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ADAPTATION OF CONTRACT MODELS OF OIL AND GAS: A COMPARATIVE STUDY

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Abstract

Differences in law systems, constitution, legislation, and regimes in oil and gas business across the world enforce to have a comparative study by extending laws in oil and gas. It is, from global perspective, implemented a constant demand to the law to take essentialization categories as its base. Nature required universalism, an analysis of valid and constant law sifted toward cosmopolitan law. Manifestation of globalization was transformed and corresponded to natural regulations in adapting a contract model. Oil and gas and its exploring development within global law systems included Civil Law, Common Law, Socialist Law, Scandinavia Law, and Islamic Law. Important discoveries in oil and gas sector, therefore, might have changes by universally global cosmopolitan law.

Keywords

investment, constitution of nation, oil and gas contract, natural resource

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Introduction

Oil and gas are identified as universally primary energy resources up to several further decades rather than any other energy resources such as solar, geothermal, nuclear, hydraulic, and wind (Almada and Parente, 2013). The use of sophisticated technologies, skillful human resources, high capital, and high risks to do exploration and production made countries, particularly developing countries invited developed countries to have Foreign Direct Investement (Zaidun, 2005; Subedi, 2008; Dolzer and Schreuerm 2011). At the same time, as investors, developed countries required legal instruments ensuring and binding developing countries to secure their investments. Following that, developed and developing countries addressed the deal in a common instrument called Bilateral Investment Treaties (Voss, 2011; Hofbaver, 2013; Kusnowibowo, 2013).

Three fundamental pillars in oil and gas sector business, from investors' perspectives, included: 1) it is foreign investors' rights, when findings are found, to have profitable investment; 2) stability of oil and gas contract; and 3) rights to access to international arbitration (Lubiantara , 2012). It is likely to cancel any investment planning when one of those pillars was not fulfilled. Given that this sector brings significant incomes to sustain development, it needs multinational companies, both National Oil Companies (NOCs) and International Oil Companies (IOCs) to participate (Marcel, 2006; Machmud, 2000).

In regard to developing international instruments, oil producing countries could not avoid the impact of Free Trade Agreements (FTAs) beyond boundaries of the countries called Agreement on Trade-Related Investment Measure (TRIMs) held by World Trade Organization (WTO). TRIMs is an international instrument publicly created by people around the world through General Agreement on Tariffs and Tra (Lubiantara, 2006; Machmud, 2000).

Following that, in order to provide a legal foundation, the government established Law Number 22, 2001 on oil and gas, government gazette 2001, Number 136. Additional government gazette, Number 4152, 'Law for oil and gas;). Mining rights in regulation for natural oil and gas was by the government of the country based on Article 4, act (1) and (2) by the Minister of energy and mineral resources whose authority was given toward businessmen under Article 1, act (5) and Article 12, act (3). Following judicial court ruling on regulation for natural oil and gas, the relationship between state and private in governing oil and gas resources could not refer to a civil relation, however, it

is a public relationship, which providing concession or licensing fully under the state's control and governance.

The analysis of significance in this study was reflexivity toward a philosophical repertoire of the state's sovereignty over oil and gas resources that develop. The characteristics of law for natural oil and gas are on its interdisciplinary approach. Other disciplines on laws are necessary to understand this legal context in comprehensive manner. This legal context relates to property laws, international maritime laws, contract laws, constitution laws, investment laws, international laws, and Islam laws. The primary question of this paper was then elaborated into a regime of contract models for oil and gas, and a governance rights for oil and gas resources in various constitutions across the globe.

International Relationship in Oil and Gas Resource Governance

Philosophy of 4A as a key element to reinforce and secure the state's sovereignty over natural oil and gas wealth in international relationship included: 1) *Availability,* the physical availability of potential oil and gas stocks and its amount for commercial in proper and accurate time; 2) *Accessibility,* the access to oil and gas resources; 3) *Affordability*, the price for oil and gas is affordable; and 4) *Acceptability*, it refers to the acceptable quality.

The competence to have international relationships in oil and gas governance suggested a fact that a state is identified as subject of international laws. States as law actors contributed for international laws. In juridical practices, states are identified as actors with "Duty on State" responsibility. This literally illustrates the scope and substance of international law.

Deriving from international relationships, states were seen as the only subjects of international laws. In a line with practical approach, international people might increase due to historical development and international people's needs. Identifying states as subjects of international laws was a kind of progress in developing international laws. States are new pages of the globe's history which promise glory for international laws and open a new firmament.

