

RESEARCH ARTICLE

OIL AND NATURAL GAS MANAGEMENT POLICY IN REALIZING EQUAL ENERGY IN INDONESIA

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ABSTRACT

In its development, the management of oil and gas in Indonesia has undergone several policy developments. The enactment of Law Number 22 of 2001 concerning Oil and Gas has become a new chapter in the regulation of oil and gas in Indonesia. This law wants to emphasize that national development must be directed to the realization of people's welfare by carrying out reforms in all fields of national and state life. This article finds that the law has affirmed the objectives of natural gas management to increase state income, create jobs, improve the welfare and prosperity of the people in a just and equitable manner, and maintain the environmental sustainability. However, gas management must be carried out carefully and should be free from liberalization schemes that can bring about social injustice and failure to achieve people's welfare. The Constitutional Court's decision, which has annulled the articles in the law, is imperative to do the legal reconstruction by ensuring laws that create happiness for the people.

Keywords: Oil and Natural Gas, Equal Energy, Management Policy.

INTRODUCTION

Energy use in Indonesia is still dominated by the use of non-renewable energy derived from fossils, especially oil and coal¹. However, over time, the availability of fossil energy is running low, and to anticipate this, new and renewable energy (EBT) is the best alternative.² The use of new and renewable energy must be the primary concern of the Indonesian government not only as an effort to reduce the use of fossil energy but also to realize clean or environmentally friendly energy.³ The wealth of energy resources in Indonesia is controlled by the state as regulated in the Constitution, namely in Article 33 paragraph (3) of the 1945 Constitution, which reads, "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity. the people". Strictly speaking, Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia contains 3 (three)

¹Muhammad Azhar, *The New Renewable Energy Consumption Policy of Rare Earth Metals to Build Indonesia's National Energy Security*, Conference Guidelines The 1st Sriwijaya Internasional Conference on Environmental Issues, di Hotel Horison Ultima, Palembang, Indonesia, 26 – 27 September 2018, p. 86.

² Biro Komunikasi, Layanan Informasi Publik dan Kerja Sama Kementerian Energi dan Sumber Daya Mineral, *Jurnal Energi : Program Strategis EBTKE dan Ketenagalistrikan*, Edisi 02, 2016, p. 9.

³ Aan Jaelani, *Renewable Energy Policy in Indonesia: The Qur'anic Scientific Signals in Islamic Economics Perspective*, *International Journal of Energy Economics and Policy*, Vol.7 No.4, 2017, p. 193.

essential elements, namely:⁴ 1. Substance (natural resources); 2. Status (controlled by the state); 3. Purpose (for the greatest prosperity of the people). Based on the constitution, the existence of control and exploitation of natural resources, which are fundamental to the life of the nation and state, is carried out by the state.⁵

The people are collectively constructed by the 1945 Constitution giving a mandate to the state to carry out policies (beleid) and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad), and supervision (toezichthoudensdaad) for the greatest prosperity of the people.⁶ Therefore, all energy sources must be controlled by the state and must be used and managed optimally for the greatest prosperity of the Indonesian people in order to realize one of the ideals of the Indonesian nation, namely promoting the general welfare. The Law of the Republic of Indonesia Number 22 of 2001 concerning Oil and Gas (State Gazette of the Republic of Indonesia of 2001 Number 136, Supplement to the State Gazette of the Republic of Indonesia Number 4152), which was enforced at the time of its promulgation on November 23, 2001, is a new chapter in the regulation oil and gas in Indonesia. Previously, the regulation regarding oil and gas was regulated by Law Number 44 Government Regulation 1960 concerning Oil and Gas Mining (State Gazette of 1960 Number 133, Supplement to State Gazette Number 2070).

