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State Control over Natural Resources Oil and Gas in Indonesia

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Abstract: *Most gas-producing companies are the same foreign companies as oil-producing companies. Investment to produce gas is funded by government banks in industrialized countries. Thus, the exploration and exploitation of natural gas is intended to meet export needs to industrialized countries. Article 33 of the 1945 Indonesian Constitution envisages that the use of natural resources should be prioritized to the maximum extent possible to meet domestic needs and the greatest prosperity of the people. This implies state control over the use of natural resources. It is argued that mining business arrangements, especially Oil and Gas, can be considered as a part of the implementation of state control over natural oil and gas resources. This means that the authority in controlling natural resources of Oil and Gas is only controlled by the State and carried out by the Government as the executor of Oil and Gas business activities. Such arrangement is in accordance with the provisions of Article 4 paragraph (1) and (2) Law No . 22 of 2001 concerning Oil and Natural Gas.*

This paper analyses the State control over the use of oil and gas as natural resources. The analyses was carried out through the study of the Decision of the Constitutional Court of the Republic of Indonesia Number: 002 / PUU-I / 2003. Using normative juridical approach, this paper argues that the Indonesian Laws on oil and gas are incontrary with the 1945 Indonesian Constitution.

Keywords: *state control, state sovereignty, oil and gas laws, Indonesian constitutiion, natural resources*

I. INTRODUCTION

Oil and gas is one of natural resources vital support the national economy. Gas as a branch of production of an important for the country and dominate countless lives state-controlled, according to mandate of the constitution.[1] (Journal of Law, Policy and Globalization, 2014). Oil and Gas natural resource energy plays an important role in the global and national economy. This is very meaningful for national economic growth, because of its linkages with state revenues, oil and gas exports and the entire balance of payments. The linkages can actually be seen significantly and empirically from the events of the global economic crisis in the past few

[1] Asror Nawawi, 'Sharing Revenue of Oil and Gas Industry between Center and Local Government from Legal Perspective' (2014) 26 *Journal of Law, Policy and Globalization*

years and continue to this day, due to the world energy crisis.[2]

Management of oil and gas in Indonesia has undergone several changes. Recent development shows that in order to fulfill the principles of democracy and public transparency by the public, a Supervisory and Regulatory Body was established in the upstream and downstream fields of Oil and Gas.[3] Furthermore, the enactment of Law No. 22 Year 2001 concerning Oil and Gas marks the beginning era of authority from an independent State Agency, namely the Oil and Gas Implementing Agency (BP Migas) which carried out upstream and downstream activities, as well as government authorization in the Oil and Gas business sector coordinated by the Director General of Oil and Gas acting for and on behalf of the Minister of Energy and Mineral Resources, which technically represent the state in carrying out the mandate of the Constitution are reflected in Article 33 of the 1945 Constitution of the Republic of Indonesia.[4]

Although there are a number of institutions related to Oil and Gas Law, this research finds that it is uneasy for the government to control such natural resources. The main difficulty is an opportunity from the Oil and Gas law, its relationship to the work area, which can be followed by any national or international private legal entity. The working area for a long time, to be vulnerable to state losses on natural oil and gas resources, is associated with possible damage. In the future, we must get attention with new models that are more flexible in terms of long-term mastery of the work area.[5] Based on these various obstacles, the government temporarily still allows foreign capital to develop in Indonesia, even though state administrators have quite diverse views on the existence of foreign capital in Indonesia.[6]

Unfortunately regulation oil and gas under the constitution that Law No. 22 of 2001 on Oil and Gas derogate meaning of such authorization. Law quo becomes the liberalization of the business of oil and gas to the detriment of Indonesia and vice versa profitable for capitalists. This Act has been review several times to the Constitutional Court and several times canceled clauses in it.[7]

Efforts to take over foreign-owned Oil and Gas companies and oil mines controlled by these companies have actually been going on for a long time, since Indonesia proclaimed its independence. Nonetheless, the effort to take over all Oil and Gas companies and their wells is not an easy job, even it can be said that the business has never been successful until now. The foreign-owned oil and gas companies remain firmly linked in Indonesia. The government can only give and replace the regulations that must be considered as long as the foreign oil and gas companies operate in the territory of Indonesia, that too by taking a complicated process with various long and tiring negotiations.[8]

And Opinion of the Court gained legitimacies in the philosophical level based on the theory of social contract. In this

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2 Syaiful Bakhri, *Hukum Migas Telaah Penggunaan Hukum Pidana Dalam Perundang-Undangan,* (Yogyakarta: Total Media, 2012), p. 14.

