



Politics of Law on the State Control of Oil and Gas in Indonesia: Gas Liberalization and the Hesitancy of Constitutional Court

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Abstract

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This study aims to examine in depth the legal political state control over oil and gas in Indonesia. This research is a normative law by secondary law. Based on the research can be argued that the existence of Act No. 22 of 2001 on Oil and Gas can't be separated from other state intervention. The substance oil and gas law dictation by IMF and USAID. Consequently oil and gas law is characterized by a liberal. It eliminates the mean of state control over oil and gas in Indonesia. The Constitutional Court as a judicial institution that is given the authority to judicial review of the constitution less did his part well. The Constitutional Court only eliminated some arrangements liberalization in the Act.

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INTRODUCTION

AT THIS TIME, it seems there is no country that does not need oil and gas. Oil and gas is an important component and determination of a country's economy. Oil and gas been a support almost every activity undertaken by the state, therefore it will determine control of the economy and the world political arena. With the strategic position of oil and gas, whereabouts is not only seen as an economic commodity submissive to the law of *supply and demands*, but also in the domain of economic policy between countries.

In the international arena, petroleum becomes strategic position due to the fact that increasingly depleted oil and gas reserves thinning in dependence of economic infrastructure and modern industry on oil as an energy source.² Data *US Department of Energy* states that energy consumption is projected to rise 71% from 2003 until 2030 with fossil fuels is ranked top especially petroleum as the primary energy source, followed by natural gas, coal etc.³ To illustration, world oil demand in 2003 is 80 million bph, up to 98 million bph in 2015 and will be 118 million bph on 2030.⁴ Based on the facts above, it is not wrong if put oil and gas as a commodity sensitive for grabs nations.

Indonesia is the country with the largest oil and gas reserves in Southeast Asia.⁵ According to data from the Ministry of Energy, until 2015 Indonesia has 60 hydrocarbon basins. 38 have been explored, while 22 others are still carried out exploration. Of basins have been explored, 16 basins already producing hydrocarbons, 9 basins have not produced even though it has been found hydrocarbon content, while the remaining 15 basins yet discovered hydrocarbon content⁶. Total basins owned by Indonesia is currently estimated to produce 87.22 billion barrels of oil and 594 , 43 trillion cubic feet of natural gas.⁷

In Indonesia, as in the international political economy, oil and gas has also become a major energy source in development as well as a mainstay in foreign exchange earnings.⁸ Besides important for the country, oil and gas has also become a necessity for almost the entire population of Indonesia. Therefore, oil and gas must be managed as well as possible to meet domestic needs and to provide the greatest welfare of the people. The mastery of basic constitutionally stipulated in Article 33 paragraph (2) and (3) which states:

² M. Kholid Syeirazi Kholid Syeirazi, M. 2009. *Di Bawah Bendera Asing: Liberalisasi Industri Migas di Indonesia*. Pustaka LP3ES, Jakarta. p. 30.

³ *Ibid.*

⁴ *Ibid.*, p. 31.

⁵ *Ibid.*, pp. 50-51.

⁶ Kementerian ESDM, *Peluang Investasi Migas di Indonesia*, <http://www.esdm.go.id/berita/artikel/56-artikel/4586-peluang-investasi-migas-di-indonesia.html> accessed on November 11, 2015.

⁷ *Ibid.*

⁸ *Ibid.*

- 1) Production branches which are important for the country and dominate the life of the people controlled by the state.
- 2) Earth and water and natural resources contained in it are controlled by the state and used for the people's welfare.

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.

In this study will be assessed on the liberalization regulation of oil and gas and How the Constitutional Court (MK) as an institution is given the function of keeping the constitution face the unconstitutional provisions.

LIBERALIZATION OF OIL AND GAS THROUGH LAW NUMBER 22 of 2001

IN 1997, the rupiah fell on the US Dollar. As a result, many banks lost, especially banks loans in foreign currency and does not hedge the loan. Rate volatility coupled with a worsening cash flow banks caused banks facing liquidity problems. It causes people to lose confidence in the bank, so to pull money massively. Consequently many of the banks to be closed are biased cause total paralysis economy.⁹ From the economic crisis Indonesia contracted by 14 percent and the rupiah climb very high to 14,800 rupiah per US dollar.¹⁰

As is financial crisis Indonesia again stuck in a circle of foreign debt as well as post 1965. To obtain debt Indonesia must meet the requirements proposed donors. Terms of the proposed time is to make efforts in economic liberalization either through legislation, privatization, removal of exclusive rights to a state enterprise, removing restrictions in international trade, removing restrictions on foreign capital in the businesses and the elimination of government subsidies to its people. Indonesia's main donors in the crisis of 1997 include the IMF, World Bank, ADB,¹¹ sectors were liberalized include oil and gas, electricity, water etc.

