

THE AUTHORITY OF GOVERNMENT AND PT PERTAMINA ON THE PRICING OF 12-KG LPG

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Abstract

In 2004, the price of 12-kg LPG in Indonesia fluctuated within a week. According to BPK report between 2011 and 2012, Pertamina lose 77 Trillion rupiahs in LPG sales. As a state-owned company, Pertamina decided to increase the LPG price up to 68% from the current price. The government acts to regulate the LPG price twice in a week resulting in a huge margin for agent and consumer. However, it is clearly interesting to see the boundaries of authority between PT Pertamina and Government in pricing 12-kg LPG for people. The Ministerial Regulation of Energy and Mineral Resources No.26 year 2009 should be revised as it is against the above regulation or '*lex posteriori derogat legi inferiori*'. The regulation against this regulation includes Act No. 22 year 2001, In accordance to all of the regulations mentioned here, government should regulate things with effect on many people needs in society. This research aims to analyze how is the government's responsibility on public interest and people live. And basically, the state is responsible to concern on what its people need in order to conduct a competitive economy.

Keywords

LPG, Pertamina, Government

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Introduction

The role of government is not only maintaining the societal order, but also responsible to participate in every facet of people live, as mentioned in the national mission at the fourth paragraph of the preamble of the Constitution 1945 (i.e., UUD 1945), that, therefore, to create the government of Indonesia, "Pursuant to which, in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nations's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice" (Ibrahim 1997).

The state's participation in national development and economy is encouraged based on the provision as mentioned in UUD 1945 at Article 33 that : (1) the economy shall be organized as a common endeavour based upon the principles of the family system, (2) Sectors of production which are important for the country and affect the life of the people shall be under the power of the State, (3) The land, the water, and the natural resources within shall be under the power of the State and shall be used to the greatest benefit of the people.

Article 33 of UUD 1945 does not intend that every sector of existing production or of potential ones may or should be under the power of the state, but only those for public interests and public life to reach as much as people welfare. The politic of governmental policy in economy tends to give roles toward state-owned companies as the *leading and commanding position*, making them have more strategic position rather than private ones. State-owned companies develop and turn into the power of national economy, yet with not quite good and professional management. Some existing state-owned companies are bankrupt, and even have to sell their assets for employees' wage.

In 2014, there was a turbulence on Pertamina's 12-kg LPG pricing which fluctuation reached 2 times a week. As we know, PT Pertamina (Persero) has a strong power in Indonesia, as it is the only company selling natural gas such as LPG. On July 2013, the Director of LPG and Gas Products of Pertamina, Gigih Wahyu Hari Irianto, planned to gradually raise the price of 12-kg LPG up to 10-20%, until the Ied moment. On August 2013, The Minister of Energy and Natural Resource, Jero Wacik, refused the plan by considering that the government just raised up the price of subsidized gasoline.

On the other hand, the Minister of Economy Coordinator, Hatta Rajasa, on October 2013, argued that the right time to raise up the price of 12-kg packed LPG was 2014, by considering that the economy in 2014 was likely to be more stable rather than 2013 (<http://www.tempo.co>, 2014). By 1st January 2014, PT Pertamina (Persero) finally defined the new price for 12-kg packed LPG up to Rp 3.959 /kg at average or up to 68%. This policy was due to the inflation of dollar currency and the global cost of LPG acquisition that has reached Rp 10.785/kg. The amount of price increment varies based on the space between SPBBE and the point (<http://www.pks.or.id>, 2014). The previous price of 12-kg packed LPG was Rp 70.200/pack, and it turned into Rp 117.708/pack

This policy followed up the recommendation of BPK (i.e., Financial Audit Board) on its report by February 2013 that PT Pertamina (Persero) beard a loss on non-subsidized LPG

between 2011 and October 2012 up to Rp 7.73 trillion. It assumed that this loss was the antecedent of national loss (<http://www.pertamina.com>, 2014). This mark-up policy was justified by the Minister of Economy Coordinator, Hatta Rahasa that the act of marking up non-subsidized 12-kg packed LPG price was under the authority of PT Pertamina (Persero), although the government acts as the primary stockholder (<http://www.bbc.co.uk>, 2014)