3 Ibid, 12

4 Ibid, 13

5 Ibid, 13-14

6 Adrian Sutedi, *Hukum Pertambangan,* (Jakarta: Sinar Grafika, 2011), 1-2

7 Mochamad Adib Zain, 'Politics of Law on the State Contro; of oil and Gas in Indonesia: Gas Liberalization and the Hesistancy of Constituonal Court' (2016) 1 (1) *Journal of Indonesian Legal Status.*

8 Ibid, 5

concept, people do form a state social contract. In the contract the people give part of their rights to the state to care for. The consensus in the social contract embodied in the Constitution as the supreme agreement of all citizens.[9]

It is a surprising fact that while oil and gas potential can be contribute to national economic development, unfortunately, the poverty rate in Indonesia, especially local people around the mining area is remain.[10] Research shows that Indonesia is ranked as the seventh largest gas exporter in the world from the 10 largest gas producing countries in the world after Australia.[11]

However, what has been done by the authorities at this time has not produced a great hope for the people of Indonesia. As a result, foreign companies dominate much of Indonesia's land and natural resources, while the Indonesian people are marginalized and become spectators of foreign business activities in extracting Indonesia's natural wealth. The direction and purpose of the state must be returned to the ideals of the founders of the state as embodied in the Pancasila and the 1945 Constitution of the Republic of Indonesia. On this basis, Indonesia can turn towards the direction of Indonesia that is socially just and fair and civilized.[12]

Even though it has a lot of natural wealth and is very complete, the Indonesian government is considered not optimal in using it for the national interest and its own people. Most of the Oil and Gas wealth is controlled by foreign companies. More than 85% of Indonesia's crude oil production is controlled by foreign companies from the United States, China, Japan and countries in Europe. Furthermore, the Indonesian government buys oil from foreign companies at market price levels. Moreover, the Indonesian government must issue cost recovery to replace all operational costs incurred by foreign companies during oil and gas exploration and exploitation. Some of Indonesia's oil products are also exported abroad, such as to Singapore to be processed by oil refineries there. Indonesia then re-imported Fuel Oil (BBM) processed by Singapore oil refineries. Singapore has multiplied profits from the surplus generated from the processing of Indonesia's oil wealth. Because Indonesian people must buy their own oil at an expensive market price level.[13]

Similarly, the wealth of natural gas. Most gas-producing companies are the same foreign companies as oil-producing companies. Investment to produce gas is financed by government banks in industrialized countries. So that the exploration and exploitation of natural gas is intended to meet export needs to industrialized countries. For example, natural gas exploration and exploitation activities by British Petroleum (BP) Indonesia operating in Tangguh Field, Papua Province. The plan is for BP production to focus on the exports of the four countries, namely the United States, China, South Korea and Japan. The four buyers include Fujian China LNG of 2.6 million tons per year, Korea's K-Power of 0.6 million tons per year, POSCO Korea of 0.55 million tons per year, and Sempra Energy Mexico of 3.6 million tons per year. In addition, BP has agreed to the principles of gas sale and purchase agreements with Tohoku Japan. With a purchase contract from

[9] M. Laica Marzuki, 'Konstitusi dan Konstitusionalisme', *Jurnal Konstitusi*, Vol. 7, No. 4, Agustus 2010

[10] M. Hatta Taliwang and Salamuddin Daeng, *Indonesiaku Tergadai*, (Jakarta: Institute Ekonomi Politik Soekarno Hatta, 2011), p. 3

[11] Ibid, 16

[12] Ibid, 4-5

[13] Ibid, 17

Tohoku Japan, the number of requests reached the Tangguh LNG plant capacity for two trains, which is an average of 7,6 million tons per year. The entire contract relates to a funding commitment of USD 2,6 billion from 9 financial institutions whose agreement was signed in August 2006.[14]

The low income of natural resources actually occurs in the midst of the increasing rate of exploitation of natural resources from year to year. In addition, the vast contract of Oil and Gas works, mining work contracts , coal work contracts , and mining rights are increasing, as investment increases in these sectors.[15] One of the various facilities provided by the government is the enactment of Law Number 25 of 2007 concerning Investment (UUPM). The Act provides extraordinary facilities to investors, namely in the fields of land, taxation and finance. The facility helped reduce state revenues, while the government continued to strive to boost state revenues from the tax sector.[16]

From the explanation of the background above, the author argues that there is a problem that questions the sovereignty of the State over the natural resources of Oil and Natural Gas based on the 1945 Constitution of the Republic of Indonesia. Therefore, according to all the explanations from the above background, the authors are interested in discussing and analyzing concerning the control of the State over natural resources of Oil and Gas based on the 1945 Constitution of the Republic of Indonesia through the study of the Decision of the Constitutional Court of the Republic of Indonesia Number: 002 / PUU-I / 2003.

II. LEGAL MATERIALS AND METHOD

This research adopted normative juridical method which examine relevant laws regarding the management of natural resources, especially oil and gas. Such examination is based on the 1945 Indonesian Constitution to discuss how the role of state in managing its natural resources for its people's prosperity. Legal materials used in this research include the 1945 Indonesian Constitution, Indonesian Act Law Number 44 Prp of 1960 concerning Oil and Gas Mining, Indonesian Act Number 8 of 1971 concerning the State Oil and Gas Mining Company and Indonesian Act Number 22 Year 2011 regarding Oil and Gas. Relevant journals and books are also used to support academic arguments of this research.