Agenda liberalization as a condition for obtaining a loan for example put forward by the IMF through a *Letter of Intense* (LoI) which started before

⁹ Bank Indonesia, 2010, *Krisis Global dan Penyelamatan Sistem Perbankan di Indonesia*, Bank Indonesia, Jakarta, p. 70.

¹⁰ M. Kholid Syaerazi, *Op.Cit.*, p.1.

¹¹ Syamsul Hadi dkk, 2012, *Kudeta Putih: Reformasi dan Pelembagaan Kepentingan Asing dalam Ekonomi Indonesia*, Jakarta, Indonesia Berdikari. pp. 42-44.

Suharto stepped down and passed on by further President. Especially for oil and gas LoI conducted in 2000, the *Memorandum of Economic and Financial Policies Medium-Term Strategy and Policies for 1999/2000 and 2000*. In this LoI matter mastery oil formulated in two chapters, namely the *Reform and Privatization of State-Owned Enterprises* and on *the Energy Sector*. In chapter reform and privatization, stipulated in point 72 in the LoI states:

The government does not plan to establish holding companies for public enterprises such as arrangements would dampen competition and slow privatization. Indeed, where Appropriate, the government will unbundle effective monopolies and encourage competition. Plans for restructuring Pertamina and PLN are being prepared and will be accelerated (see below). A strategy to improve the performance of other state monopolies, Including ports, airports, telecommunications, and toll roads, will be prepared by end-March 2000 with assistance from the AsDB and the World Bank.¹²

In the memorandum of understanding is clear that the IMF has asked Indonesia not to set up *holding companies* that are public. The government was also asked to slowly privatize state-owned companies has. For example, Pertamina as a state company that holds the entire Mining Authority, and monopolized the exploitation of oil and gas through the PSC should be deducted or removed most of their rights. Steps to make the management of state enterprises to follow private companies will soon be done at this liberalization effort in collaboration with the IMF with World Bank and AsDB.

In the chapter *The Energy Sector* agenda of economic liberalization that is specific to oil and gas in the MoU stated in points 80 to 82 which is the point in the reform of the governance of oil and gas, it is required to do Indonesia is to replace the law of oil and gas, ensure business upstream and downstream being competitive internationally, ensuring the price of oil and gas in the country in accordance with the international market, eliminate fuel subsidies, special subsidies for poor families (exampel direct cash assistance), Pertamina Transformation into a limited liability company, eliminating the monopoly Pertamina replaced by an independent agency to allocate contracts and overseeing exploration and production, the establishment of an independent agency to regulate the downstream sector, etc. All these provisions that must be included in legislation that the new oil.¹³

Indonesia as a country with an economy on the verge of destruction, once again subject to donor agencies such. Indonesia must comply with all

¹² IMF, Point 72 *Letter of Intens (LoI) Memorandum of Economic and Financial Policies Medium-Term Strategy and Policies for 1999/2000 and 2000*

<http://www.imf.org/external/np/loi/2000/idn/01/> accessed on December 11, 2015.

¹³ Point 80-82 *Ibid.*,

requirements of the clause in the memorandum of understanding and should include it in the rules of law. Government Regulation No. 44 of 1960 regarding Oil and Gas and the Law No. 8 of 1971 on Pertamina replaced by Act No. 22 of 2001 on Oil and Gas. An Act to remove the meaning of the state's control is not even designed by Indonesia. This Act is "orders" of America through USAID. This was recognized by USAID in the report which states:

USAID helped draft new oil and gas policy legislation is submitted to Parliament in October 2000. The legislation will increase of competition and efficiency by reducing the role of the state-owned oil company in exploration and production. A more efficient oil and gas sector will lower prices, increase of product quality for consumers, increase of government revenues, and improve water quality. USAID will continue to work on developing the implementing regulations for the oil and gas legislation.¹⁴

According to USAID Act is designed aiming to increase competition and efficiency in the oil and gas companies. Effort to achieve this is by reducing the role of the state oil company. USAID assistance designed not only in the manufacture of the Act only, but also in the implementation of rules and rule-making derivative. This confession clearly showed us how the interests of the American oil and gas industry in Indonesia.