The origin of international relationship in commercial scale was tracked by catalog works displaying perfect essays and providing information about the relationship between the Western, Eastern, Northern, and Southern, particularly in diplomatic, international business transactions, and military context. Such international

relationships were held among Eastern countries and followed by several countries in America.

Westerns, through diplomatic relationships, developed some principles of international laws. At that time, international laws were based on interests among countries. Compared with other laws, a discipline on international Islam laws were considered more proper across countries. One of those was Turkey, in maintaining the relationship with South East Asia (Menski, 2015).

Cooperation among Turk businessmen followed Muslims' paths of Arab, Persia, and India in having business transactions with West Asia and Chinese after Seljuk rules were prevailed in West Asia in the Middle Ages of 12nd decade. A monumental work "*Portugaliae Monumental Cartographica*" described Portuguese's attempts to search for "*Black Gold*" (Gold Island) which reinforced them to explore Asia in Middle Ages (Cortesao and Mota, 1960).

Islamic empire, in middle ages, had the world biggest marine which remained popular until recent day. Moslems had successfully made progress in science and weapons. Moslems' marines ruled for Atlantic Ocean, from Spain's beach in north area to the west reaching Africa in south area. In addition, the marines ruled for Chinese sea, Pacific Ocean, Read sea, and India sea.

International business transactions Moslems had included far-away countries overseas, such as Spain, Philippine, France, Japan, and Korea. Mediated by Europe, the business transactions had successfully reached Sweden, Norway, Britain, and further headed to North Africa and Siberia.

Global Upstream Investment of Oil and Gas

Upstream investment climate for oil and gas related to the core of regulation on capital investment. Upstream investment for oil and gas constituted a unique investment conducted by NOCs-IOCs which both had broad international networks (The Ministry of Energy and Mineral Resources, 2016). To provide a conducive climate for oil and gas upstream investment, foreign investors should be equally treated without any race-discriminations.

In order to ensure and create security for investment, countries across the globe provided a legal security for foreign investors' invested capital. For states which were identified as subjects of international laws and as parts of international community, a demand for such investment security did not solely referred to ethics and standards

within international relationship, but also referred to embedded responsibilities for every country based on common prevailing practices in association and economics relationship among countries (Kusnowibowo, 2013).

In governance context, a nation's interest to have PIB agreement basically constituted a part of public policy, and in international relationship context, such agreement and establishment of PIB were identified as a part of diplomacy among countries in order to develop foreign economic relationships. PIB dealt by two countries should be guided by national interests and based on the principles of equality, mutual benefits, and caring, both in prevailing national laws an international laws (2011).

Agreement for bilateral investments manifested in the form of treaty was a part of enforcing national economic and considered as an attempt to improve national economic growth, create jobs, improving sustainable economic growth, increasing capacity and competence of national technology, reinforcing populist economic development, and realizing community well-being in a competitive economic system.

Indonesia government had ever been involved in 6 (six) investment disputes in International Centre for The Settlement of Investment Disputes ("ICSID"). Those included Amco Asia Corporation and others v. Republic of Indonesia (1980), Cemex Asia Holdings Ltd v. Republic of Indonesia (2004), Kalimantan Timur v. Kalimantan Prima Coal (2007), Rafat Ali Rizvi v. Republic of Indonesia (2011), Churchill Mining Plc and Planet Mining Pty v. Republic of Indonesia (2012), Nusa Tenggara Partnership B.V and PT. Newmont Nusa Tenggara v. Republic of Indonesia (2014) (Huala Adolf and An An Chandrawulan, 2015), Countries across the globe set ways through which they overcome any disputes dealing with oil and gas upstream. In Article 22 The PSA Law of Russia, ways of overcoming disputes were set between Russian government and investors in implementing PSA. Dispute resolution was through Russian court or arbitration domiciled in Paris. The International Chamber of Commerce ("ICC"). Article 29 Model Offshore PSA Pakistan was determined by two patterns in their dispute resolution, which included conciliation and arbitration (Adolf and Chandrawulan, 2005).