III. RESULTS AND DISCUSSIONS

Sovereignty of the State for Oil and Gas Natural Resources

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Earth and water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people". Controlled by the state interpreting the State's Right to Control the assets of natural wealth. An absolute sovereign state over the wealth of natural resources. Used as much as possible the prosperity of the people interpreted as the right of ownership of natural wealth is the people of Indonesia. Both of these meanings are one entity. The meaning of "controlled by the State" is an instrument, while "the greatest prosperity of the people" is the ultimate goal of managing natural wealth.[17]

[14] Ibid, 18
[15] Ibid, 39-40
[16] Ibid, 40
[17] Adrian Sutedi, above n.5

The natural wealth of the Indonesian people that is authorized to the state is mandated to be managed properly in order to achieve the goals of the Indonesian state. The government as a representation of the state is given the right to manage the wealth of natural resources to be enjoyed by the people in a fair and equitable manner. The prosperity of the people is the spirit and ideals of the end of the welfare state (welfare state) that must be realized by the Indonesian state and government. Natural resource management is one of the instruments to achieve it.

In terms of the utilization of natural resources, in a state administration, there are three forms of state involvement in the management of natural resources, namely regulation (regulation), business management (management), and supervision. The regulatory aspect is the absolute right of the state which cannot be left to the private sector and is the most important aspect played by the state among other aspects. Said the state to fully control the meaning of the state, through the government, has the authority to determine the use, use, and rights to natural resources within the scope of regulating, managing, managing, and supervising the management, and utilization of natural resources.[18]

In the consideration of Law No. 44 of Prp of 1960 concerning Oil and Gas Mining, stated "that oil and natural gas has a very important function for the development of a just and prosperous society, compared to other minerals, that oil and gas production The earth is a production branch that is important for the State and controls the livelihood of many people, whether directly or indirectly, that oil and gas have a special meaning for national defense. State control over the management of Oil and Gas natural resources, Article 4 paragraph (1) of Law Number 22 Year 2001 concerning Oil and Natural Gas states that "Oil and Gas as strategic non-renewable natural resources contained in the Mining Law Area Indonesia is a national wealth controlled by the state ". National wealth sentences controlled by the state mean that natural wealth is national wealth controlled by the state, through regulation, company, management, supervision, and utilization of Oil and Gas natural resources for the prosperity of the people.

Because of the unique characteristics of natural resources, the exploitation cannot all be carried out by the state. State business in the scope of exploitation (concession rights) can be delegated to private legal entities or individuals within the Indonesian mining jurisdiction with a Mining Authority (KP), Contract of Work (KK), or Cooperation Agreement. However, the devolution does not mean that the private sector is the owner of the mining material being cultivated. The state remains sovereign over mining (natural resources). In the case of transfer of tenure rights, the state cannot transfer beyond what is controlled. The nature of transfer of tenure rights is the right to operate in the form of mining concessions to holders of the Mining Authority. The Mining Authority is not the right to own mining material but a permit to conduct a mining business.

The Contract of Work is not a mechanism for transferring state rights, but only a means or instrument that allows private parties to participate in mining businesses. Allowing the private sector to have monopoly rights in controlling, commercializing, and distributing the production of mining business in the case of Oil and Gas is a violation of the state

[18] Ibid

constitution and can harm the interests of the community as a whole. The state representative in carrying out the agreement is the Government. The Contract of Work and the Mining Authority are not the transfer of the absolute power of the mining material from the state to the contractor, but rather the cooperation between the state and the contractor in the matter of exploiting mining materials. The position of the state in this relationship is in the capacity as the owner of the mine material (principal), and the contract opponent as the executor of mining (contractor).

Mining business arrangements, especially Oil and Gas, are part of the implementation of state control over natural oil and gas resources. This arrangement is carried out by the government with the aim that the exploitation of Oil and Gas provides benefits for the country and for the greatest prosperity of the people. With the decentralization policy, Regional Governments (Districts and Cities) are given the authority to regulate the Oil and Gas mining business in their regions in a responsible and proportionate manner. Responsibly interpreted the use is aimed at the greatest

Regulation on Oil and Gas in Indonesia Before the enactment of Law No. 22 of 2001 concerning Oil and Natural Gas

On the consideration of Law No. 44 Prp of 1960 concerning Oil and Gas Mining, stated, "That oil and gas has a very important function for the development of a just and prosperous society, compared to other minerals, that oil and gas production The earth is a production branch that is important for the State and controls the livelihood of many people, whether directly or indirectly, that oil and natural gas have a special meaning for national defense ". Then at the consideration of Law Number 8 of 1971 concerning the State Oil and Gas Mining Company stated, "That oil and gas is a strategic excavation material, both for the economy of the country and for the interests of national defense and security".

Mastery of the State over Oil and Gas

Article 2 of Law No. 44 Prp Year 1960 states that "All oil and gas extracts that are within the Indonesian mining jurisdiction are national assets controlled by the State". This confirms that Oil and Gas are national assets controlled by the State for the greatest benefit of the people. In the case of the implementation of Oil and Gas business activities carried out by the State Company, PERTAMINA. This is regulated in the provisions of Article 3 paragraph (2) of Law No. 44 Prp of 1960 concerning Oil and Gas Mining which reads "Oil and gas mining business is carried out by a solely State Company".