With various national and international developments, changes to the law are carried out to create independent, reliable, transparent, competitive, efficient, environmentally friendly oil and gas business activities and encourage national potential and roles. With these considerations, it is hoped that the issuance of the law will answer the welfare of the community. All-natural resources must be used for the greatest prosperity of the people. Its management must also answer the concept of social justice. Several considerations in this law, among others: First, national development must be directed to realize people's welfare by carrying out reforms in all fields of national and state life based on Pancasila and the 1945 Constitution. Second, oil and gas are natural resources, non-renewable strategies controlled by the state, and vital commodities that control the lives of many people and have an essential role in the national economy so that their management must maximize the prosperity and welfare of the people. Third, oil and gas business activities have an essential role in providing real added value to increasing and sustainable national economic growth.

RESEARCH METHOD

This type of research is normative legal research, which is conducted to find solutions to legal problems, so the results of this study are conducted to provide a prescription of what should be about the problems raised and can be applied in legal practice. The approaches used in this study include the statute approach, the conceptual approach, and the analytical approach. The statute approach is carried out by examining all laws and regulations relating to the legal

⁴ Zen Umar Purba, *Kepentingan Negara dalam Industri Perminyakan Indonesia, Hukum Internasional, Konstitusi dan Globalisasi*, Jurnal Hukum Internasional Vol.4 No.2, Januari 2007, Lembaga Pengkajian Hukum Internasional, FH Universitas Indonesia, halaman 257-258.

⁵ Ahmad Redi, *Hukum Pertambangan Indonesia*, Jakarta: Gramata Publishing, 2014, p. 3.

⁶ Komisi Yudisial Republik Indonesia, *Kompilasi Putusan Pengujian UU Oleh MK : Putusan Yang Dikabulkan Tahun 2003 – 2015*, Jakarta: Biro Rekrutmen, Advokasi, dan Peningkatan Kapasitas Hakim, Komisi Yudisial Republik Indonesia, 2015, p. 1009.

issues being studied. Researchers need to look for legis ratios and the ontological basis for the birth of laws on natural resource management both oil and gas and minerals. capturing the philosophical content that is behind it. Understanding the philosophical content behind the law, will be able to conclude whether or not there is a philosophical conflict between the law and the issues at hand.

The conceptual approach moves from the views and doctrines that develop in the science of law. With the conceptual approach (conceptual approach), researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issue at hand. Understanding of these views and doctrines is the basis for researchers in developing a legal argument in solving the issues at hand. The analytical approach (analitical approach) is useful for interpreting logically, systemically and consistently where a more detailed and in-depth study of data is collected. Secondary data collected in this study is processed, analyzed and concluded conclusions using a judicial jurisdiction method.

FINDING AND DISCUSSION

Government Policy in the Form of Policy Regulations according to Administrative Law

According to the Dutch Indonesian General Dictionary, the word beleid' means policy. In the Dutch literature, various terms are used to denote policy regulations, including pseudowetgeving, spiegelrecht, and beleidsregel.⁷ The Big Indonesian Dictionary provides the meaning of the word "policy" as follows:⁸ In Indonesian legislation, the word policy is mentioned in Law Number 25 of 2004 concerning the National Development Planning System, precisely in Article 1 number 15, which reads, "Policy is a direction/action taken by the Central/Regional Government to achieve goals." According to P.J.P Tak, as quoted by S.F Marbun, the definition of policy regulation is:⁹

“Beleidsregels zijn algemene regel die een bestuursinstantie stelt omtrent de uitoefening van ee bestuursbevoegdheid jegens de burgers of een andere bestuursinstantie en voor welke regelstelling de grondwet nochde formele wet direct een uitdrukkelijke gronslag biedien Beleidsregels berusten dus niet op een bevoegdheid tot wetgeving en kunnen daarom ook geen algemeen verbindende voorschriften zijn- maar op een bestuursbevoedg heid van een bestuursorgaan en betreffen de uitoefening van die bevoegdheden.”

[Policy regulations are general regulations issued by government agencies regarding government authority over citizens or against other government agencies. Such laws do not have a firm basis in the Constitution and formal laws, either directly or indirectly. This means that policy regulations are not based on the authority to make laws - and therefore do not include statutory regulations that are binding on the general public - but are placed on the authority of the government, an organ of state administration, and are closely related to the implementation of the government]

⁷ Hotma, P. Sibuea, *Asas Negara Hukum, Peraturan Kebijakan & Asas-asas Umum Pemerintahan yang Baik*, Jakarta : Penerbit Erlangga, 2010, p.101

⁸ Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia Pusat Bahasa*, Jakarta: Gramedia Pustaka Utama, 2008, p. 190.