Dispute resolution through conciliation was also set under Article 33, act (1) UN charter and ICC. Article 29.1-29.2 Model Offshore PSA Pakistan mentioned that parties would take the best way to peacefully resolve any disputes, compensation, different arguments on terminology, interpretation and implementation of contracts. Dispute resolutions through arbitration was set in Article 29.3-29.5 Model Offshore PSA

Pakistan, including ICSID and The Rules of Arbitration of the International Chamber of Commerce, as well as Article 21 PSC Ecuador, Petro-Ecuador was resolved by mediation and arbitration. In lndonesia laws for oil and gas, it did not mention any article addressing dispute resolution. Patterns of dispute resolutions were formulated in KKS (PSC).

Dispute resolution through arbitration agencies provided ease in terms of freedom, trust, security, expertise, fast, and efficient cost, secret in nature, arbitrary sensitivity, and verdict implementation. Arbitrary verdict is easy to implement rather than court verdict. This is due to the fact that such verdict is final and any appeal is not allowed. PSC model agreed by both oil and gas companies and contractors had set a pattern of dispute resolution by implementing mediation, conciliation, and arbitration(Salim, 2005)

In order to create conducive climate for global oil and gas upstream investment, it needed a legal protection to secure dealt contracts so that it could prevail up to the due date. With such legal protection, both capital-investee and capital-investor countries were responsible to respect each other. Legislation and regulation, instead of constitution and adoption of international laws in capital-investee countries, could create a pleasant and secure condition as well as basis to attract capital-investor countries.

Legal protection is a stipulation in agreement of investment protection which guarantees all the responsibilities to be completed by both capital-investee and capital-investor countries (Dolzer and Schreur, 2008). With such legal protection, capital-investee countries had responsibility to respect other responsibility engaged toward the related capital-investor countries

Article 11, act (3) BITs Englang-Indonesia contended "*Sunset Clause*" mentioning that in the end of agreement, the stipulation of its articles would remain prevailed in a period of prevailing investors or, if not, the agreement would remain prevailed in 20 years of time period since the end of the agreement. Respecting the existing agreement was in the form of commitment to ensure the enforcement of whether national of global oil and gas upstream investment. Investment policies toward oil and gas upstream business activities did not solely dealt with determining allocation and risk deployment, but also contained rules of basic rights for each party, authorities, and agreed responsibilities.

Governance Rights and Exertion Rights of Oil and Gas Resources

In the context of sovereign countries, constitution was actually a contract to define political governance boundaries of exerting a country and rights of individual freedom. Constitution had function as direction to drive the wheels of government in order to reach the nation's ideals, which Oliver Cromwell identified as the "Instruments of Governments." Such function, therefore, constructed constitutionalism, a belief on boundaries of governmental dominance and assurance for civil rights.

The first constitution mentioning the stipulations of governance rights and exertion rights of natural source wealth was the constitution of Soviet-Russia in 1918 mentioning that all underground and underwater mineral wealth which was fundamental for the country was proclaimed as state property. Unlike Britain, Canada, Australia, and USA, the constitution was not influenced by the arrangement of nation governance policy over the natural resource wealth. The arrangement of oil and gas resource governance was set in legislation, regulation, and contract of oil and gas.

System of Civil Law *(Europe)*

The influence of ancient Roman philosopher was adopted into the system of Europe, particularly Dutch, by classifying laws into 2 broad categories, based on its content, which include public law and civil law. Hood Philips in "*A First Book of English Law*" asserted that continental law of West Europe (excluding Scandinavia) was a heritage of Roman law, since the classification, organization, and stipulations of Roman civil laws remained prevailed up to recent day (Pound, 1982).

Germany-Roman laws began to emerge and grow in Europe mainland and it was expanded by scholars since 12nd decade as a mutual attempt with "*Corpus Iuris Civilis*" from Kaisar Justinianus (483-565) as the base. in the context of governance and exertion rights of oil and gas resource wealth, the system of *Civil Law* was strongly influenced by Roman laws. The holders of a land on the surface-ground area did not, by itself, have rights over the above and the under-ground area, and such stipulation remained prevailed for the inverse. This principle of horizontal separation law was common in countries which legal system was based on the principle of Continental Europe Law (Simamora, 2000).

In its implementation, countries still had rights to govern oil and gas resource wealth contained underground of their sovereign territory. Portugal, for instance, in Article 84 *Constitution of the Portuguese Republic of 1976* mentioned:

1) Half part of public domain was:

   (a) Maritime territory along with the ground beneath and base-borders, lakes, lagoon, and navigable maritime territory or floating point along with each base-soil beneath;

   (b) Atmosphere over the territory and higher than recognized borders for the owner and the tenant;

   (c) Mineral base, medical water resources, hole or underground hollow space, rocks, common soil, and any other common materials for merlon;

   (d) Roads;

   (e) National train

   (f) Other wealth under the law.