Oil and Gas Business Activities

Based on the provisions of Article 4 of Law No. 44 Prp of 1960 concerning Oil and Gas Mining, Oil and Gas mining business activities are integrated in one unit, covering exploration, exploitation, refining and processing, transportation and sales activities. And all business activities are carried out entirely by PERTAMINA in accordance with the provisions of Article 6 paragraph (1) of Law No. 8 of 1971 concerning the State Oil and Gas Mining Company, which reads "The Company is engaged in the operation of oil and gas which includes exploration, exploitation, refining and processing, transportation and sales".

Then based on the provisions of Article 7 paragraph (1) of Law No. 8 of 1971 concerning the State Oil and Gas Mining Company, which reads "Corporate Capital is

State assets that are separated from the State Budget of Revenue and Expenditure as large as those planted in PN PERTAMINA until the time of dissolution, the amount of which is listed in the Opening Balance Sheet which will be ratified by the Minister of Finance " In this case, PERTAMINA's capital and wealth are separate from the State's wealth.

PERTAMINA in carrying out its Oil and Gas business activities can cooperate with contractors through Production Sharing Contracts, as stipulated in Article 12 paragraph (1) of Law No. 8 of 1971 concerning the State Oil and Gas Mining Company. The Minister may appoint another party as a contractor for a State Company if necessary to carry out work that has not been or cannot be carried out by the State Company itself as the holder of the mining authority, in accordance with the provisions of Article 6 paragraph (1) of Law No. 44 Prp of 1960 concerning Oil and Gas Mining.

In other sides, It is true there have been corruption, collusion and and nepotism in Pertamina. But accuse matter of business monopoly as the only cause is misguided thought unforgivable. The root of corruption in Pertamina is wrong management controlled by the military at Pertamina. Lack of accountability within the management of Pertamina been allowed by the government because the government enjoyed also the flow of funds from the corruption of the government enjoyed also the flow of funds from the corruption of it. There were no report of financial book keeping there are no report on business operations so that Pertamina is like a state within a state.[19] (Journal of Modern Asian Studies, 2006) and (Journal of Pacific Affair, Winter, 1975-1976)

State Revenue for Oil and Gas Business

The holder of the mining authority pays to the State the defined contribution, exploration and / or exploration contribution and / or other payments related to the granting of mining authority. The details and size of the State levies are regulated by Government Regulation.

In implementing oil and gas mining operations in accordance with the provisions contained in this Law, the Company must deposit the State Treasury, the following amounts:

1. 60% of net operating income (net operating income) on the results of the Company's own operations;
2. 60% of the net operating income (net operating income) of the Production Sharing Contract before being divided between the Company and the Contractor;
3. All results obtained from the Work Agreement referred to in Act Number 14 of 1963;
4. 60% of the Company's bonus receipts obtained from the Production Sharing Contract.

After the enactment of Law No. 22 of 2001 concerning Oil and Natural Gas

Since the enactment of Law No. 22 of 2001 concerning Oil and Natural Gas, then Act Number 44 Prp of 1960 concerning Oil and Gas Mining, Law Number 15 of 1962 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 1962 concerning Obligations of Oil Companies to Meet Needs Domestic, Law Number 8 of 1971 concerning Pertamina jo. Law Number 10 of 1974 Concerning Amendment to Law Number 8 of 1971 concerning Pertamina is

[19] Harold Crouch, 'General and Business in Indonesia', (1975-1976) 48 (4) *Pacific Affairs*; Rajeswary Ampalavanar Brown, 'Indonesia Corporations, Cronyism, and Corruption' (2006) 40 (4) *Modern Asian Studies*

no longer valid, but the implementing regulations of the four laws remain in force as long as they do not conflict or have not been replaced with new regulations based on Law No. 22 of 2001 concerning Oil and Natural Gas.

Mastery of the State over Oil and Gas

In accordance with the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, Oil and Gas are controlled by the state. The purpose of state control is that national wealth can be utilized for the greatest prosperity of the Indonesian people. Thus, both the interests of individuals, communities, and businesses, do not have the right to control or even have Oil and Gas contained therein. On the consideration of Law No. 22 of 2001 concerning Oil and Gas, states "that oil and natural gas are strategic non-renewable natural resources controlled by the state and are vital commodities that control the livelihood of many people and have an important role in the national economy so that management must be maximized provide prosperity and prosperity for the people ".

Article 4 paragraph (1) Law No. 22 of 2001 concerning Oil and Gas, which reads "Oil and Gas as a strategic non-renewable natural resource contained in the Indonesian Mining Law Area is a national wealth controlled by the state", has also affirmed the control of the state over Oil and Gas in Indonesia .

The state control is held by the Government as the holder of the mining authority, in accordance with the provisions of Article 4 paragraph (2) of Law No. 22 of 2001 concerning Oil and Gas which states that "The control by the state as referred to in paragraph (1) is held by the Government as the holder of the Mining Authority". Mining Authority is the authority given by the state to the government to conduct Oil and Gas business activities.