⁹ S.F Marbun, *Op.cit*, p. 174.

The daily implementation of government shows how state administrative bodies or officials often take specific policy steps, including creating what is now often called policy regulation (beleidsregel, policy rule).¹⁰ A policy regulation is essentially a product of state administrative actions aimed at "naar buiten gebracht schriftelijk beleid (showing out a written policy)" but without being accompanied by the authority to make regulations the state administrative agency or official that creates the regulation needs.¹¹ State administration officials create policy regulations to carry out government duties, which is a consequence of the welfare state, which imposes a vast task on the government to organize the welfare of the people (welfare state).¹² This policy regulation provides an opportunity for an agency or state administration official to carry out government authority (beschikking bevoegheid) in the context of carrying out government tasks. In its implementation, policy regulations can be tested by looking at their characteristics. In short, Van Kreveld argues that policy regulations have the following characteristics:¹³

1. The regulation, directly or indirectly, is not based on the provisions of the wet formele or the Grondwet, which gives them authority to regulate. In other words, it does not have a firm legal basis in wet.
2. The regulation may: a). Unwritten, then there are a series of decisions of independent government agencies in the context of carrying out government authorities that are not related: b) firmly stipulated in writing by a government agency.
3. The regulation generally indicates how a government agency will exercise the government's authority, which is not bound, towards every person in the situation as stated in the regulation.

Like Van Kreveld, Bagir Manan, as quoted by S.F. Marbun, also stated several policy regulations' characteristics:¹⁴

- a. Policy regulations are not statutory regulations;
- b. The principles of limitation and testing of statutory regulations cannot be applied to policy regulations;
- c. Policy regulations cannot be tested wetmatigheidly because there is no basis for statutory regulations to make such policy regulations;
- d. Policy regulations are made based on Freies Ermessen and the absence of the relevant administrative authority to make laws and regulations;
- e. The examination of the rules of wisdom is more left to doelmatigheid so that the touchstone is the general principles of good governance;
- f. In practice, it is given a format in various forms and types of rules, namely decisions, instructions, circulars, announcements, etc., and can even be found in regulations.

In relation to the form, Van Kreveld stated that "policy regulations" can be expressed in various forms, such as lines of wisdom (beleidslijnen), wisdom (het beleid), regulations

¹⁰ Philipus M. Hadjon, Pengantar Hukum Administrasi Indonesia, Yogyakarta : Gadjah Mada University Press, 1999, p. 152.

¹¹ Philipus M. Hadjon, Loc.cit.

¹² Hotma, P. Sibuea, Op.cit, p. 104.

¹³ Hotma, P. Sibuea, Op.cit, p. 104.

¹⁴ S.F, Marbun, Op.cit., p. 175

(voorschriften), guidelines (rechtlijnen), instructions (regelingen), circulars (circularies), resolutions (resoluties), instructions (aanschrijvingen), policy notes (beleids-nota's), ministerial regulations (reglemens ministriële), decisions (beschikkingen), announcements (en bekendmakingen)¹⁵. In addition, according to Phillip M. Hadjon's opinion, there are policy regulations in the form of announcements, guidelines, circulars, technical instructions (juniors), and implementation instructions (juklak), and so on.¹⁶