With the involvement of USAID public should be angry, especially the liberalization efforts made to reduce subsidies and raise fuel prices as well. It is a policy that is unpopular and against the will of the people is still facing a crisis. Anticipating the possibility that upheaval, USAID poured funds amounting to US\$ 4 billion to the central and regional parliaments, non-governmental organizations, the media and universities to help smooth the early stages of liberalization. The funds will be used to develop programs related to the energy sector issues, including the removal of oil subsidy.¹⁵

To further safeguard and ensure the implementation of economic liberalization agenda Indonesia, USAID recognizes that the document has to intervene in the appointment of the managing director of Pertamina in 2000. The president director raised was a reformer who had a private orientation. This is done in order to expedite the reform agenda in the body Pertamina. In addition, the more important thing is the USAID expressed in all the above efforts carried out jointly with the World Bank and the Asian Development Bank.¹⁶

¹⁴ USAID, *Budget Justification to The Congress, Anex II Asia and The Near East*, http://pdf.usaid.gov/pdf_docs/PDABU805.pdf accessed on December 11, 2015.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The things above show that foreign intervention in an attempt to liberalize the oil and gas sector is very strong. The process of liberalization of the energy sector is waged with great scenario to seize control of oil from OPEC countries. Through liberalization, controls the world's oil will move to transnational, especially the US-flagged. This is logical given the advanced countries such as the United States is relying economies of the oil supply. Oil and gas sector liberalization and privatization not only cultivated in Indonesia but also in some oil-producing countries are others like Venezuela, Nigeria and Algeria, Iraq, Libya, Iran. Even more egregious, if regulatory liberalization efforts did not succeed then the choice is the United States and its allies did not hesitate to use military invasion.¹⁷

If in the Middle East and Latin American agenda aimed at the liberalization of the upstream sector in Indonesia is targeted more downstream sector. This is because most of these countries have huge oil reserves that attract industrialized countries. On the other hand, the downstream sector is not attractive because the population of the countries there is relatively little. By contrast in Indonesia, oil reserve to support the upstream sector is not as big as in countries of the Middle East and Latin America. Even the Indonesian oil and gas production had tended to decline and began to import oil to meet domestic demand. With a population of 220 million people, Indonesia is a lucrative oil and gas market. Therefore, the weakening of state companies that can't meet domestic demand, eliminating subsidies, the release of oil and gas prices in a perfect market competition is a priority of the liberalization agenda.¹⁸

In the national political level, effort to liberalize Indonesian economy is supported by the executive. The government has become a collaborator for foreign interests in Indonesia. The government filed after the bill twice to get the discussions with the Parliament. Filing after the bill first proposed in 1999 in the reign of BJ Habibie. The subject of the current bill is to reform the body Pertamina. The reason the government proposed is a monopoly Pertamina has led to inefficiency and a fertile field for corruption, collusion and nepotism. Because of that monopoly exploitation of oil and gas by Pertamina should be removed. Pertamina took competitors in pursuit of oil and gas. If the monopoly Pertamina trimmed, all companies can enter the competition and make production more efficient.¹⁹

Parliament rejected the bill on the grounds that harm the interests of the state and contrary to Article 33 of the Constitution Republic of Indonesia of 1945. Other than, Pertamina doing fierce resistance on the draft legislation. The reason for disapproval is due to oil and gas bill prefers free

¹⁷ Naomi Klein, 2008, *Shock Doctrine : The Rise of Disaster Capitalism* dalam Adrian Sutedi, *Hukum Pertambangan*. Sinar Grafika, Jakarta., p. 23.

¹⁸ M. Kholid Syaerazi, *Op.Cit.*, p. 211.

¹⁹ *Ibid* p 177.

markets and threaten the stability of availability of oil and fuel prices in Indonesia.²⁰ Thus oil and gas bill on first round failed to proceed into law.