2) Stipulations on what included in central public domain, and what included in autonomous region public domain, and what included in local governance public domain, and which regulation prevailed for those, the requirements of utilizing public domain along with its boundaries, was further set in law (Asshiddiqie, 2010).

In this case, Portugal ensured that land and any other natural resources were all rationally utilized and managed in order to maintain the fits of its regeneration's function. What might be more interesting referred to the stipulation on living environment. it was national responsibility to preserve the living environment and civil rights for environment and quality of life.

System of Anglo Saxon Law *(Common Law)*

Britain practice was an interesting model, since the custom rules of international laws were considered as a part of state law (*law of land*). The development of other states' national laws adopted Britain law, including *Anglo Saxon* relatives. *Anglo Saxon* law was natural, clear, and tangible in its structure, resource, dispute resolution method, concept, and vital mindset. Like Germany-Roman law, *Anglo Saxon* was successful to dominate several states' national laws through reception, such as Pakistan, India, Canada, Australia, and USA.

The development of *Anglo Saxon* tightly related to *Royal Court/King's Court* due to the judges. Through King's intervention, *equity* agency existed. *Equity* was identified as an

idea of fairness in implementing law. Britain law system was less influenced by Roman law, although it had ever been colonized by Roman and Norway. *Anglo Saxon* system pointed to the system of Anglo-America family.

The very first recognized law was civil law. In fact, law was originally formal. Civil law emerged due to formal law. Classic law did not recognize the term *recht ohne hafting*. The law of contract in Britain emerged after people might be required to pay compensation. It derived from assumption lawsuit (a kind of ways to sue). For instance, clarification of Britain Law in term of *property law* and not like Dutch law called *Zakenrecht*. In addition, *The Law of Contracts and Tort* and not like *Verbintenissenrecht*. *Common Law* mentioned that the owner of mineral resources and *petroleum in situ* was the land owner. The land owner over the surface area had rights for all underground content as well.

This system was commonly followed by *Anglo Saxon* states, such as USA and Britain. Some states which law systems were influenced by *Anglo Saxon* included New Zealand, Ireland, Pakistan, Malaysia, Britain, India, Hongkong, Canada, Australia, and USA. Particularly in Pakistan and India, some aspects of private law were mostly influenced by religious law.

The Constitution of *Anglo Saxon* states like Canada, Australia, and USA had similar pattern. They did not mention any stipulation of basic economic policy, as like Britain's tradition. Formulation patterns USA followed, which did not formally set any systematization of economic issues in its regulation, had been adopted by other states across the globe, such as Thailand, France, Philippine, Mexico, Malaysia, South Korea, Japan, Italy, Canada, and Dutch (Asshiddiqie, 2010).

The Constitution of Australia (*The Constitution of the Commonwealth of Australia Act* 1986), for instance, comprised 128 sections and 8 chapters, however, none of them set any policy regarding to economic and living environment issues. The economic issue was based on market mechanism. Multinational companies which explored and developed oil and gas resources operated their business for the interests of their state. Individuals were allowed to have rights over the natural oil and gas resources contained beneath of their territory.

The development of Australia law did not depend on their written law. Likely, Canada constitution did not mention any stipulation dealing with economic issues in entire manner. The constitution of states with "common law" followed Britain's tradition,

and the concept of their statehood and government was set in practical. From the beginning, multinational companies' business activities was developed to explore natural oil and gay resource wealth (Asshiddiqie, 2010).

Anglo Saxon states, which commonly took the principles of adhesions, defined land broadly, not only based on the surface area but also all the materials contained underground and upper-ground. Defining land did not solely include the surface. The regulation about land along with its authority that Britain set was then adopted by other states such as Singapore, Malaysia, Canada, Australia, and other commonwealth member states through their written law as well as their court verdict.

The governance concept of natural oil and gas resource wealth on Anglo Saxon states – mostly in terms of oil and gas governance and utilization- was bestowed to IOCs in business competitive manner. Both individuals and corporation had rights for the governance and utilization of oil and gas, and government functioned as tax or royalty carrier.

System of Socialist Law

As the reaction from the philosophy of law was too individualistic, the philosophy of socialist-communistic law emerged in 19th decade, which distinguished social ownership from private ownership, and state property from individual property. At the beginning of that decade, West-European was not stable yet. The rapid progress of industry had created social issues which troubled the community.

