

# Energy Privatization as an Act of Constitutional Violation on the Omnibus Law of Electricity Sector

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## Energy Privatization as an Act of Constitutional Violation on the Omnibus Law of Electricity Sector

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### Abstract

The Constitutional Court had classified electric power as a branch of vital product for the country since it influenced and controlled the lives of many people. As a consequence, the management of electric power should be controlled by the state. So, the vital sector of electricity always is the objective of the Privatization concept which eventually affects the loss of state control towards electric power. Moreover, the Government had a plan to create a geothermal holding company, which consisted of Pertamina Geothermal, PLN, and Geodipa. The Electricity Law which had been issued w<sup>1</sup> focused on two things, which were unbundling and privatization. Law No. 20 the Year 2002 and Law No. 30 the Year 2009 had been sued for judi<sup>15</sup> review process as they were thought to be in contradiction to the 1945 Constitution article 33 paragraphs 2 and 3. After conducting a judicial review of those Laws and were declared partially/conditionally granted, especially unbundling articles and privatization articles by the Constitutional Court. What became the concern was if the private company entered the state company's shares, and it was only a matter of time until the state company's shares decrease and the private company's shares increase in equity participation way. If this thing <sup>15</sup> opened, a serious violation of the constitution occurred as mandated in the 1945 Constitution article 33 paragraphs 2 and 3.

### Keywords

energy; constitutional; omnibus law



### I. Introduction

<sup>9</sup> The right to a good and healthy environment is a part of human rights <sup>6</sup> 1). Human rights are a set of rights that adhered to the nature of humans' existence as the Almighty God's creatures and is His grace that should be respected, upheld, and protected by the state, law, government, and every person for the courtesy and protection of human dignity. The Republic of Indonesia acknowledges <sup>17</sup> upholds human rights and the basic freedom of humans as natural rights that adhere to and are inseparable from humans, and that should be protected, respected, and enforced for the escalation of human dignity, prosperity, happiness, and intelligence as well as justice.

<sup>14</sup> The right to a good and healthy environment is also written in the provision of Article 9 paragraph (3) Law No. 39 the Year 1999 on Human Rights which stated: "Every person has the right over a good and healthy environment".<sup>2</sup>) The ar<sup>13</sup>gement of living environment problems in Indonesia had experienced several big leaps since the enact<sup>9</sup>nt of Law Number 4 the Year 1982 on the Basic Provisions of Environment, then it was replaced with Law Number 23 t<sup>13</sup>Year 1997 about Management of Living Environment, and the last was replaced with the enactment of Law Number 32 the Year 2009 about Protection and Management of Living Environment. One thing that became attention in

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these three laws was the strength of the state's role which becomes stronger in order to provide a good and healthy environment as a media for Indonesia's citizens in their life. Indonesia Constitution Year 1945 has stated that a good and healthy environment is the right and constitutional right of every citizen of Indonesia.

There are no countries that do not do development for the countries. Development is a process of changing into something better. The development should notice some important cases in order to support the process. Essentially, the implementation of development affects and is influenced by the environment, including electricity development.<sup>10</sup> Electric power is one of the vital objects that according to the 1945 Constitution article 33 paragraphs 2 and 3 confirm that "the production branches that are important for the State and that affect the lives of many people are controlled by the State"<sup>3</sup>). Moreover, electric power has been classified 2 times (twice) by the Constitutional Court as production branches that are essential for the state and affect the lives of the people. This case has brought consequences that electric power should be controlled by the state. Besides that, electric power is a factor that determines the achievement of the National development target.

Government regulations on the National Energy Policy year 2014 in article 2 state that national energy policy is an energy management policy that is based on justice, sustainability, and environmental principles to achieve energy independence and national energy security. What is meant by energy management is the implementation of energy supply, cultivation, and energy utilization activities, provisions of energy reserve, and conservation of energy resources. The paradigm shift in energy management policy that turns energy resources into export commodities in generating <sup>16</sup> foreign exchange has become a new paradigm for energy as national development capital is expected to increase state revenues from the energy sector so it can be used to support the development in the energy sector. In building national energy independence and security, energy management encourages the condition of ensuring energy availability by utilizing potential domestic resources.