Oil and Gas Management Policy in Indonesia

As mandated by the constitution, Article 33 Paragraph (1) of the 1945 Constitution is the basis of economic democracy. Therefore, for a country with the principle of being a state based on the law (rechtsstaat), this provision is an imperative demand normatively. Imperatively, with the stipulation of Article 33 of the 1945 Constitution, a firm national policy has been outlined to carry out economic and social transformation. Likewise, the management of oil and gas has gone through an economic transformation through the laws and regulations established in implementing the constitutional mandate. In each of these transformations, oil and gas management forms the implementing agency and the system used. Usually, the formation of a statutory regulation comes from an authority, both attribution, and delegation.¹⁷ By understanding the principles regarding the laws and regulations, particularly on the function, the basis of authority, and the substance of the content (substance), it is seen that; (1) The function of legislation is essential to carry out legislative functions. (2) Then viewed from the basis of the authority comes from attribution and delegation. (3) As seen from the content (substance), the legislation contains provisions that regulate the basic order of community life, which can reduce, limit the human rights of citizens, contain orders/prohibitions, and can contain criminal sanctions and other sanctions.¹⁸ The implementation of the national oil and gas industry relies on a solid and quality legal basis. By looking at the legal basis of the stages of the implementation of the oil and gas industry, the authors of this study take the following rationale:

1. Principles of Formation of Legislations

The principles for the formation of laws and regulations are guidelines or signs in the formation of good laws and regulations, which are also formulated in Law Number 12 of 2011 concerning the Establishment of Legislations formulated as follows:¹⁹

- a) Clarity of purpose;
- b) Appropriate institutions or forming organs;
- c) The suitability of the type and material of the load;
- d) Can be implemented;
- e) Usability and effectiveness;
- f) Clarity of formulation; and
- g) Openness.

¹⁵ S.F, Marbun, Op.cit, p. 176.

¹⁶ Hotma, P. Sibuea, Op.cit, p. 107.

¹⁷ Yuliandri. *Asas-Asas Pembentukan Peraturan Perundang-undangan Yang Baik*. PT Rajagrafindo Persada. Jakarta. 2010, P. 43

¹⁸ Ibid. P. 44

¹⁹ Pasal 5 Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan.

According to Philipus M. Hadjon, he explained that the general principles of establishing good legal rules serve as a basis for testing in the formation of applicable legal rules (formal tests) and as a basis for testing applicable legal rules (material tests). Then A. Hamid S. Attamimi explained that the principles of the formation of appropriate laws and regulations functioned to provide guidelines and guidance for the pouring of the contents of the regulations into the appropriate form and structure, so that appropriate use of the method of formation and following the process and predetermined formation procedure.²⁰ The word law formation is a series of words that can be interpreted as the process of making laws whose framework starts from planning, preparation, drafting techniques, formulation, discussion, ratification, promulgation, and dissemination.

2. Roles and Functions of the Special Task Force for Upstream Oil and Gas Activities (SKK Migas)

The dissolution of the Executive Agency for Upstream Oil and Gas Business Activities (BP Migas) through the Constitutional Court Decision Number 36/PUU-X/2012 on November 13, 2012, created a regulatory vacuum in oil management and gas in the fields of exploitation and exploration. Previously, the Executive Agency for Upstream Oil and Gas Business Activities (BP MIGAS) was an independent institution established by the government of the Republic of Indonesia on July 16, 2002, as the supervisor and supervisor of Cooperation Contract Contractors (KKKS) in carrying out exploration, exploitation and marketing activities for Indonesia's oil and gas. By adjusting to the globalization of the financial industry, the government enacted Law Number 22 of 2001 concerning Oil and Gas, in order to organize oil and gas mining in Indonesia in an orderly manner and maintain legal certainty, as well as carry out the mandate of Article 33 Paragraph (3) of the Law. 1945 Constitution of the Republic of Indonesia.²¹ With the establishment of BP Migas through Law Number 22 of 2001 concerning Oil and Gas and Government Regulation Number 42 of 2002 concerning the Implementing Agency for Upstream Oil and Gas Business Activities, the problem of supervising and fostering Cooperation Contract activities previously carried out by PERTAMINA was subsequently handled, directly by BP MIGAS as a representative of the government.²²

Moreover, after the decision, taking into account, there are still 353 contracts, cooperation contracts, and oil and gas sales contracts, which will cause losses to the state to reach Rp300 trillion per year.²³ Moreover, to fill the void of regulators in the management of oil and gas, both in the fields of exploitation and exploration, the government formed a particular temporary work unit called SKK Migas. The Special Task

²⁰ A. Hamid S. Atamimi, Disertasi, Universitas Indonesia, Jakarta. 1990 *Peranan Keputusan Presiden Indonesia Dalam Penyelenggaraan Pemerintah Negara*, dikutip oleh Yuliandri. *Azas-Azas Pembentukan Peraturan Perundang-undangan Yang Baik*. PT Rajagrafindo Persada. Jakarta.