A great leap in China happened through its governmental policy amendments in economic sector supported by other changes in law and constitution. The major changes began from the constitutional amendment in 1975, which was the amendment of the constitution in 1954, and latterly amended in 1978. In 1982, China's forth constitution was finally legitimate by following a legislation amendment that related to economic sector (Zaidun, 2005).

The system of social-communist law, which followed by Vietnam, South Korea, Kuba, set the ownership of natural resources on their constitution. South Korean constitution (Constitution in 1947 which was later legitimate in 1998), particularly at Chapter II on Economic, Article 20 mentioned that every facility and infrastructure of production belonged to the state: (1) community organization and cooperation; (2) the state property belonged to all people.

Declaration of Cuba Independence was declared at 5th July 1811 which freed their people from Spain colonialization. Cuba constitution in Article 11, 1976 stated that their sovereignty of living environment, natural and mineral resources, farms, and fauna, all materials under maritime economic zone had been recognized by the state law and practice. Cuba constitution on Article 15, 1992 considered the wealth of socialist states as the property of all people, which included:

a) Lands owned by small farmers or public cooperation, underground area, mine, mineral, farms, and fauna sources in Cuba Economic Zone, forests, sea, and communication facility and infrastructure;

b) Sugar mills, factories, primary transportation, all banking business, and other facilities that had been nationalized and taken over by imperialists, lairds, and bourgeois, and factories, companies, and facilities for economic, science, social, culture, and sports that had been or would be build, maintained, or bought by the state in the future period of time. The ownership of all those mentioned properties could not be bestowed toward individual or corporation, but followed by the government approval based on prevailed regulation. (Asshiddiqie, 2010).

Ex-communist states, such as Ukraine, Russia, Poland, Lithuania, Kazakhstan, Hungary, Georgia, and Armenia, set the stipulation of natural resource ownership in their constitution. Ukraine constitution at Article 13, 1996, for instance, mentioned that land, mineral resource wealth, air, water, and other natural wealth in their territory belonged to Ukrainian, which implementation was conducted by local government. Every citizen had rights to utilize the wealth under the stipulation of regulations (Asshiddiqie, 2010).

Governance rights of natural resources had also been specifically set in Kazakhstan constitution, which was identified as an ex-communist in East Europe adopting socialism values in their state enforcement. Kazakhstan constitution at Article 6 admitted and protected the state and individual properties in equal manner. For every single wealth they had, the owners had also responsibility to be fully completed based on the prevailed regulation. Land and sea along with all natural resources beneath, flora, fauna, and other resources belonged to the state. Ex-communist states in East Europe specifically set their sovereignty over the natural resource wealth under their constitutions. The sovereignty of the living environment, minerals, oil and gas mines, both underground and undersea as mentioned in Maritime Economic Zone were all considered as the state property which was exclusive in nature.

System of Scandinavia Law

The aggregate of five states in North Europe which comprised Sweden, Norway, Iceland, Finland, and Denmark was popular as "The Nordic Countries." Some autonomous regions that joined as well were Aland (Finland), Faroe Island (Denmark), and Greenland (Denmark). Scandinavia was a part of Nordic countries which was one of Uni-Europe members. Both Norway and Iceland were the members of Europe free trade association.

The modern jurists of Scandinavia had developed an exclusive approach toward the law which was little bit similar to other countries. The system of Scandinavia law was continental with critical and abstract discussion. The concept of welfare state of Sweden, Norway, Finland, and Denmark was identified as the ideology, and the system had been well-running. One benefit from the welfare state was that the gradual economic progress might bring into welfare.

Scandinavia states were popular with the utilization of their natural wealth. Sweden, for instance, was a monarchy-constitutional country. "*The Constitution of the Kingdom of Sweden* 1974" was identified as a more flexible constitution, as like France, Germany, Italy, and Belgium, which set their sovereignty of the natural wealth into the regulation. The constitution solely mentioned core issues dealing with government. Likely, Norway was the biggest natural oil and gas producing country in Middle East under their monarchy-constitutional system in the form of parliamentary government. The first constitution was legitimated on 17th May 1814, which latterly amended on 7th June 1995 comprising 75 articles, which then amended in 2003, 2004, and 2006 comprising 112 articles.