The role of private sectors in the electricity field was actually not a new thing, since the beginning of the entry of electricity in Indonesia, that was during the Dutch colonial era, around the early 19th century, private enterprises had taken an important role in electric power supply in Indonesia based on the Ordinance dated 13 September 1890, Staatsblad Year 1890 Number 190, about the Provision Concerning the Installation and <sup>11</sup> Laying of Channels For Electric Lightning and The Transmission Of Electric Power in Indonesia ("Bepalingen omtrent den aanleg en het gebruik van geleidingen voor elektrische verlichting en het overbrengen van kracht door middel vanelectriciteit in Nederlandsch Indie"), which then underwent several alterations, the last one was Ordinance Dated 8 February 1934, Staatsblad Year 1934 Number 634).<sup>8</sup>

Furthermore, Law No. 15 the Year 1985 on Electricity, states that the business of providing electricity is carried out by State-Owned Enterprises (SOEs) as Powerholder of electricity business (PKUK), however, as an effort to accomplish the needs of electric power to be more evenly and to improve the state ability furtherly in supplying electric power, as long as it does not harm the state's interest, the widest opportunity can be given to cooperatives and other business entities to provide electric power according to the Electricity Business License.

Regulations regarding private enterprises' role in electricity supply business had undergone substantive alteration with the issuance of Law No. 20 the Year 2002 about electricity which revoked Law No. 15 the Year 1985. Law No. 20 the Year 2002 was not accepted by the communities as it was considered contrary to Article 33 paragraph (2) of

the 1945 Constitution. The new Electricity Law instructed separating/unbundling systems where each type of electric power supply business would be conducted by different business entities. However, this law withered before it developed, when this law was issued, the pros and cons from all elements of society were really strong, and there were parties who submitted the judicial review to the Constitutional Court. After a long and tough trial, the lawsuit was finally granted through the Constitutional Court's decision No. 001-021-022/PUU-1/2003. With the granting of the lawsuit by the Constitutional Court, so Law No. 20 Year 2002 was stated to be invalid and the Law No. 15 Year 1985 was reinstated.

The regulation of Electricity sector had changed again by the issuance of Law No. 30 Year 2009 about Electricity that revoked Law No. 15 Year 1985). One of the considerations for the issuance of this law was to improve the role of regional government and the community in the maintenance of electricity, since the provision of electric power was capital and technology intensive activities and was in line with regional autonomy principle and democratization in the life of the society, nation and state. The provision of electric power was controlled by the state which maintained by the government and regional government based on the regional autonomy principle, that was conducted by State-Owned Enterprises and Regional-Owned Enterprises. However, private enterprises, cooperatives and nongovernmental institutions could participate in the electric power supply business.

Not too long after the stipulation, Law No. 30 Year 2009 about electricity was sued as it was considered to be in contradiction with the constitution (unbundling and privatization) which then, by the Constitutional Court, judicial review was granted through decision No. 111/PUU-XII/2015 which stated that article 10 paragraph (2) of Law No. 30 the Year 2009 about electricity contradicted the 1945 Constitution conditionally and did not have binding legal strength if it was interpreted as the justification of unbundling practice in electric power supply business for public interest in such a way that it eliminated State's control as in the principle of "controlled by the State". According to the Constitutional Court, electricity should be maintained integratively as this case was not regulated in a quo Law6).

It can be concluded that the State is facing a very dilemmatic condition in formulating Electricity Law7). On one hand, the Government needs to protect electricity management as one of the vital branches that should be controlled by the State, but on the other hand, the Government needs the role of private enterprises in managing and developing electricity power and besides that, the State also needs the independence of the citizens in realizing resilience of electricity demand.

## II. Research Method

The method used in this research is normative legal research, which is a process to find law regulations, legal principles, as well as legal doctrines in order to answer legal cases stated, by using a statutory approach and conceptual approach8). The analysis of the statutory approach is an approach that was done by analyzing the entire legislation and regulations linked to the legal issue handled. While the conceptual approach is an approach based on the views and doctrines that developed in legal studies.