Oil and Gas Business Activities

Based on the provisions of Article 5 of Law No. 22 of 2001 concerning Oil and Gas, Oil and Gas business activities are divided into two types, namely Upstream Business Activities and Downstream Business Activities.

Upstream Business Activities

Upstream Business Activities are regulated in Article 1 number 7, Article 5 to Article 6, and Article 9 through Article 22 of Law No. 22 of 2001 concerning Oil and Natural Gas. Upstream Business Activities are business activities that focus on Exploration and Exploitation business activities.

Upstream Business Activities are carried out and controlled through Cooperation Contracts (KKS). Cooperation contracts are production sharing contracts or other forms of cooperation contracts in exploration activities benefit the country and the results are utilized for the welfare of the people.

In accordance with the provisions of Article 22 paragraph 1 of Law No. 22 of 2001 concerning Oil and Gas, Business Entities or Permanent Establishments must submit a maximum of 25% (twenty five percent) of their shares from the production of Petroleum and / or Natural Gas to meet domestic needs.

Downstream Business Activities

Downstream Business Activities are regulated in Article 1 number 10, Article 5, Article 7, Article 23 to Article 25 of Law No. 22 of 2001 concerning Oil and Natural Gas. Downstream business activities are carried out through a fair, healthy and transparent

business competition mechanism. Downstream business activities are carried out with a business license. A business license is a permit granted to a business entity or permanent establishment to carry out processing, transportation, storage and / or trading in order to obtain profits and / or profits. A new business entity can carry out its activities after obtaining a business license from the government. Business licenses needed for Oil and Gas business activities are distinguished by:

1. Processing business license,
2. Transportation business license,
3. Storage business license,
4. Commercial business license

Every business entity can be given more than one business license as long as it does not conflict with the provisions of the prevailing laws and regulations. Business license must at least contain:

1. Organizer name
2. Type of business provided
3. Obligations in the operation of business
4. Terms

Every business license that has been granted can only be used according to its purpose. The government may submit written reprimands, suspend activities, freeze activities or revoke business licenses based on:

1. Violation of one of the requirements stated in the business license.
2. Repetition of violations of business permit requirements.
3. Does not meet the requirements stipulated under this law.

Before carrying out the revocation of a business license, the government first provides an opportunity for a certain period of time to the Business Entity to eliminate the violations that have been committed or fulfillment of the stipulated requirements. Downstream business activities can be carried out by:

1. State-Owned Enterprises (BUMN)
2. Regional Owned Enterprises (BUMD)
3. Cooperatives, small businesses, and,
4. Private Enterprise.

The four types of business entities can submit applications to obtain business licenses in carrying out downstream business activities.

Position of Implementing Agency and Regulatory Body in Upstream and Downstream Business Activities

The legal provisions governing the Executing Agency are Article 1 number 23, Article 44 to Article 45 of Law No. 22 of 2001 concerning Oil and Natural Gas. The Implementing Agency is an agency established to control upstream business activities in the Oil and Gas sector. The position of the Executing Agency is a State-Owned Legal Entity. The State Owned Legal Entity has the status as a subject of civil law and is an institution that does not seek profit and is managed professionally.

The function of the Executing Agency is to supervise upstream business activities so that the extraction of state-owned natural oil and gas resources can provide maximum benefits and state revenues for the state for the greatest prosperity of the people. The task of the Executing Agency is regulated in Article 44 paragraph (3) of Law No. 22 of 2001 concerning Oil and Natural Gas Jo. Article 11 Government Regulation Number 42 of 2002 concerning the Implementing Agency for Upstream Oil and Gas Business Activities. Implementing Agency tasks, namely:

1. Giving consideration to the minister discretion in terms of preparation and work areas as well as offer employment contract together.
2. Carry out work contracts together.
3. Review and submit a field development plan which will first be produced in a working area to the minister to get approval.
4. Approving the field development plan, other than those listed in number 3 above.
5. Approve work plan and budget.
6. Exercise supervision and report to the minister on the implementation of the employment contract together.
7. Appoint the state Oil and Gas seller who can provide the maximum profit for the country.

The Regulatory Body is regulated in Article 1 number 24, Article 8 or (4), Article 46 to Article 49 of Law No. 22 of 2001 concerning Oil and Natural Gas. The Regulatory Body is an agency established to regulate and supervise the supply and distribution of Oil and Gas fuels in downstream business activities. The functions of the Regulatory Agency are as follows:

1. Supervise the implementation of the supply and distribution of Petroleum fuels and the transport of natural gas through pipelines. This provision is intended to protect the interests of the consumer community towards the continuity of the supply and distribution of fuel oil in all parts of Indonesia. Supervision of the transport of natural gas through pipelines is carried out to optimize and prevent the monopolization of the use of transmission, distribution and storage pipeline facilities by certain business entities.
2. Make arrangements so that the availability and distribution of Oil and Gas fuels set by the government can be guaranteed throughout the territory of the Republic of Indonesia.
3. Increase the utilization of natural gas in the country.