Five days after the mark-up, the government announced to mark down the price with only raising it up to 10% of the previous price before the mark-up established. This policy was enacted by the government by referring to the Resolution of Constitutional Court No. 002/PUU-I/2003 as the result of *judicial review* of Act No. 22 Year 2001 about Oil and Natural Gas (later known as Act No. 22/2001) that this regulation is against the Constitution 1945, particularly Article 28 subsection (2) which puts the price of refined fuel oil and natural gas into a fair and sound mechanism of business competition.

The Constitutional Court finally stated that the price of refined fuel oil and natural gas was defined by government. This statement is supported by the establishment of an implementation provision of Act No. 22/2001 and the Resolution of Constitutional Court No. 002/PUU-I/2003, in term of Governmental Regulation of the Republic of Indonesia No. 30 Year 2009 (later known as PP No. 30.2009) about the Amendment of Governmental Regulation No. 36 Year 2004 (later known as PP No. 36/2004) about Oil and Natural Gas Downstream Business. Article 72 of this regulation mentions, "The price of Refine Fuel Oil and Natural Gas is defined by Government."

Therefore, several research problems reveal, including: How is the government's responsibility on public interest and people live? And How is the authority of the government and PT Pertamina (Persero) in pricing 12-kg packed LPG?

Research Method

This study is a juridical-normative research which aimed to examine the legislation and applied regulations along with the literatures of theoretical concepts associated to the discussed problems. It sought to find the legal provision, legal principles, and legal doctrines in order to address current legal issues (Marzuki, 2009: 35). This study used two approaches; statute approach and case approach. The former was aimed to examine every act and regulation related to the discussed legal issue, and the later was aimed to complete the analysis by reviewing some cases related to the discussed issue. This approach was analytical as it analyzed the *ratio decidendi* of the Constitutional Court's resolution in *judicial review* against Act No. 22/2001. In addition, conceptual approach was aimed to see the perspectives and doctrines in legal science (Marzuki, 2009: 95).

The legal resources are classified into two categories; primary and secondary. The primary legal resource is useful to analyze the research problems of this study, as it contains relevant regulations such as Act No. 5 Year 1999 about the Prohibition of Monopoli and unfair business rivalry, Act No. 22 Year 2001 about Oil and Natural Gas, the Constitutional Court Resolution No. 002/PUU-I/2003 about *Judicial Review* of Act No. 22 Year 2001, Act No. 19 Year 2003 about State-Owned Companies, Governmental Regulation No. 36 Year 2004 about Oil and Natural Gas Downstream Business, Governmental Regulation No. 30 Year 2009

about the Amendment of Governmental Regulation No. 36 year 2004 about Oil and Natural Gas Downstream Business, Presidential Regulation of the Republic of Indonesia No. 104 Year 2007 about the Supply, Distribution, and Pricing of 3-kg packed LPG, the Ministerial Regulation of Energy and Mineral Resource No. 26 Year 2009 about the Supply and Distribution of *Liquefied Petroleum Gas*, and Civil Code. The secondary legal resources refer to literatures of law, law dictionary, journals, and articles in legal field, as well as the other supporting sources as like internet.

The legal substance of this study was analyzed using descriptive method which described the legal norms, the collected and processed data based on deductive syllogism; the collected legal materials was analyzed in general way in prior to making a specific conclusion. Those legal regulations was associated to the discussed issues, and discussed through conception, description, interpretation, and analysis in order to figure out a very clear depiction on synchroized level of the existing legal material. The result would be considered as a conclusion to address the existing problems.

Result and Discussion

The Criteria of Public Interest

The aspect of public interest is considered important to understand. It has various definitions. Looking into the presence of rights and responsibility embedded to public, it has three terms, as follow (Ibrahim,1997:20).

