Reconstruction and Institutional Sovereignty of Oil and Gas Mining Management Based on Access to Justice

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Abstract—The legal issues are related to how the state sovereignty in terms of planning, implementation, control, and evaluation over exploration and exploitation by investors is implemented according to the principles of the power of the state in mining regions. What arises as a problem is how the freedom of state sovereignty of mining regions should be performed independently or with the intervention of foreign countries. This paper examines how state sovereignty over the management of oil and gas, especially in the form of a work contract, raises disputes over land rights with indigenous law communities and is not capable of providing welfare for the community as mandated by the constitution. Various cases are faced by the government of the Republic of Indonesia in the management of oil and gas managed by PT. Pertamina, and the production sharing contract is the most vulnerable sectors to corruption. This is due to the high profits generated from oil and gas industry, thus potentially creating high rent seeking activities that utilize their political positions and connections to seek profit through this illegal act. The final result of this study is to find the arrangement of regulation and institutional management of oil and gas mining which is not only aligned with the essence of the philosophical value based on Pancasila principles, Article 33 of the Constitution of the Republic of Indonesia. It is widely accepted that the state sovereignty of mining and natural gas resources are managed fairly and entirely for the welfare and prosperity of the society.

Keywords—reconceptualization, reconstruction, sovereignty, legal recognition, access to justice

I. INTRODUCTION

Indonesia has a long history of oil exploration, with the Dutch drilling in the late 1800s. Companies such as Shell have been operating in Indonesia for over 100 years. In the 1960s, under the former President Suharto, Pertamina (the main Indonesian state-owned oil and gas company) was set up to function as both an oil company and as the state's chief energy regulator. Pertamina both controlled and supervised oil and gas operations under various production sharing contracts. During this time, most of the companies exploring and producing oil in Indonesia were foreign companies, having invested billions of dollars setting up their operations. From the perspective of legal history there are dynamics of oil and gas mining policy and regulation in Indonesia on the one hand. On the other hand, there have been interesting dynamics to study from the results of studies from the law department of the Ministry of Energy and Mineral Resources in a series of laws and regulations governing oil and gas since the enactment of Law Number 44/PRP/1960 concerning Oil and Natural Gas, Law Number 8 of 1971 concerning Oil and Natural Gas Companies, and Law Number 22 of 2001 concerning Oil and Gas before and after the Decision of Constitutional Court on judicial review regarding Oil and Natural Gas was enacted [1]. Based on the Law on oil and gas Number 22 of 2001 mining rights are owned by the state as an institutional entity as the holder of the mandate of the entire nation according to Article 33 Paragraph 3 of the 1945 Constitution. Through the right to control from the state as an instrument, the government can hand it over to the cooperative or the private sector. Thus, the government, in this case the Ministry of Energy and Mineral Resources, holds the mining authority by providing certain work areas for exploration and continued exploitation. Upstream oil and gas industries based on Article 11 Paragraph 1 of the oil and gas law are carried out by a business entity or permanent establishment based on a cooperation contract with the implementing agency. Thus, the business entity or permanent establishment has the following characteristics:

a. It does not have ownership rights of oil and gas natural resources (mineral right)

b. It does not hold mining rights;

c. It is not authorised for operational management as well

d. It receives compensation from production results or does not have control over the work plan, budget, and field development plan (economic rights).

Referring to Government Regulation Number 79 of 2014 concerning National Energy Policy, the policy of energy and mineral resources sector by linking with other laws and regulations, Law Number 4 of 2009 concerning Mineral and Coal Mining, Law Number 30 of 2009 concerning Electricity and Law No. 21 of 2014 concerning Geothermal are used as the basis for the preparation of the National Energy General Plan and the Regional Energy General Plan. Many cases faced by the government of the Republic of Indonesia regarding oil and natural gas management by PT Pertamina regulated in cooperation agreements show that this business sector vulnerable to corruption. This is due to the high profits generated from the oil and gas industry, thus potentially creating high rent for both exploration and exploitation activities that utilize their legal positions and connections to
seek profit through corruption[2][3].

II. LEGAL ISSUE

The legal issue is how to realise the dynamic and precise state sovereignty over oil and natural gas resources management and its supervision in Indonesia either at exploration or exploitation level according to maxim uti possidetis or absolute sovereignty of a state regarding oil and gas, following the principle of freedom, and it should be independent from foreign companies?

III. THE AIM OF THIS PAPER

This paper examines how state sovereignty over the management of oil and gas, especially in the form of a work contract, raises disputes over land rights with indigenous law communities and is not capable of providing welfare for the community, especially for the Local Community as mandated by the constitution.