Commonly, the constitution of Scandinavia states did not mention any stipulation of basic economic policy, as like UK, Canada, Australia, and US. The constitution of Norway did not explicitly set social rights and state property over the natural resources as what Venezuela and Brazil mentioned on their constitutions. Norway constitution solely set the state property in brief manner. Countries with Scandinavian or European system, as like Norway, provide priority for NOCs to explore the natural oil and gas resources. Mining rights and the authorization of mining was governed by the state or bestowed to State Corporation. Mining corporations applied concession method.

System of Islamic Law

In Islamic trade context, the concession rights of natural resources were not absolute. Islam, as a revealed religion, admitted individual ownership. *Fiqih* scholars agreed that rights referred to a specific relationship between the owner and the benefits derived from that right. Such relationship, in Islamic *Syari'ah*, was not natural, which rooted from nature, or the provision of human reasoning. Allah SWT is the source of all rights, since Allah SWT is the creator of *Syari'at*, regulations, and rules for mankind and all creatures. Thus, rights always related to Allah SWT will and was Allah blessing .

Islam, as a revealed religion, set ownership rights for natural wealth which comprised: 1) individual ownership (*milk fardiyah*); 2) public ownership (*milk 'ammah*); 3) state ownership (*milk daulah*). The construct of ownership over natural oil and gas wealth referred to gift and grace from Allah SWT. Basically, the natural oil –and-gas resource wealth belonged to Allah SWT, and mankind's proprietary depended on their competences to explore, develop, and produce through which the welfare might be achieved.

Exploring and developing the natural oil and gas resources had been the world most attention topic to be discussed. Most of Moslem countries were so careful to decide a contract model for their oil and gas upstream business. In regard to the ownership of natural oil and gas resources, Moslem countries in Middle East took *A-Qur'an, Sunnah, Ijtihad,* and *Qiasi* (analog) as their guidance (Alkahtani, 2009).

Sunnah An-Nabawiyah/Hadist is the secondary source in Islamic law functioning as *tabyin* (confirmatory) of Al-Qur'an. For public ownership (*milkiyah 'ammah*) in Islam, such as savannah, mineral salt, fire, and water, it is the state authority to do extraction on it. *Hadist* Rasulullah SAW told by Abu Daud about Abyad bin Hamal who asked Rasullullah SAW to allow him manage a mineral salt mine in Ma'rab:

> "That he came to Rasuullah SAW to ask a salt (mine), and Rasulullah gave it. After the man gone, a man asked Rasulullah SAW: "Ya Rasulullah, do you know what you just gave? In truth, you have given something which is like water flow." And then Rasulullah took back the mine from him." (HR. Abu Daud)

The government of Arab Saudi distinguished between the public ownership of land and the ownership of land spheres and mineral beneath. *Article 1 and 25 of the Original Aramco Agreement of 1933, Royal Decree No. 211 M of 1392 A.H* (1972**)** mentioned:

> *"Article 1 of the Mining Regulations clearly stipulates that all natural deposits of mineral, in any form or combination, either in soil or subsoil, belong exclusively to the state. This includes both land and sea territories comprising the continental shelf."*

The relationship between the state and the natural oil and gas resource wealth is a utilization relationship, not proprietary relationship. Proprietary relationship, in fact, is contradictive with the nature of mankind as a creature of Allah SWT, as globe, water, and space belonged to Allah SWT and all countries across the globe are allowed to utilize those all resources for the benefits of mankind's well-being. The constitution of Egypt, in Mamluk dynasty (1250-1517), Sultan Al-Zaher officially established Justice Constitutional Court which was latterly expanded to Osmaniya Dynasty located in Istanbul, Turk (1517-1805). The final Constitution in 2005 specifically set the basic economic policy under the Article 23 to Article 37.

Comparing the constitution of those countries described above, it argued that the constitution of a country commonly comprised several stipulations dealing with the ownership capacity of the country which referred to (i) sources with absolute nature belonged to the state; (ii) sources with public nature belonged to anyone; (iii) business fields exclusively monopolized by the state; and (iv) business fields that anyone could conduct (Zaidun, 2005; Asshiddiqie, 2010).

Internationalization and convergence to set the sovereignty of a state over the natural oil and gas resource wealth was a constitutional phenomenon of international economic policies. UK, for instance, was recognized as a country that had no written constitution but was categorized into *constitutional state, constitutional government,* and *constitutional democracy*. Likely, Canada, Australia, and USA felt the same way which considered that the constitutional arrangement on natural resources was not necessary to set (Asshiddiqie, 2010).