The government is responsible for availability and service to avoid the scarcity of fuel oil throughout Indonesia. The duties of the Regulatory Agency include the arrangement and stipulation regarding:

1. Availability and distribution of fuel oil
2. National oil fuel reserves
3. Utilization of Oil fuel transportation and storage facilities, utilization of Oil fuel transportation and storage facilities are primarily intended for certain areas or remote areas where the market mechanism has not been able to work so that the existing transportation and storage facilities need to be regulated to be utilized so that optimal conditions are achieved and achieved the lowest possible price.
4. Tariff for transporting natural gas through pipes.
5. Natural gas prices for households and small customers, households are every consumer who uses natural gas for household use.
6. The operation of natural gas transmission and distribution, the operation of natural gas transmission and distribution are regulated by the regulatory body relating to the business aspects of the natural gas transmission and distribution activities.
7. Supervision in fields in numbers 1 to 6.

The structure of the Regulatory Body consists of the Committee and the Field. The Committee consists of:

1. One chairman concurrently a member, and
2. Eight members from professionals.

The Chair and Committee members of the Regulatory Body are appointed and dismissed by the President after obtaining approval from the House of Representatives of the Republic of Indonesia (DPR RI). The Regulatory Body in carrying out supervision and regulation is responsible to the President. The establishment of a Regulatory Body is stipulated by a Presidential Decree. The budget for operational costs of the Regulatory Body is based on the State Budget of Revenue and Expenditure and contributions from the Business Entity which are regulated in accordance with the prevailing laws and regulations.

State Revenue for Oil and Gas Business

Arrangements regarding state revenues for Oil and Gas businesses are regulated in Article 31 to Article 32 of Law No. 22 of 2001 concerning Oil and Natural Gas. Business Entities or Permanent Establishments that carry out Upstream Business Activities as referred to in Article 11 paragraph (1) are obliged to pay state revenues in the form of taxes and Non-Tax State Revenues. The state revenue in the form of taxes such as the following :

1. Taxes;
2. Import duties, and other levies on imports and excise;
3. Local taxes and regional retribution.

Non-tax state revenues include the following:

1. State section;
2. State levies in the form of permanent contributions and Exploration and Exploitation contributions;
3. Bonuses.

Provisions concerning the determination of the amount of the state, state levies, and bonuses as referred to in paragraph (3), as well as the procedures for depositing, are further regulated by Government Regulation.

In the meaning that, the state and local governments have regulated oil and gas over the past decade following the expanded industry use of new technologies like hydraulic fracturing (fracking) and horizontal drilling. A consequence of fracking was a substantial increase in energy production accompanied by the emergence of policy concerns about how resource development and jobs could be balanced with efforts to maintain environmental quality[20]

Resume of Decision of the Constitutional Court of the Republic of Indonesia

Based on quotations from the results of the Decision of the Constitutional Court of the Republic of Indonesia Number: 002 / PUU-I / 2003 which granted the Petitioners' petition for material review in part;

Declare:

1. Article 12 paragraph (3) insofar as the words "are authorized",
2. Article 22 paragraph (1) as long as the words "most" are said,
3. Article 28 paragraphs (2) and (3) which reads "(2) The price of fuel oil and natural gas prices are left to a fair and fair business competition mechanism; (3) The implementation of price policy as referred to in paragraph (2) does not

[20] Charles E Davis, 'Shaping State Fracking Policies in the United States: An Analysis of Who, What, and How', (2017) *Sage Journa*l

reduce the Government's social responsibility towards certain groups of people ".

Law Number 22 of 2001 concerning Oil and Natural Gas (State Gazette of the Republic of Indonesia of 2001 Number 136, Supplement to the State Gazette of the Republic of Indonesia Number 4152) "contradicts the 1945 Constitution of the Republic of Indonesia".

Stating Article 12 paragraph (3) insofar as the words "empowered", Article 22 paragraph (1) as far as the words "most", and Article 28 paragraph (2) and (3) Law Number 22 Year 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) does not have binding legal force.

The argument of the Petitioners in the Decision of the Constitutional Court of the Republic of Indonesia Number 002 / PUU-I / 2003, including:

First, Article 12 paragraph (3) of Law Number 22 Year 2001 contradicts Article 33 of the 1945 Constitution by arguing that foreign companies will dominate the national oil and gas industry, in addition to reducing the authority of the President and accumulating power over oil and gas resources in the hands of the Minister of Energy and Mineral Resources. Article 12 paragraph (3) Law Number 22 Year 2001 states, "The Minister determines a Business Entity or Permanent Establishment that is authorized to carry out Exploration and Exploitation business activities in the Work Area as referred to in paragraph (2)"

Against this matter, the Court does not agree with the Petitioners who consider that the provision causes a huge accumulation of power in the ESDM Minister, because it is an internal matter of the Government that is not relevant in the a quo case . However, the Court assesses the provisions referred to are not in accordance with Article 4 paragraph (2) of the a quo law which states that the control by the state is held by the Government as the holder of the Mining Authority. Juridically, the authority to control the state only exists with the Government, which cannot be given to a business entity as stated in Article 1 number 5 of the a quo law.