IV. THEORETICAL FRAMEWORK AND LEGAL METHOD

Through normative legal research with conceptual approach, this research is aimed to study the meaning of the concept of state sovereignty rights, concession, contract of work, production sharing contract (PSC) and cooperation contract, and access to justice and statute approach through reviewing a series of history of legislation since Staatsblad 1899 No.214 Jo S 1906 No.434, the 1945 Constitution of the State of the Republic of Indonesia Article 33, Law No.5 of 1960, Decree of People’s Consultative Assembly (MPR) No.IX / MPR / 2001, Law No.44 / PRP / 1960, Law No.8 Year 1971, Law No.22 of 2001, Decision of the Constitutional Court No.36 / PUU-X / 2012 as well as Minutes of Discussion and Academic Paper of related Law.

Based on primary legal materials, prescriptive analysis is done through hermeneutic interpretation method as an attempt to find the meaning of text according to the context of legal problem. Steps are taken in consecutive assessment: collecting, classifying, categorising, systematising legal materials according to the history of state policies and regulations. The obtained data is then interpreted hermeneutically, so that the concepts and constructions that rebuild should be made. The second argument is from the perspective of access to justice[5] in particular, people as owners of natural resources, especially oil and gas, with critical questions to be answered are: what is the significance of access to obtain justice for the marginalized people?, what reforms are proposed by these approaches to legal development cooperation? Conceptually, dispute resolution between government and investors is considered too sensitive due to political influences and an intention or a vision to change oil and natural gas management based on formal regulation of the state and any regulations out of the context of the state or Adat to measure the realisation of the outcome in the view of either justice or benefit.

V. DISCUSSION

Referring to Affina Niken Al-Islami’s research on legal implications of the issuance of Presidential Regulation No. 9 of 2013 and the Regulation of the Minister of Energy and Mineral Resources No. 9 of 2013 on existence of the Oil and Gas Special Task Force, it is stated that SKK Migas is not a rechtspersoon; it is not a perfect legal subject because it is a rechtspersoon; it is not a perfect legal subject because it is a

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1. Iliham M Putuhena

2. Prima Gandhi

3. Sk K Migas

4. Ratio leges

5. Access to justice

6. A legal subject
eliminates fundamental rights breeds conflicts with complex configurations of various actors and diverse economic, political and cultural interests through legalization, among other licensing agencies which are conceptually contradictory. As an effort to complement the case study materials to get valuable lesson that can be learned, this paper refers to Bolivia’s experience in natural gas management. Bolivia government has succeeded in mainstreaming the aspirations of natural resource governance based on local wisdom in the political discourse on the Quechua and Aymara tribes with a series of protests by utilizing the weakness of government[7]. Based on The Bolivia government experience and referring to the Article of the Decree of the People's Consultative Assembly Number IX / MPR / 2001 concerning Agrarian Reform and Natural Resource Management, a fundamental effort is required for the government to carry out policies to reconstruct regulations, institutions and relations between stakeholders related to natural resources, especially oil and natural gas based on the interests of the nation and local wisdom. In relation to this thought, the government needs to take the initiative to directly take the leading role to implement governance as the authorised body to conduct mining activities.

The results of the study of Maria SW Sumandjono et al. in 2008-2009 in the context of the Oil and Gas Law the legal relationship between subject (human) and natural resources of oil and gas management were only focused on the rights or authority (bevoegd) of the subjects who conduct the supervision. Meanwhile, the philosophy of legal relations between countries in this case the government is based on the constitutional mandate of the Indonesian nation, with natural resources lacking attention as stated in Article 4 Paragraph (1) on Mining Law but prioritizing pragmatic aspects (het pragmatisch denken) both on upstream business and downstream. There is confusion over the placement of the first government position, as an authority over state control according to Article 4 Paragraph (2) and Article 6 Paragraph (2) as an owner (eigenaar) as in a Cooperation Contract. Government as a public institution has the authority to regulate and supervise the use of oil and gas. The first view is that the government grants business licenses for business entities that undertake downstream business activities placed unilaterally without the consent of the permit recipient to determine the rights and obligations of business actors. The law must be reconciled on the meaning of state control which occupies as a private entity that is the owner (eigendom recht) towards the second meaning of regulating and supervising oil and gas business. The author argues that private entities mostly care about making as much profits as possible without much concern on profit share. This is certainly irrelevant to the principle of humanity and social justice for all societies in Indonesia (het Integralistiek Staat). Such a state reflects the synthesis or harmonious combination of ideological trilogy with religious direction, nationality and socialism, especially the principles of social justice and a just and civilized humanitarian principle. In line with this concept, the authority of the state as a public institution includes: conservation of resources, environmental management, development of the environment and local communities, occupational safety and health, types and quality of oil and gas processed products, allocation and distribution of oil and gas fuels, the use of foreign workers and so on.[8]. Essentially, the meaning of Article 33 Paragraph (2) of the 1945 Indonesian Constitution states that 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. The use of oil must be controlled by the government responsible for the people's sovereignty in the form of a public permit. As an effort to confirm and realize the rule of law state of Pancasila (het Pantjasila rechtstaat), a review of the products of laws and regulations whose value contradicts Pancasila, including Oil and Gas Law, is needed to change institutions whose authority overlaps and weakens state institutions permanently and reclaim economic independence in the realization of the Pancasila economic system that is independent, efficient, through the revitalization of the role of the state in the control of the earth, water, and natural wealth contained in it as the core content of the prosperity of all people who are just[9].