- *Public Service*; services to public needs, and it should be well fulfilled and satisfying as a part of public rights. Public facilities and convenience is the rights and responsibility to public interest.
- *Public Utilities*; serving commodity and services for public facilities based on the principles and the essence of authorization for the sake of public interest, and thus, the facilities and services belong to public rights.
- *Public Interest Law*, services for the sake of public interest and benefits based on charity.

The attainment of successfulness on public interest is apparent in four theories as follow (Atmosudirdjo, 1995:28).

- Theory of tranquility, the primary public interest is safe and tranquil living.
- Theory of welfare, welfare is another primary needs for public, with as cheap as price for foods, medication, and work opportunity.
- Theory of efficiency of life. With this theory, public prosperity and productivity may keep increasing.
- Theory of mutual prosperity. It is public interest on happiness, mutual prosperity, and thus, any social tension should be well controlled.

The explanation of those four theories shows that public interest involves the attainment of feeling safe in life which makes people may comply with their primary needs. Those are the needs that people expected to reach easily and efficiently, and give them mutual happiness and prosperity without any dangerous gaps between the rich and the poor. Following the explanation on the previous sections about the provision of LPG and the criteria of public interest, it seems that, currently, LPG is considered as one of the very fundamental needs and it turns into general stipulation from many people across level.

In prior to the huge conversion of kerosene in 2007, the people of Indonesia still recognized it as another alternative fuel instead of LPG. Its utilization in that time depended not only on LPG, but also another substitutive goods such as kerosene before a conversion that consisted of 10% for the very poor, 10% for the poor, 50% for the moderate, and 20% for the rich (<http://www.esdm.com>,2014). On the other hand, the shift to LPG may reveal another issue.

Government's Responsibility on Public Interest and People Live

A turbulence on the pricing of LPG by PT Pertamina (Persero) on the early of this year makes many societal parties argue on the absolute authority of this red-plat company on the management of this state's Oil and Natural Gas. On a general discussion entitled *Gas Alam untuk Rakyat* (9/1), the former Minister of Economy Coordinator in the era of President Adurrahman Wahid, Rizal Ramli, argued that: Government should open the faucet for oil and natural gas management, in particular to LPG to the other state-owned companies in order to create a fair competition and transparency. Years ago, the government forced people to use gas. However, PT Pertamina marked up the price unilaterally. It was like not allowing people to select. LPG turned into people primary needs. Therefore, the price may not be attached to the mechanism of market (<http://www.suarapembaruan.com>, 2014).

Many responses reveal, not only from the Minister of Economy, but also from others. many of them deplored the decision that PT Pertamina (Persero) and the government made on LPG pricing. On similar occasion, the member of committee VII of the legislative assembly RI, Effendi Simboloj also argued, "I is very dangerous if organizing a state based on the economy of no choice, through which people have no option. The management of LPG is not transparent, including the issue of distribution. As the result, people should bear a big burdern."

The government's role on addressing the issue of the price changes of 12-kg packed LPG turns into a problematic issue in Indonesia. the government's authority on LPG pricing is crucial, as the biggest oil and natural gas company has changed the price based on their own policy. People have no option for the pricing, since LPG produced by PT Pertamina (Persero) is the only one in Indonesia. Toward this issue, the Constitutional Court (later called MK) has decided on Judicial Review Act No. 22/2001, that: "Oil and natural gas are the unrenewable strategic natural resources under the power of the state, and it is a vital commodity for people live and hold an important role in national economy, and thus the management should be optimal providing welfare and prosperity for the people."

Therefore, the Constitutional Court inferred that the government and the legislative assembly, as ones organized under the Constitution, have an authority to enact regulations by considering that oil and natural gas are two vital products for people live, and thus should be under the government's authority and utilized as much as the people welfare. This statement indicates that LPG is vital for people live.