### III. Result and Discussion

The raise in demand for electric power as an effect of the raise in society's welfare is also followed by the development of industries in Indonesia, meanwhile, PLN is facing limitations in fulfilling the increase of electricity demand. This condition has caused several electricity systems outside Java-Bali to undergo power supply shortage and prompted PLN to take the initiative to not produce electricity from its own generators, but also by hiring or buying electricity from private companies. Law No. 20 in the year 2002 about electricity also required electricity sectors (generation, transmission, distribution, and retail) to be managed by a separate body. Important to be noted, in Law No. 20 the Year 2002 also allows private companies to buy/control the electricity sectors in all sectors. However, the implementation in the 2 (two) countries is different. In Indonesia, Law No. 20 the year 2002 is annulled entirely by the Constitutional Court.

In this Omnibus Law, there are private's aggressive steps that aimed to take over the electricity sector. After the cancelation of Law No., 20 years 2002 about Electricity, Law No. 30 the Year 2009 about electricity was issued. Then, Law No. 30 the Year 2009 was also focusing on 2 (two) matters, which were unbundling and privatization. Luckily in 2015, judicial review towards Law No. 30 the Year 2009 is granted partially/conditionally, especially article unbundling and article privatization. However, particular parties kept trying to legalize unbundling and privatization by including article unbundling and article privatization that had been annulled partially by The Constitution Court in 2015 in the Omnibus Law of job creation, especially in the sub-cluster of electricity.

After Law No. 20 the year 2002 and Law No. 30 the year 2009, a new regulation is issued in the Omnibus Law cluster Electricity Law<sup>9</sup>, that the unbundling of electricity is returned, as stated in article 10 paragraph (2) The business of provisioning electric power for public interest as intended in paragraph (1) can be done in an integrated manner. Paragraph (3) The business of providing electric power for public interest in an integrated manner as intended in paragraph (2) is done by 1 (one) business entity in 1 (one) business area. Therefore, electric power management is integrated only in one business area.

Furthermore, Article 11 reaffirms how unbundling<sup>12</sup> electricity will be done. Paragraph 1 The business of providing electric power for public interest as intended in Article 10 paragraph (1) is carried out by state-owned enterprises, regional-owned enterprises, private enterprises, cooperatives, and non-governmental organizations that operate in the electricity supply field. For the regions that have not received electricity services, the Central Government gives the opportunity to the regional-owned enterprises, private enterprises, or cooperatives to be the organizer of integrated electricity supply business.

The reappearance of Articles 10 and 11 that had been annulled by the Constitutional Court seem to cause a new constitutional conflict against the Constitution and has a possibility to be sued again by various community groups to the Constitutional Court. Omnibus Law will add more conflicts between institutions and conflicts with the communities that had sued and annulled the previous Law. Additionally, Omnibus Law will create more legal uncertainty. Furthermore, the omnibus law cluster energy bill in the electricity sector also changed and erased the article and paragraph about the authority of local government except for the obligation to provide a budget for the fulfillment of electricity. Most of the authorities are centralized or authorized by the central government and eliminated most of the regional government authorities.

Apart from the explanation above, it can be concluded that private companies are not only trying to enter through the Constitution. But, particular parties surely want to control

the electricity sector, especially from the New and Renewable Energy side. Some time ago, the Government has planned to make geothermal holding companies consist of Pertamina Geothermal, PLN, and Geodipa10). It means that in the future, geothermal assets that are only under the ownership of Pertamina, PLN, and Geodipa, can be released and given to an entity separated from Pertamina, PLN and Geodipa. Moreover, some time ago we all heard that Pertamina's subsidiary which is Pertamina geothermal will have an IPO or some of its shares will be sold to private companies. For that reason, if Pertamina geothermal's shares are owned by private companies, so when Pertamina is merged with PLN and Geodipa, the merged companies will also be entered by private companies.