In the reign of Abdurrahman Wahid, as a consequence of the signing of letter of intent with the IMF then he should apply for oil and gas bill to Parliament to grant the IMF and other donors can be availed. Volume II after the bill rests on the same thing, namely the liberalization of the oil and gas sector both upstream and downstream. Pertamina was subjected to disarm setting authority. In this second submission, the House did not directly criticize the government, but refused. Moreover, in order not repeated failures such as in oil and gas bill vol 1, the donors and multinational companies to press the government to replace President Director of Pertamina. Pertamina's new director is a former CEO at PT. Caltex Pacific Indonesia one of the companies Transnational oil and gas in Indonesia. A new director of Pertamina supports liberalization agenda in the oil and gas sector.²¹

The bill of act on oil and gas 2nd volume after the bill was originally obtained the views and attitude different from the House. Faction pro and cons of the substance of the bill is in the power balance. In the midst of the debate the discussion of oil and gas bill 2nd volume, a new scandal happened? Pertamina. The case concerns the *mark up* oil refineries projects Oriented Export Refinery (Exor I) in Balongan during the period January to December 2000. Such corruption committed by Tabarani Ismail former Pertamina processing director estimated state losses worth 1.7 trillion.²² With the condition it strengthens the pro arguments against the restructuring and abolition of monopoly Pertamina in Parliament. The pro liberalization of gas to get new ammunition for the argument broke party who does not want a market economy.

It is true there have been corruption, collusion 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 reports of financial book-keeping there are no reports on business operations so that Pertamina is like a state within a state. Due to lack of accountability and corruption in Pertamina, Pertamina in 1975, bankruptcy, debt dependents exceeds US\$ 10 billion, equivalent to 30% of Indonesia's GDP.²³

²⁰ M. Kholid Syaerazi, *Op.Cit.*, pp. 176-177.

²¹ *Ibid.*, hlm. 77.

²² M. Kholid Syaerazi. *Op.Cit.*, hlm. 179. See also, Antaranews, "Tabrani Ismail mulai disidangkan", <http://www.antaranews.com/berita/58779/tabrani-ismail-mulai-disidangkan> accessed on December 11, 2015.

²³ Rajeswary Ampalavanar Brown, "Indonesian Corporations, Cronyism, and Corruption", *Modern Asian Studies*, Vol. 40, No. 4 (Oct., 2006), p.964. See also Harold Crouch,

Finally, with a variety of political intrigue at the top of the liberalization of oil and gas in Indonesia managed to do even though the final stages of the legislation is accompanied *minderheidsnota*. If you examine the settings in Law Number 22 Year 2001 on Oil and Gas, the substance is not far from being dictated by the IMF, USAID, World Bank and Asian Development Bank. Oil and gas is no longer regarded as the country's economic capital is important and mastering lives of many people. Oil and gas market is seen as a commodity that should be subject to the laws of market liberalism. They are already deviated from the spirit of Article 33 of the Constitution Republic of Indonesia year 1945. Effort to achieve the greatest prosperity of the people is becoming increasingly distant from the fire roasted.

THE CONSTITUTIONAL COURT VERSUS LIBERALIZATION OF OIL AND GAS

THE CONSTITUTIONAL Court several times to review on Law No. 22 of 2001 on Oil and Gas. As a benchmark for understanding the political constellation of the oil and gas law, the Court gives meaning words that are controlled by the State of Article 33 paragraph (2) and (3) the Constitution NRI 1945 MK. Giving meaning controlled by the state court had first performed in Decision Number 001-021-022 / PUU-I / 2003 which tested the Law No. 20 Year 2002 on Electricity. The Court reiterated that the state authority comes from the people's sovereignty.²⁴ Opinion of the Court gained legitimacies in the philosophical level based on the theory of social contract. In this 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.²⁵ The above also explains the reason of state control instead earmarked for the country itself but rather to create the greatest welfare of the people.

Objects that are controlled by the State were classified by the constitution into two types. *First*, control of the production branch which is important for the state and live of many people. *Second*, is control on natural resources. Constitutional arrangements on the mastery of the production

"Generals and Business in Indonesia", *Pacific Affairs*, Vol. 48, No. 4 (Winter, 1975-1976). p.525.

²⁴ Constitutional Court Decision No. 001-021-022 / PUU-I / 2003 concerning Case Testing Act No. 20 of 2002 on Electricity of the Constitution NRI 1945, December 21, 2004, see also Case Decision Number 002 / PUU-I / 2003 Testing the Case concerning Act No. 22 of 2001 on Oil and Gas to the NRI Constitution of 1945, January 4, 2005.