The Authority of PT. Pertamina (Persero) on the Pricing of 12-kg LPG

PT. Pertamina (Persero) is a state-owned company in energy sector including oil and gas, as well as the new and renewable ones. This company was held on 10th December 1957 named PT Pertamina (Persero) with a mission to organize an integrated business of oil, natural gas, and the new and renewable ones based on a strong commercial principle (<http://pertamina.com>,2014). PT. Pertamina (Persero) runs its function as the management of oil and natural gas based on the provision of Article 33 of the Constitution 1945. However, this article does not intend that every existing and/or potential production facet should or shall be under the power of the state, but only those that relate to public interest and people live (Ibrahim, 1997: 2). Natural gas packed in the form of LPG is one example of public needs that relates to people live, thus, the pricing may not burden the people.

Article 28 of Act No. 22/2001 mentions that the price of oil and natural gas is based on a fair business play, that: "(2) the price of refined fuel oil and natural gas refer to the mechanism of fairplay. (3) The implementation of pricing policy as mentioned in subsection (2) does not alleviate the government's social responsibility on particular group of people." The subsection (2) mentions that the price of natural gas refers to the mechanism of business fairplay, and this is not yet fulfilled by the sales of LPG in Indonesia. As hat previously explained, PT Pertamina (Persero) has no rival on LPG, and thus, a non-fair selling may be likely to happen in this business.

Government's Authority on the Pricing of 12-kg LPG

The pricing of LPG under the government's authority is mentioned in Article 72 of Governmental Regulation No. 30//2009 that "The price of refined fuel oil and natural gas is set and/or define by the government." This article clearly explains that the pricing of refine fuel oil and natura gas (e.g., LPG) is under the government's policy, and thus, the government has an important role on LPG pricing.

This Governmental Regulation on Oil and Natural Gas in 2009 is different from the perspective of the Ministerial Regulation of Energy and Mineral Resources No. 26/2009, legally established 6 month after the enactment of Governmental Regulation No. 30/2009. This Ministerial Regulation rules the pricing of LPG in more detail based on its classification. Article 24 of this regulation mentions the pricing of LPG for particular users, including: (1) The price of LPG for particular users as mentioned in Article 23 consists of the standard price of particular LPG and the price of particular LPG in retail; (2) The standard price of particular LPG as mentioned in the subsection (1) is based on the standard one defined by the Minister; (3) The price of particular LPG, as mentioned in subsection (1), is defined by the Minister based on the consent from the related instances coordinated by the Minister of Economy Coordinator, and it corresponds to the provision of Law.

Particular LPG, known as 3-kg subsidized LPG, as what the article has mentioned, is based on the standard price defined by the Minister. The policy from the Minister of Energy and Mineral Resource on the previous conference was coordinated with the Minister of Economy Coordinator, and PT Pertamina (Persero) as the management company. Thus, the pricing of 3-kg LPG in retail is clearly under the direct authority of the government.

The Analysis of Settlement on the Contradiction of Legal Regulation

Some regulation, as previously discussed above, show the basic difference on the authority of the government and its management company (i.e., PT Pertamina [Persero]) on the pricing of 12-kg LPG. Based on Act No. 12 Year 2011 (later called Act No. 12/2011) on Legislation, it shows the hierarchy of regulation for this issue. Article 7 subsection (1) of Act N. 12/2011 mentions: “(1) the kinds and hierarchy of Law consist of a. The Constitution of the Republic of Indonesia 1945; b) the Decree of People Consultative Assembly; c) Government Regulation in Lieu of Law; d) Governmental Regulation; e) Presidential Regulation; f) Provincial Regulation; and g) Local Regulation.”

In addition to those all regulations, the other regulations mentioned in Article 8 of Act No. 12/2001 are the parts of legal regulation as well, including: (1). The kinds of Regulation in addition to what have been mentioned in Article 7 subsection (1) include any regulation by People Consultative Assembly, Legislative Assembly, Local Assembly, the Supreme Court, Financial Audit, Judicial committee, Bank Indonesia, Ministers, institutions, or the relevant committee under the law or government’s order on behalf of the Law, Provincial Legislative Assembly, Local Legislative Assembly, Regencies, Regents, Local Head or the equivalents; (2) The legal regulations mentioned in the subsection (1) is recognized and it has a binding legal power as long as it is under the order of higher regulations or based on particular authority.”

