertain about the constitutionality or the application of statute or ordinance; in case the judges ‘refer’ the constitutional question or complaint to the constitutional court for resolution*” “[12] Put differently, the concrete judicial review takes place whenever MKRI though that a legislation of a Law in any kind of form or the lower court’s decision is contrary with the Indonesian 1945 Constitution.

4. CONCLUSION

Finally, in the Decision of Case Number 14/PUU-XVI/2018, the Judges of MKRI concluded that the objections of objecting Parties are not subject of constitutionality of the Indonesian 1945 Constitution’s norms. The Court argued that the provisions of PP Number 72/2016 in conjunctions with PP Number 47/2017 constitute a problem of the implementation of the Law Number 19/2003’s norms on BUMN. Therefore, in the dictum of the Decision Number 14/PUU-XVI/2018, the Judges of MKRI conclude that the substance of the appeal is not subject to the judiciary competence of the Court; thus, the MKRI refuse the Judicial review appeal of the objecting Parties respectively.

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