²⁵ M. Laica Marzuki, "Konstitusi dan Konstitusionalisme", *Jurnal Konstitusi*, Vol. 7, No. 4, Agustus 2010, p. 2.

branch that is important for the state and lives of many people have valid normative power as follows:

1. The Constitution gives authority to the state to control the production branches which are important for the country and dominate the life of many
2. The authority addressed to them either to be or who have worked on the production of which is important for the country and that dominate the life of many. In the production branch that kind of production does not exist or will be cultivated, the type of production is important for the state and the life of many countries have the right priority / precedence that states pursue their own and the master branch of production and at the same time prohibits individuals or private to commercialize the production branch
3. In the branch of production which has been managed by individuals or private and that production is important for the state and lives of many people, on the authority granted by Article 33 paragraph (2) of the 1945 Constitution, the state can take over the production branch in a manner that is in accordance with the rules fair law.²⁶

While the constitutional arrangements on the state control over natural resources stipulate that overall natural resources of Indonesia in the form of the earth, water, air, and all the wealth contained therein controlled by the state.²⁷ This means that there is no segregation which should be controlled by the state and which are not.²⁸

From the meaning of the state's control by the Court in the above implies the permissibility of state monopoly in controlling the production branches which are important for the country and dominate the life of many. Such things can be seen from the opinion of the Court that provides privileged form of precedence in concession rights for the production of which branch of an existing or new production has not grown as well as providing the prohibition concessions for individuals or private. It thus further strengthened with the opinion of the Court concerning the permissibility of taking over the production branch cultivated or private individuals. Individual or private individual or a foreign first allowed to join exploits if the state has not been able to capital or the technology to do so. If the state is able to then it should

²⁶ Constitutional Court Decision No. 001-021-022 / PUU-I / 2003, *Ibid.*, p. 330.

²⁷ See Article 2 (1) of Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles (State Gazette of the Republic of Indonesia Year 1960 Number 104 Additional State Gazette No. 2043)

²⁸ In practice, these resources will separate those that must be done directly by the operation of the state and which may be handed over to the private sector. Between two objects is controlled by the state, is not always completely separate. There are times when a resource is classified as minerals that strategy for the country so as to qualify as a branch Oil and gas production is important and dominate the life of many people. It applies to oil and natural gas are natural resources as well as the production branches which are important for the state and dominate the life of many people.

be done alone for the results obtained optimal for realizing the greater welfare of the people.

Furthermore, the Court describes the authority of the state of the conception of the State's control which includes holding policy (*beleid*), acts of management (*bestuursdaad*), setting (*regelendaad*), management (*beheersdaad*) and supervision (*toezichthoudensdaad*) for the purpose of the prosperity of the people. Fifth those powers apply cumulatively, each of which can't be separated from each other. The cumulative imposition important to refute the government's view that says that the state's control interpreted as the state regulates (as regulator).²⁹ In the implementation of the authority's fifth MK elaborate as follows:

The maintenance of function of the State (*bestuursdaad*) provided by the government with authority to issue and revoke permission of facilities (*vergunning*), licenses (*licentie*) and concessions (*concessie*). The regulating of the country (*regelendaad*) is done through legislative authority by the Parliament and the Government, and regulation by the government. Management functions (*beheersdaad*) carried out through the ownership of shares (share-holding) and/or through direct involvement in the management of State-Owned Enterprises or State Owned legal entity as institutional instrument, through which the State, *cq* government, leveraging its control over the sources of wealth for used for the greatest prosperity of the people. Likewise, the function of oversight by the state (*toezichthoudensdaad*) conducted by the State, *cq* government, in order to monitor and control that exercise of control by the state over the resources in question really do for the greatest prosperity of the people.³⁰

The concept of mastery offered by the Constitutional Court confirms and complements the meaning that has been given by the BAL. Meaning by the Court about the State's control become a benchmark in each test laws that regulate oil and gas.