Oil and Gas Contract Model

Investment in oil and gas sector was actually a cohesiveness the elements of public and private laws. The exclusive characteristics of the systematization made countries played their roles, particularly in interaction dynamic between parties in a contract, in terms of their interests. The contract which related to oil and gas resource management was conducted by the state corporations and IOCs. In accordance to the various provisions of legislation across the world, it argued that the contract models which set

oil and gas concession issue between the state and IOCs-NOCs commonly referred to concession and *Production Sharing Contract* ("PSC").

Consistent with the principle of ownership over the natural oil and gas resources, concessionary and contractual regimes were both different in in terms of their ownership system on equipment and assets utilized. Concession was concessionary, indicating that the holders of a concession was not a contractor of a country who expended oil and gas, but they had their own autonomy to conduct their oil and gas business and possessed all the production outcome based on the concession they hold (Economic Development and Sovereign Immunity, 2008). In contractual regime, conversely, the equipment utilized would belong to the state with different starting points of ownership among contracts.

Concession Regime

Concession referred to an contract between states of concession holders. Concession was the very first model which mostly countries applied. Some countries that conducted this regime included Thailand, Norway, Britain, Australia, USA, and some Middle East states. Classically, concession could be defined as a license granted by a state toward a qualified contractor -in terms of particular obligations- to conduct oil and gas mining business.

France had developed a modern concession as a concept of administrative contract, known as *droit administrative.* A contractual relationship based on *droit administrative* was under the provision of the state's constitution or related government agencies. furthermore, one principle of administrative contract based on France Law was that a contractual relationship had to obey the provision of the state constitution or other related government agencies. Therefore, the authority that a contractor had in modern concession was less than the classic one (Simamora, 2000).

In concession regime, oil and gas companies had an exclusive right to explore and exploit the natural resource during particular periods of time. The characteristic of this regime was that all production outcomes in that concession region would belong to the company, and the state would have royalty which was commonly in the form percentage of gross income. Besides, the state would take taxes as well, since all the resources beneath the surface of the land belonged to the state and the point of transferring an ownership happened on the wellhead (Lubiantara, 2013 ; Simamora, 2010).

This classic concession regime had particular limitations though. It limited the state's role to get involved as a host. This constraint would minimize the state intervention in companies' operational management. Additionally, this regime had long periods of time and very broad concession region (which might include the total region of a country or province), with no mechanism to return some territory, etc.

During its development, classic concession regime had lots shifts to accommodate the state's interests as host. The development included an increased share for the government both from royalty and taxes, such as imposing a special tax on excessive profit and other taxes. Besides, for the purpose of direct intervention in oil and gas upstream business, the provision on government participation was then established.

In Thailand concession contract, for instance, the contractor was allowed to pay royalty in cash of in the form of production outcome. Subtraction on royalty was also possible if the state got the contractor to accelerate the development process in a less attractive region or if the state asked them to accelerate their production in order to cope with economic crisis or to accelerate the economic growth of the state. Such subtraction was vary which might be up to 30% of royalty commonly prevailed.

Contractual Regime

a. *Production Sharing Agreements* (PSA) Model

Contract practices the government conducted in natural oil and gas resources were vary in terms of applying the terminology of oil and gas contract. Uzbekistan, Turkmenistan, Russia, Kazakhstan, and Azerbaijan, for instance, used the term *Production Sharing Agreements* ("PSA"). Nigeria, Malaysia, and Indonesia, however, used the term PSC. Suriname, on the other hand, used the term *Production Sharing Service Contract* ("PSSC"), whereas, Norway used the term *Joint Operating Agreements* ("JOA"), besides the term *State Participation Agreement, Concession Agreement.* Finally, Brazil also used the term PSC besides adopting concession regime (Maniruzzaman, 2005).

Countries had mining rights, thus, they had production rights as well. It, as the consequence, would create monopoly from the state to explore, develop, and produce oil and gas. Investors were responsible for the risks and funding. Le Leuch argued that the success of PSC/PSA regime was derived from politic motivation, given that IOCs were solely identified as contractor and only had rights for partial production (Lubiantara, 2013).

For some professional companies which had reputation, the contractor would be willing to take risk and provide technology and funding in order to conduct exploration. They had expected that they might get compensation in the form of reimbursement for the initial cost they had expended and the profit gained might be equal in cash or oil and gas, with expected condition that the exploration conducted might successfully find economical oil and gas resources for production.