Meanwhile, Business Entities and Permanent Establishments only carry out these activities based on cooperation contracts with limited economic rights, namely the division of part of the benefits of oil and gas as stipulated in Article 6 paragraph (2). In the field of state administrative law, the notion of delegation of authority is the transfer of power from the giver of authority, namely the state, so that by the inclusion of the word "given authority to the Business Entity and Permanent Establishment" the state control is lost. Therefore, the words "empowered" are not in line with the meaning of Article 33 paragraph (3) of the 1945 Constitution, in which the working area of the upstream sector includes the earth, water, and natural resources contained therein, one of which is oil and natural gas, which is the right of the state to master through the implementation of the functions of regulating (regelen), roling (bestuuren), managing (beheeren), and supervising (toezichthouden). Therefore, the words "given authority" in Article 12 paragraph (3) referred to are contradictory to the 1945 Constitution.

Secondly, Article 22 paragraph (1) of the a quo law which reads "Business Entities or Permanent Establishments must submit at most 25% (twenty five percent) of their shares from the production of Petroleum and / or Natural Gas to meet domestic needs. "As

contradictory to the 1945 Constitution. From the sound of the article that a Business Entity or Permanent Establishment is obliged to submit a maximum of 25% (twenty five percent) of its share of oil and gas production to meet domestic needs, it may cause the Business Entity or Permanent Establishment not carry out its responsibilities to participate in meeting domestic fuel needs as mandated in Article 1 number 19 in the context of the elaboration of Article 33 paragraph (3), namely the principle of the greatest prosperity of the people by prioritizing domestic needs.

The Court considers that the principle of the greatest prosperity of the people in the oil and gas production branch implies not only the low price and good quality, but also the guarantee of the availability of fuel and supply for all levels of society. With the provision of Article 22 paragraph (1) of the a quo law which states the words "most" then there is only a ceiling above (the highest percentage benchmark) without giving the lowest ceiling limit, this can be used by business actors as a juridical reason for only submit the portion as low as possible (for example up to 0.1%). Therefore, the Court considers the words "at most" in the clause "... must submit at most 25% (twenty five percent) ... "must be abolished because it contradicts Article 33 paragraph (3) of the 1945 Constitution. Furthermore, the regulation concerning the implementation of the 25% of the intended portion is set forth in the Government Regulation as stipulated in Article 22 paragraph (2) a quo law ;

Third, Article 28 paragraph (2) of the *a quo* law, in addition will cause price differences between regions / islands which, according to the Petitioners, can trigger national disintegration and social jealousy, also contrary to the practice of fuel price policy in each country where The government also regulates the price of fuel in accordance with the national energy and economic policies of each country, because the fuel commodity is not included in the WTO agenda. With regard to the arguments of the Petitioners referred to, the Court is of the opinion that the Government's intervention in the pricing policy must be the authority prioritized for production branches that are important and / or control the livelihood of many people. The government can consider many things in determining the price policy including the prices offered by the market mechanism. Article 28 paragraphs (2) and (3) the a quo law prioritizes competition mechanisms and only then does the Government's intervention involve certain groups of people, so that it does not guarantee the meaning of the principles of economic democracy as stipulated in Article 33 paragraph (4) of the 1945 Constitution, for prevent the emergence of strong practices that eat the weak. According to the Court, the price of domestic fuel oil and natural gas prices should be determined by the government by taking into account the interests of certain groups of people and considering the mechanism of fair and fair business competition. Therefore Article 28 paragraphs (2) and (3) must be declared contradictory to the 1945 Constitution.

Analysis on Indonesian Constitutional Court Decision

Based on the resume of the Republic of Indonesian Constitutional Court Decision Number 002 / PUU-I / 2003 above, the author agrees with the decision of the Republic of Indonesia's Constitutional Court which invalidates the provisions of Article 12 paragraph (3), 22 paragraph (1), and 28 paragraph (2) and (3) Law No. 22 of 2001 concerning Oil and Natural Gas. The following are some opinions of the authors

through various analyzes related to the decision of the Republic of Indonesia Constitutional Court, including the following:

First, Article 12 paragraph (3) of Law No. 22 of 2001 concerning Oil and Natural Gas, which reads "The Minister determines a Business Entity or Permanent Establishment that is authorized to carry out Exploration and Exploitation business activities in the Working Area as referred to in paragraph (2)". In the article there are words "empowered", which can be interpreted as devolution of authority from the giver of authority, namely the state, so that by the inclusion of the word "given authority to Business Entities and Permanent Establishments" the state control becomes reduced, and turns to parties investor. In this case it can be said that there has been privatization of the Oil and Gas natural resources sector, where the private sector has more control over Oil and Gas business than the State. Constitutionally, all natural wealth and production branches that control the livelihood of the public are controlled by the State and used to the greatest prosperity of the people, in accordance with the provisions of Article 33 paragraph (2) and (3) of the 1945 Constitution of the Republic of Indonesia.