Although the Court has made the signs above, in practice some of the Court decision does not fully comply with these references. There are several contradictory things between these references with the decision of the Court in the subject of the petition. This applies also to the testing of oil and gas law. Thus the role of the Constitutional Court in the legal political state control over oil and gas are not optimal. For example in two Court decision that tested oil and gas law the Constitutional Court Decision Number 002/PUU-I/2003 and the decision of the Constitutional Court Number 36/PUU-X/2012. The two decisions have enormous influence and political

²⁹ Constitutional Court Decision No. 001-021-022 / PUU-I / 2003, *ibid.*, Pp 333-334. See also Case Decision Number 002 / PUU-I / 2003 concerning Testing Act number 22 of 2001 on Oil and Gas of the Constitution NRI 1945, *ibid.*, pp. 208-209.

³⁰ *Ibid.*

implications directly against the laws of state control over oil and gas in Indonesia.

In the first decision, the Applicant in this test almost simultaneously also examined the Law No. 20 Year 2002 on Electricity. The applicant's argument is built on two laws tested are exactly the same as that regulation is built on the principle of liberalization. In the concept of liberalization of the State's role is reduced, the remaining oil and gas industry and electrical power delivered to the market competition. State stands only as regulator meaning that State just only a *night-guard*. The act of electricity (electricity law) overall annulled by the Court by reason of the principle of *unbundling* as the main paradigm. That is a principle which separates the upstream and downstream business to be done by two different companies. Given this principle then each separate companies will create their own profit cost so that the price of the product will be expensive. Expensive electricity prices would burden the people. This violates the duty of the state to provide welfare.³¹

Unlike the case on the electricity law, the Oil and Gas law although also the principle of unbundling but not canceled by the Constitutional Court. No cancellation of the oil and gas law raises questions. The Court argued that the *unbundling* arrangements must be understood in order to avoid the centralization of control of oil and gas on the one hand so that it leads to monopolies that harm the public interest.³² This is contradictory to the opinion of the Court in the previous decision. Even contradict with other opinions in the decision. The Court was also recognizes the exploitation of oil and gas as a monopoly by the state. The Court stated:

However, the provisions of the Article must be interpreted as not applicable to business entities that have been owned by the state that actually should be empowered in order to become stronger state control. Article 61, which included the transitional provisions should be interpreted to mean that the transition is limited to the status of Pertamina to be such and does not abolish its existence as entities that are still conducting business activities upstream and downstream activities, although for the upstream and downstream activities shall be conducted by two Board Enterprises "Pertamina Upstream" and "Downstream Pertamina" both of which are still controlled by the state.³³

The Court stated that Pertamina should perform upstream and downstream activities. Unfortunately, in the conclusions of the Constitutional Court did not obey previous premises to become unsynchronized. Although Pertamina pursue upstream and downstream sectors, but the Court requires

³¹ Constitutional Court Decision No. 001-021-022 / PUU-I / 2003, *Ibid.*, p.350.

³² Decision on Case Number 002 / PUU-I / 2003, *Ibid.*, p. 225.

³³ Decision on Case Number 002 / PUU-I / 2003, *Ibid.*, p. 225.

the exploitation of upstream and downstream sector undertaken by two companies (a subsidiary of Pertamina) with a reason to avoid monopoly.

Upon the opinion of the Constitutional Court, the question is whether there should be no monopoly of oil and gas by the company? Based on the setting of Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Effort healthy, Monopoly allowed on activities related to the production branches which are important for the country and dominate the life of many people.³⁴ Of the electricity and oil and gas enter the category that should be monopolized by country. In addition, the prohibition of monopoly by requiring solving efforts to work on each of the sectors it violate a growing trend in the business of oil and gas in the world. Exxon and the car which is a separate company just merged. The two companies before the merger also have been integrated operations from upstream to downstream. This also applies to other multinational companies.

Besides failing to cancel the oil and gas law, the Court also maintains the settings on the appointment of non-SOE enterprises by BP Migas to sell oil and gas part of the PPP government. According to the applicant, it is susceptible to corruption in state losses. On this proposition, the Court stated are not authorized to assess the problems of combating corruption.³⁵ Has the maintenance of such arrangements sometimes made State control over the oil and gas is lost. Example of the loss of state control is tough cases gas sold by Beyond Petroleum to China with a very cheap price would be detrimental to the country.³⁶

Although the view of most of the judicial reviews contented MK failed to restore state control over the oil and gas that has been usurped by Act No. 22 of 2001 on Oil and Gas. Some things which the Court granted the judicial review of law *quo ie* cancellation of Article 12 paragraph (3) of the authorization of a business entity or a permanent establishment by the Minister; Article 28 paragraph (2) and (3) of the oil pricing mechanism to be submitted on the market; and Article 22 paragraph (1) of domestic marketing obligation (DMO) is able to provide little deterrence for the liberalization of oil and gas in Indonesia.