The characteristic of investment in PSC/PSA regime was that the state had selected oil and gas companies as contractors for particular WK PM. They were responsible with all the possible risks and all expense for exploration, development, and production. In regard to the risk and funding issue, the guarantee that a commercial production could be soon conducted right after exploration was successfully reached was important, which related to the *Cash Flow* in funding.

b. Risk Service Contract Model

The main characteristic of risk service was basically based on the common concepts implemented in every model of concession contract of oil and gas mining. The peculiarity of this model was on its compensation for contractor which was in cash, not in the form of oil and gas, although it was possible to buy oil and gas from the production with prevailing market price.

Risk Service Contract between a state as the owner or the holder of mining rights and the contractor in order to run a mining business of oil and gas would allow the contractor to get compensation in cash if the oil and gas were successfully produced, and if the oil and gas were not found during the process of exploration, the contract would ended by itself. Risk intended here was exploration risk. This risk distinguished Risk Service Contract from Service Contract model (Simamora, 2000).

Another peculiarity of Risk Service Contract was that if oil and gas was successfully found in commercial manner, the contractor would provide the infrastructure needed for the production process and two possibilities might come: first, the operation might be transferred into the state corporation or, the second, the contractor would remained to be the operator. All the expenses would be reimbursed added with a service fee for the risk. Brazil was identified as the one that used Risk Service Contract. Furthermore, Peru, India, and Argentina had ever used that model; however, their implementation could not be as successful as Brazil.

Peru used Risk Service Contract to determine whether or not the commercial production could run depending on several factors such as geology, infrastructure, finance, and ring fence. Furthermore, for the contractor that operated in more than one working area, the income tax would be calculated and assigned in the contract. Loss could be calculated later and compensated with the profit of other working areas based on the contractor's will.

c. Service Contract Model

Exploration risk was a distinctive factor between Risk Service Contract and Service Contract. Both them actually had similar principle aside from the risk issue. One variant of Service Contract was *Technical Assistance Contract*. This contract could be used in a condition on which a State had oil and gas stock and it needed operational management of marketing or foreign technical skills to maintain or improve production. The contractor would keep the existing production run (Simamora,2000).

Service Contract between Arab Saudi and Aramco mentioned that Aramco run the operation of oil and gas production with a fixed remuneration at 15 cents dollar, after subtracted by tax per barrel of oil and gas produced. Aramco did exploration as well, and as the compensation, Aramco got 6 cent dollar as its additional grant for every single barrel successfully explored. Service Contract was also used in Venezuela, Qatar, Kuwait, and Bahrain.

d. Joint Venture Model

Joint Venture Model could not be defined as a separated contract or stand-alone. This model would always be engaged with and based on either concession or contractual contract model. States, whether directly of through corporation, would invest their capital under the provision and stipulation of particular contract, such as PSC.

States would get some parts of the production corresponding to the share held. For instance, if a State had a stake of 25%, it deserved 25% of production outcome added by other gain. In other word, the State would gain from two sources with big amount.

Shareholding by a State in Joint Venture could be done by nationalizing or taking over all contractors' assets as the state assets, as what Arab Saudi had done to Aramco. It might also be done with an inclusion of coercion by asking a share distribution from the contractor, as what Nigeria, Libya, and other States had done. Esso contract in Natuna was constructed with share-holding and distribution voluntarily conducted based on business consideration.

Consistent with the exclusive rights of ownership over the natural oil and gas resource wealth, concession regime and contractual regime set the ownership on equipment and asset utilized for operation. In contractual contract, it was common that the equipment utilized belonged to the State with different starting points of ownership among contracts.

Conclusion

Philosophy of state sovereignty over the natural oil and gas resource wealth identified the origin, nature, purpose, existence, and norms of state sovereignty over oil and gas resource wealth. Various models of contract for oil and gas had emerged to provide new nuance for the existence of constitutional governance rights and concession rights for oil and gas resources. In State sovereignty context, constitution was actually a contract to define the borders of political authority of the host country and rights for individual freedom. Constitution functioned as a direction to conduct the governmental wheels in order to reach the ideals of the State. Such direction considered constitution as the base for the government to implement their policies. The adoption of oil and gas contract models and the capacity of governance rights and concession rights for oil and gas resources in various constitutions of countries across the globe might happen due to the different constitutional philosophy, the strategic interests, consideration of financial capacity, technology, and other pragmatic factors in order to bring the state sovereignty of the natural oil and gas resources into reality.

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