2010, P. 14

²¹ I. G. Rai Widjaya, *Hukum Perusahaan Dan Undang-Undang Dan Peraturan Pelaksanaan Di Bidang Usaha*, Kesaint Blanc, Jakarta, 2003, P. 12

²² Wikipedia Bahasa Indonesia. *Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi* pada http://id.wikipedia.org/wiki/Badan_Pelaksana_Kegiatan_Usaha_Hulu_Minyak_dan_Gas_Bumi#Wewenang_BPM_IGAS

²³ Hukum_Online_Pemerintah_Jamin_Bisnis_Migas dalam <http://www.hukumonline.com/berita/baca/lt50a7c28fde2c3/pemerintah-jamin-bisnis-migas>

Force for Upstream Oil and Gas Business Activities (SKK Migas) is an institution established by the government through Presidential Regulation Number 9 of 2013 concerning the Management of Upstream Oil and Gas Business Activities. SKK Migas is tasked with managing upstream oil and gas business activities based on the Cooperation Contract. The establishment of this institution is intended so that the extraction of state-owned oil and gas natural resources can provide maximum benefits and revenues for the state for the greatest prosperity of the people.²⁴

In carrying out these duties, SKK Migas carries out the following functions:²⁵

- a. give consideration to the Minister of Energy and Mineral Resources on his discretion in terms of preparation and bidding of Working Areas and Cooperation Contracts;
- b. carry out the signing of the Cooperation Contract;
- c. reviewing and submitting a field development plan which will first be produced in a Work Area to the Minister of Energy and Mineral Resources for approval;
- d. give approval for development plans other than those referred to in the previous point;
- e. provide approval of work plans and budgets;
- f. carry out monitoring and reporting to the Minister of Energy and Mineral Resources regarding the implementation of the Cooperation Contract; and
- g. appoint a seller of oil and/or natural gas share of the state who can provide the maximum benefit to the state.

3. Decision of the Constitutional Court Number 36/PUU-X/2012 concerning the Review of Law Number 22 of 2001 concerning Oil and Gas

- a. Decision Number 002/PUU-I/2003, which was decided on December 21, 2004
- b. Decision Number 20/PUU-V/2007, which was decided on December 17, 2007
- c. Decision Number 36/PUU-X/2012, which was decided on November 13, 2012

In 2012 ten Islamic community organizations and 32 individuals led by Prof. Dr. H.M. Din Syamsudin, M.A., General Chairperson of Muhammadiyah proposed a review of the Oil and Gas Law. The Petitioner is of the opinion that the establishment of BP Migas with the 2001 Oil and Gas Law has reduced the role of the state in natural resources, which has resulted in the violation of Article 33 of the 1945 Constitution of the Republic of Indonesia.²⁶ In the decision of the Constitutional Court Number 36/PUU-X/2012, the Constitutional Court stated:

- a) Phrases with the Implementing Body in Article 11 Paragraph 1, phrases through the Implementing Body in Article 20 Paragraph 2, phrases based on considerations from the Implementing Body and in Article 21 Paragraph 1, phrases for Implementing Bodies and in Article 49 of Law Number 22 Year 2001 concerning Oil and Gas Natural Gas has no binding legal force;
- b) All matters relating to the Implementing Body in the explanation of Law Number 22 of 2001 concerning Oil and Gas are contrary to the 1945 Constitution of the Republic of Indonesia;

²⁴ Wikipedia Bahasa Indonesia. *Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi* http://id.wikipedia.org/wiki/Satuan_Kerja_Khusus_Pelaksana_kegiatan_Usaha_Hulu_Minyak_dan_Gas_Bumi