The legal setting has the principles of law related to those all regulations, known as the principle of *Lex Superiori Derogate Legi Inferiori* that the higher-level law may ignore or put aside the lower-level law. The Ministerial Regulation No. 26/2009 is found against the higher regulation. Based on this principle, thus, the ministerial regulation is ignored by the higher regulation. Therefore, it shows that 12-kg LPG is a vital need and it controls people live, hence, it should be seen that it is under the government’s authority. This authority refers to pricing 12-kg LPG under the government’s policy. It is the government’s responsibility to maintain the prosperity of the people.

Conclusion

1. The result of *judicial review* shows that the mechanism of LPG sale put on business fairplay as mentioned in Article 28 subsection (2) of Act No. 22/2001 is considered having no binding legal power. Therefore, the government, based on the statement of Constitutional Court, has higher responsibility to seek for solution for LPG pricing. Given that LPG is a vital need for many people currently. Basically, the state is responsible to concern on what its people need in order to conduct a competitive economy.

2. PT Pertamina (Persero) was found wrong on defining the price as it used the Ministerial Regulation of Energy and Mineral Resource No. 26/2009. This regulation is against another higher regulation, and it is called the principle of *Lex Superiori Derogate Legi Inferiori*. Based on this principle, therefore, that ministerial regulation is ignored by its higher regulation, including Act No. 22/2001, Governmental Regulation No. 30/2009, through which the pricing of LPG is under the government's authority by considering that LPG is vital for people live, although the consumers for this 12-kg LPG are those in high level, as well as the subject of micro businesses.

References

- Ibrahim R. (1997). *Prospek BUMN dan Kepentingan Umum*. Bandung : Citra Aditya Bakti.
- Marzuki, Peter Mahmud. (2009). *Penelitian Hukum*, Cet. V. Jakarta : Kencana Prenada Media Group.
- Prajudi Atmosudirdjo (1995), *Hukum Administrasi Negara*, Jakarta: Ghalia Indonesia.
- Tafsir MK atas Pasal 33 UUD 1945 : (Studi atas Putusan MK mengenai Judicial Review UU No. 22/2001", *Jurnal Konstitusi*, Vol.7, Nomor 1, Edisi Februari 2010.
- The Resolution of Constitutional Court No. 002/PUU-I/2003 on judicial review of Act No. 22/2001.

Internet

- <http://www.tempo.co>. 'Pejabat Plin Plan Soal Harga Gas'
- <http://www.pks.or.id>. 'Kenaikan Harga LPG Pemerintah Harus Buat Mekanisme dan Terobosan'
- <http://www.pertamina.com>. 'Sesuaikan Harga Elpiji Non Subsidi 12kg, Pertamina Jalankan Kebijakan Korporasi'
- <http://www.bbc.co.uk>. 'Elpiji Price'
- <http://www.esdm.com>. 'Konversi Minyak Tanah ke LPG : Menggerakkan Perekonomian, Menghemat Energi'
- <http://www.suarapembaruan.com>. 'Sudah Waktunya Monopoli Pertamina Dihapus'

Laws and Regulations

- The Constitution 1945
- Act No. 22/2001 on Oil and Natural Gas.
- Act No. 19/2003 on State-Owned Company.
- Act No. 15/2006 on National Audit of Finance.
- Government Regulation No. 36/2004 on Oil and Natural Gas downstream Business.

Government Regulation No. 30/2009 about the Amendment of Government Regulation No. 36/2004 about Oil and Natural Gas downstream Business.

Presidential Regulation No. 104/2007 about the Supply, Distribution, and Pricing of 3-kg LPG.

Ministerial Regulation of Energy and Mineral Resource No. 26/2006 about the Supply and Distribution, of *Liquefied Petroleum Gas*.