Juridically, the authority in controlling natural resources of Oil and Gas is only controlled by the State and carried out by the Government as the executor of Oil and Gas business activities, in accordance with the provisions of Article 4 paragraph (1) and (2) Law No. 22 of 2001 concerning Oil and Natural Gas. The author argues that the provisions of Article 12 paragraph (3) of Law No. 22 of 2001 concerning Oil and Natural Gas is contrary to Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia, which reads "(2) Production branches that are important to the state and which affect the livelihood of many people are controlled by the state. (3) Earth and water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people ". Also contrary to the provisions of Article 4 paragraph (1) and (2) of Law No. 22 of 2001 concerning Oil and Gas, which reads "Oil and Gas as a non-renewable strategic natural resource contained in the Indonesian Mining Law Area are national assets controlled by the state. (2) The control by the state as referred to in paragraph (1) shall be held by the Government as the holder of the Mining Authority. Therefore, the provisions of Article 12 paragraph (3) of Law No. 22 of 2001 concerning Oil and Gas does not have binding legal force.

Second, Article 22 paragraph (1) of Law No. 22 of 2001 concerning Oil and Natural Gas which reads "Business Entities or Permanent Establishments must submit at most 25% (twenty five percent) of their shares from the production of Petroleum and / or Natural Gas to meet domestic needs". The words "at most 25%" can result in the Business Entity and Permanent Establishment not carrying out their responsibilities in the effort to fulfill domestic Oil and Gas needs.

Because if the words "at most 25%" are stated, Business Entities and Permanent Establishments can only give their share of the Oil and Gas production below the specified percentage, which is 25%. Or even Business Entities and Permanent Establishments can provide their share of the proceeds of Oil and Gas production in the Indonesian jurisdiction of 0.1% of the percentage specified in Article 22 paragraph (1) of Law No. 22 of 2001 concerning Oil and Natural Gas. If the provisions of the article are not canceled by the Constitutional Court,

it will have an impact on the scarcity of fuel in the country, because most of the oil and gas production is owned by business entities and permanent establishments, or even exported abroad by business entities and Permanent Establishment. But the author does not agree with the opinion of the Constitutional Court of the Republic of Indonesia which argues that the words "at most 25%" are changed to "at least 25%". The author argues that even though the words "at most 25%" are changed to "at least 25%", still not able to meet domestic fuel needs.

Because business entities and permanent establishments may only provide a percentage of their share of oil and gas production in the Indonesian jurisdiction of 25%. The author believes that 25% has not been able to meet domestic fuel needs. This has resulted in the author arguing that Article 22 paragraph (1) of Law No. 22 of 2001 concerning Oil and Natural Gas is contrary to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads "Earth and water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people". The results of Oil and Gas production in the Indonesian jurisdiction should be prioritized to the maximum extent possible for the fulfillment of domestic needs and the greatest prosperity of the people.

Third, Article 28 paragraph (2) and (3) Law No. 22 of 2001 concerning Oil and Natural Gas which reads "(2) The price of fuel oil and the price of natural gas is left to a fair and fair business competition mechanism. (3) The implementation of price policy as referred to in paragraph (2) does not reduce the Government's social responsibility towards certain groups of people ". The author agrees with the opinion of the Constitutional Court of the Republic of Indonesia which cancels the article, because the fuel price must be set by the Government to adjust the ability or purchasing power of the Indonesian people. Determination of fuel prices should not be left to the business competition mechanism, which means liberalizing oil and gas business activities in Indonesia. If the determination of fuel prices is left to the business competition mechanism, it will have an impact on high fuel prices and are difficult to reach by the ability or purchasing power of the Indonesian people. The author argues that Article 22 paragraph (2) and (3) of Law No. 22 of 2001 concerning Oil and Natural Gas is contrary to Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads "Branches of production which are important to the state and which control the livelihood of many people are controlled by the State". That the determination of fuel prices must be under the control of the Government as the executor of the State as the ruler of the production branches that control the livelihood of many people.

IV. CONCLUSIONS AND SUGGESTIONS

Based on the previous description, how many conclusions can be drawn are as follows:

It is submitted that to fulfill Article 33 of the 1945 Indonesian Constitution, the management of natural resourcesa, especially iol and gas should be controlled by State. The role of State in this regard is very crucial as envisaged in the 1945 Indonesian Constitution. This research finds that while the regulation on Oil and Gas business in Indonesia has experienced various changes, it is argued that the substance of the regulation in Law No. 22 of 2001 concerning Oil and Gas is contrary to Article 33 of the 1945 Constitution of the Republic of Indonesia.

This is reinforced by the Decision of the Constitutional Court of the Republic of Indonesia Number: 002 / PUU-I / 2003, which has canceled Article 12 paragraph (3), 22 paragraph (1), and 28 paragraphs (2) and (3) Law No. 22 of 2001 concerning Oil and Gas, because the substance of the legislation was judged to have liberalized business activities of the National Oil and Natural Gas, and decided to have violated Article 33 of the Constitution of Republic of Indonesia Year 1945. Another case as at the time of the enactment of Law No. 44 Prp of 1960 concerning Oil and Gas Mining and Law No. 8 of 1971 concerning the State Oil and Gas Mining Company in accordance with the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia.

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