In connection with the cancellation of Article 12 paragraph (3) is the grant of authority from the government to the business entity or permanent establishment would eliminate state control. It passed away of meaning granting authority in the state administrative law means devolution of power

³⁴ See Article 51 of Law No. 5 of 1999 on Prohibition of Monopoly Practices and Unhealthy Effort (State Gazette of Indonesia Year 2003 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 4297) which states monopoly and centralization of activities related to the production and or marketing goods and or services that dominate the life of many well as production branches which are important for the state governed by law and organized by the state-Owned Enterprises and or body or institution established or designated by the Government.

³⁵ *Ibid.*,

³⁶ M. Kholid Syaerazi, *Op.Cit.*, p.199.

from the authority giver that country to another party to carry out this authority. This is opposed to the construction of the law established by the Act *a quo* which determines that the implementation of the right to control the country carried out by the government as the holder of mining rights.³⁷ Granting authority to businesses is tantamount to handing a mining concession to business actors. This will make Indonesia back to the concession of *indische mijnwet* system that has long resisted and abandoned. Cancellation of these provisions is appropriate by the Court to maintain control of the country.

Besides about empowerment Court also disagreed with Article 28 paragraph (2) and (3) the price of gas delivered to the market mechanism and limit government intervention limited to social responsibility for certain groups. The elucidation of Article 28 paragraph (3) explained that the social responsibility for the provision of special assistance in lieu of subsidies to certain consumers for the type of Fuel particular and the government set the natural gas pricing policy for household and small customers as well as the use of other specified. It is explains why the arrangement when fuel prices reduced the subsidies in 2006, the government made a direct cash assistance policy and seeks to convert from fuel oil to LPG. Construction will thus make the liberalization of the oil and gas more perfect.³⁸ With the opening of competition in the downstream sector and plus pricing through market mechanisms that benefit employers will be more than doubled. The community will bear the high price of fuel and the government must spend big to provide special assistance. By the Court, the liberalization of the oil prices thwarted by repealing the provisions of Article 28 paragraph (2) and (3). The Court found that the Government's intervention in pricing policies should be prioritized authority for the production of an important branch and / or dominate the life of many.³⁹

The last thing the Constitutional Court granted in this decision is the DMO. MK annul Article 22 paragraph (1) associated with the word "most". Of the word only establish a floor above without providing benchmark will be the lowest limit for the availability of oil and gas in the country. With only the top set limit, businesses could only deliver his share very little so most will be sold to the international market when the price is higher. It leads to the supply of oil and gas in the country forced the government to import less. Therefore, these provisions should be abolished because it is not in accordance with Article 33 of the Constitution NRI 1945.⁴⁰ And MK prediction proved rights, in 2004 Indonesia changed its status from a net importer and exporter in 2008 out of the OPEC membership. Had such provision is not canceled and the burden borne by the

³⁷ Decision on Case Number 002 / PUU-I / 2003, *Ibid*, p.222.

³⁸ See LoI Memorandum of Economic and Financial Policies Medium-Term Strategy and Policies for 1999/2000 and 2000

³⁹ Decision on Case Number 002 / PUU-I / 2003, *Ibid*, p.227.

⁴⁰ *Ibid.*, p. 231.

Government budget will be higher because it must import more oil and gas from the outside.

The Constitutional Court is the second discount enormous influence for the political state control over oil and gas law in Indonesia is the Constitutional Court's decision number 36 / PUU-X / 2012. In this ruling the Court cancelled BP Migas to provide construction in the upstream oil and gas concession contract and strengthen the role of SOEs. BP Migas was cancelled because its existence is to degrade the State's control. It is given in the regulation of Law Number 22 Year 2001 BP Migas is positioned as a representation of the state. As a representation of the state, BP Migas only give the function of control and supervision of the management of natural resources of oil and gas. The regulation in this case, the state government can not do directly over the management of natural resources

According to the Court in order to provide the greatest welfare of the people, if the five functions of state control can not be done then the whole state authority given levels. The first level and most important form of control over the country is the country doing direct management of natural resources, in this case oil and gas, so that the state benefit that is greater than the management of natural resources. The second level is the state policy making and handling, and function in a third country is the regulatory and supervisory functions. Throughout the country has a good ability of capital, technology, and management in managing the natural resources, the country should choose to undertake direct management of natural resources.⁴¹