²⁵ Ibid

²⁶ Simon Butt dan Fritz Edward Siregar. *Analisis Kritik Putusan Mahkamah Konstitusi Nomor 26/PUU-X/2012*. Mimbar Hukum. Vol 25 Nomor 1 Februari 2013 P. 2

- c) All matters relating to the Implementing Body in the elucidation of Law Number 22 of 2001 concerning Oil and Gas do not have binding legal force; and
- d) The functions and duties of the Implementing Body for Upstream Oil and Gas Business Activities are carried out by the government Cq the relevant ministries until the promulgation of a new law that regulates this matter.

In the decision, the Constitutional Court believes that based on the constitution, the first and foremost form of control lies with the state by direct management of oil and gas, second-level state control, namely the state makes policies and management, and third-level state control, namely the state carries out regulatory and supervisory functions. However, the Oil and Gas Law stipulates that BP Migas as a government organ only carries out the function of controlling and supervising the management of oil and gas, while direct oil and gas management in the upstream sector is carried out by state-owned enterprises and non-state-owned enterprises based on the principles of fair, efficient and transparent business competition. . This means that the relationship between BP Migas as a representation of the state and these business entities in oil and gas management has degraded the meaning of state control over natural oil and gas resources so that the state cannot exercise its authority in the management function of oil and gas management to achieve the greatest prosperity of the people. This relationship is contrary to the constitutional mandate as regulated in Article 33 of the 1945 Constitution.

In addition, according to the Constitutional Court, state control of oil and gas will be effective if the Government directly holds the function of regulation and policy (policy) without being added to the formation of BP Migas so that all aspects of state control mandated by Article 33 of the 1945 Constitution are implemented. The management of oil and gas natural resources must be in the form of state organization based on efficient bureaucratic rationality and does not create opportunities for abuse of power. This is related to the existence of BP Migas and the pattern of relationships in it, so BP Migas has the potential for inefficiency and is suspected, in practice, has opened up opportunities for abuse of power so that the existence of BP Migas is unconstitutional, contrary to the state's objectives regarding natural resource management in organizing the Government. So far, there is no evidence of abuse of power within BP Migas, but the existence of BP Migas is unconstitutional because it is based on the Constitutional Court Decision Number 006/PUU-III/2005 dated 31 May 2005 and the Constitutional Court Decision Number 11/PUU-V/2007 dated 20 September 2007, something that has the potential to violate the constitution can also be decided by the Court as a case of constitutionality.²⁷

CONCLUSION

In its development, the management of oil and gas in Indonesia has undergone several policy developments. Before Indonesia's independence, the Dutch East Indies colonial government had discovered, explored, and exploited oil and natural gas from Indonesia by establishing a Dutch government-owned company (the Royal Dutch and Batafsche Petroleum

²⁷ Shantika Putusan MK atas Uji Materi Undang-Undang Migas pada <http://shantidk.wordpress.com/2012/12/12/putusan-mk-atas-uji-materi-uu-migas/> diakses pada hari Minggu tanggal 27 April 2020 pada pukul 20.13 WIB.

Maatschappij). Based on the explanation in the previous section, many vital conclusions are: First, basically, the purpose of natural gas management is to not only ensure the effectiveness of the implementation and control of business activities but also to support and develop national capabilities to be able to compete at the national, regional and international levels. Another goal is to increase state income, create jobs, and improve people's welfare and prosperity in a just and equitable manner while maintaining environmental sustainability. Second, the concept of gas management must be carried out carefully and should be free from liberalization schemes that can bring about social injustice and failure to achieve people's welfare. Third, with some Constitutional Court decisions that have annulled the articles in the Law, it is imperative to do legal reconstruction. However, this process must ensure the existence of laws that create happiness for its people, as in the Preamble of the 1945 Constitution, the purpose of the Indonesian state is to protect all of Indonesia's bloodshed, promote public welfare, educate the nation's life, and participate in carrying out world order.

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