The state, according to Mohammad Hatta, does not need to be an ondemner / businessman but it has to make regulations to accommodate the work of the Pancasila economic system and prohibits exploitation of citizens of the weak nation by capitalists (exploitation de l'homme par l'homme). The strategy that must be carried out in negotiating the formulation of oil and gas resource cooperation contracts between the government and foreign investors is sixty percent for the state, thirty percent for investors, and ten percent for local governments. Roads or canalization for citizens who are in disadvantaged positions or experience injustice, including the customary law community in oil and gas mining business activities, carried out through the access to justice mechanism in the agrarian court which is assigned to the general court according to the

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3 Adrian Sutedi, 2012, Hukum Pertambangan (Mining Law), Second Print, Sinar Grafika, Jakarta, pp. 171-174 compare the results of the research of Robert Krat and Jennifer A Parmelli in 1985-1995 in the Pagerungan of ARCO governance in Ian A. Bowles, Glenn T. Prickett. (2001), Footprints in the Jungle: Natural Resource Industries, Infrastructure and Biodiversity Conservation. Oxford University Press. New York, pp. 73-87 by demonstrating the success and excellence of environmental management through information systems and complaints about the environment, integrated complaints regarding the environmental assessment systems both technical, and social impact. Based on the percentage of profit sharing between the government and ARCO whether in real terms the impact of prosperity on the community, how much profit is the oil and gas exploitation received by the government that flows, especially around business activities, precisely the latter becomes the most important thing.

4 Permit according to Article number 19 of Law Number 30 of 2014 concerning Government Administration is the decision of the appropriate official as a form of agreement on the request of the community in accordance with the provisions of the legislation.

5 Compare with Yudi Latif., 2015., The Pancasila Revolution, First Print, Mizan, Jakarta, pp. 173-175 which states that radical movements in embodying Pancasila-based revolutions are intended to rebuild the citizens' mentality and morality and rearrange policies, arrangements the institutional and governance system that correctly realizes the essence of Pancasila values by not repeating the error in the New Order era of 1966-1998 in translating and realizing these values.

6 An agrarian court is an ad hoc court system which is formed by law in the form of a panel judge / assembly whose composition is determined according to the basic needs of the dispute consisting of Indigenous community leaders, peasant / fishermen figures, non-government organizations, professional judges, local cultural / community figures and / or Customary law communities, as well as representatives

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Judicial Power Act Number 48 of 2009 Article 1 number 5 to carry out the judiciary in accordance with the principle of Godhead, upholding law and justice based on Pantjasila ideology, as well as the principle of simplicity, efficiency, and affordability.

VI. CONCLUSION AND RECOMMENDATIONS

A. Conclusion

Conclusion the sovereignty of the state is permanently in the form of state control over oil and natural gas in Indonesia for exploration and exploitation activities as maxim uti possidetis in the form of freedom tangible the right to exercise regardless of influence of foreign elements carried out with concrete efforts, continuously by reviewing and arranging policies, arrangements and institutions in the management of oil and gas as a form of national sovereignty over natural resources.

B. Recommendation

1. The government in reviewing and arranging policies, arrangements, and institutions in the management of oil and gas as a whole as a form of national sovereignty over natural resources, should consider multi-stakeholders such as BAPPENAS, Ministry of Energy and Mineral Resources, AMAN, KLHK, Ministry of ATR, Ministry of EKUIN

2. The government is expected to form an agrarian justice institution as an ad-hoc court that will resolve natural resource disputes in a legal and fair manner.

REFERENCES


ministries / departments / agencies and local governments. Comparatively referring to Article 3.4 letters of c, e, f, h, j and the Decree of the People’s Consultative Assembly Number IX / MPR / 2001 concerning Agrarian Reform and Natural Resource Management. Access to justice should not only be known but also understood its meaning and most importantly applied in community life. Access to justice (access to justice) is defined as an opportunity to get justice - this applies to all circles or is often referred to as justice for all.