The existence of BP Migas is functioning only as controllers and supervisors will further consequences First, the government can not directly manage or refer directly state-owned enterprises to manage all areas of work in the oil and gas upstream activities; Second, after BP Migas signed the PSC, then immediately also state bound to the entire contents of the PSC, which means, the state deprived of their liberty to make regulations or policies that conflict with the contents of the PSC; Third, not maximum profit for the state of welfare of the people, because of the potential for large gains control of oil and gas by Legal Forms Fixed or private legal entity which is based on the principle of fair competition, fair and transparent.⁴²

With the dissolution of BP Migas, the Court had to restore state control over oil and gas in appropriate conditions. In addition, the Court also keep the spirit of Article 33 of the Constitution Indonesia 1945 attack liberalism. MK remove one of the main core of the agenda of liberalization in the intervention by the IMF, World Bank etc.⁴³ With the dissolution of BP Migas country can realize energy sovereignty easier and the state is no longer in the shadow of the international lawsuit by the private sector if it violates the contract.

⁴¹ Constitutional Court Decision number 36/ PUU-X / 2012, *op.cit.*, p.101.

⁴² *Ibid*, p.101.

⁴³ IMF, *Loc.Cit.*,

The dissolution of BP Migas also correlates with the law regarding the construction contract for the development of oil and gas in Indonesia. During this contract scheme carried out by BP Migas is between the government and the private sector. In the contract, the state must adhere to the principles of the contract, even though the state provides the minimum requirements, namely: *i)* ownership of natural resources in the Government until the point of delivery, *ii)* management control operations are at BP Migas, and *iii)* capital and risks shall be borne by business entities or permanent establishments. Civil contract put both parties on an equal footing. If the state violates the contract, then the state can be defeated in court. Civil contract degrades the meaning of state control. Therefore, according to the Court the relationship between the state and private sector in the management of natural resources can not be done by the civil relationship, but will have a relationship that is public in the form of concessions or licensing is fully under control and state power.⁴⁴

With the dissolution of BP Migas and the abolition of contract scheme B to G then once the Court also strengthen the role of SOEs. SOE will be positioned as an arm of government in managing oil and gas. It is first and foremost in the level of state control. SOE as its foundation will be given permission management or concession or other public relations of the country, while the mining rights retained by the government. If SOEs have not been able to do it yourself then SOE can enter into contracts with other parties. Contracts are not B to G anymore but B to B, among fellow business entities. With this construction, the state authority would be perfect. Countries can perform all of its functions in the control over production branches that are important and dominate the life of many people and control over natural resources simultaneously.

If you look at these decisions, the Court did not frontally strong efforts in the legal political state control over oil and gas in Indonesia. But it should be appreciated that from one decision to another decision which will be illustrated how such efforts do. Sometimes it is done as a political strategy so that countries do not face international pressures. As well as giving the decision number 002/PUU-I/2003, if the Court cremates to cancel the entire law as the Law of Electricity, the credibility of the government and the state in the eyes of businesses, investors, professionals and stakeholders will be destroyed and will cancel the contract worth billions of dollars that have been signed.⁴⁵ It certainly would make Indonesia slumped after the economic crisis. Things should be appreciated in the role of the Court in several decisions of the Constitutional Court Consistent is to gradually restore the meaning of state control.

⁴⁴ Constitutional Court Decision number 36 / PUU-X / 2012, *op.cit.*, pp.109-110.

⁴⁵ M. Kholid Syaerazi, *Op.Cit.*, p. 204.

CONCLUSION

GIVEN the liberalization agenda as evidenced by the Constitutional Court ruling on Act No. 22 of 2001 on Oil and Gas Act should be replaced. In forming oil and gas law to forward that should be the only guideline is the Constitution NRI 1945. This Act should follow up any decision of the Constitutional Court so that in the future does not end with the cancellation. The focus in the regulation should not only on control by the State, even more important is to be able to provide appropriate welfare of people who aspired by the State.

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Law Adagium

**DORMIUNT ALIQUANDO
LEGES, NUNQUAM
MORIUNTUR**

Laws sometimes sleep but
never die