The law of electrical energy that applies in Indonesia at this time has still adhered to a free market economic system that is not in line with the economic democracy of togetherness and the kinship principle, so it is in contradiction with the Constitution of the Republic of Indonesia. Liberalization of electricity will foster capitalists' strength and will weaken state-owned electricity companies. The State or government of Indonesia has only functioned as a regulator, and as an arm of the capitalists, the state has lost strategic points in the electrical energy business, and the maximum profit will only flow to the capitalists. This will lead to the absence of funds for the development (investment) of electricity infrastructure. Investors (private) take over the development of electricity infrastructure so that electricity infrastructure as the basic economic structure depends on the capitalists' or private developers' role. Because of this reality, in the future, it will be difficult to get affordable electricity prices for the people, so it will tribulate the idea of general welfare for Indonesian citizens.

The legal concept of electrical energy should be in line with economic democracy that adhered to the notion of togetherness and family foundation that is in accordance with the 1945 Constitution and its amendments in accordance with Article 33 paragraphs 2-3. Electricity has different characteristics from other important production branches, so it must be controlled by the state, and the means of state controlling is covering ownership, regulation, arrangement, management, and supervision by the state. The ownership of electricity infrastructure must be controlled by the state, so the profit of electricity maintenance could be back to the state. The existence of laws (regulations) is aimed to realize the benefits for human beings. Electricity energy concerns the fulfillment of human life and the welfare of people in general.

Indonesia's national legal system in the electricity sector must be built integratively, which means a legal system of electricity that is considered to be relevant in facing the challenges and development of the global electricity world in justice, sustainability, and environmental principles. Private's (capitalist's) ownership of power generation must be restricted to a maximum of 20% from the subsystem of electrical power in one region and a maximum of 20% from the total national electrical energy system, so state-owned domination occurred, not the domination of private enterprises as a whole, nationally and also in certain places that indeed brought significant profit in term of the electrical energy business.

Besides infrastructure ownership that became the benchmark, the application of technology and patent holders of governance systems and technology systems should also be controlled and managed well by the Government or State with strict and dynamic regulations. In the application of New and Renewable Energy, for instance, the solar cell method, this method allows private sectors and individual communities to fulfill the needs of electrical energy at an affordable cost. With the horizontal residential landscape which is applied widely in Indonesia, it is really possible that community groups/individuals to be able to realize the independence of electrical energy needs. However, if this case is not

anticipated with proper governance legislation by the State, slowly but surely it will omit the function of PLN's control in the electricity energy field and as the regulator.

On the other hand, we can conclude that with the development of applied technology on New and Renewable Energy with the solar cell method, we will be able to realize a good and healthy environment system in accordance with the purpose of environmental development. Thus, the target of climate reduction will be achieved automatically and Indonesia will get closer to the purpose of Net Zero Emission. In this condition, the State is facing a dilemmatic condition in formulating Electricity Law. On one side, the Government is required to protect the governance and control of the electricity sector as one vital branch that must be controlled by the State, but on the other side, the Government needs the private's role in managing and developing electricity technology and also the State needs the citizens' independence in realizing resilience electricity demands and to realize justice, sustainable and environmentally sound development.

#### IV. Conclusion

The control of the electricity sector in terms of New and Renewable Energy will not stop only geothermal. When the geothermal is started to be broken down, in the future, hydroelectric power plant holding will be made. Then, New and Renewable Energy will be controlled by foreigners, and fossil energy will run out automatically because its economical age has been accomplished. If private sectors enter the state company's shares, it will be a matter of time before the government's shares will decrease and private's shares will increase through equity participation.

If the energy management is not managed properly, the electricity sector, especially electricity generation, will be fully controlled by private companies and the state will depend on the private companies in the fulfillment of people's needs (that is in contradiction to Article 33 of 1945 Constitution) and the citizens will be aggrieved by the lavish cost of electricity. However, the state is facing a very dilemmatic problem in formulating this Electricity Law. On one side, the government is required to protect electricity management as one vital branch that must be controlled by the State, but on the other side, the Government needs the role of private companies in managing and developing the technology of electricity and also the State needs the independence of the citizens in realizing the resilience of electricity demands.

The restrictions of business groups that are run by private companies are needed, business clusters that are run together with the private companies with the percentage of 51% owned by the State or a minimum of 20% owns by private and business clusters that are in complete control of the State as an effort to protect, process and supervise the use of Indonesia's natural resources. In addition, governance and legislation that regulate the entire sectors of electricity generation and energy production are needed, especially on the methods that are believed to be accessible to all individual communities so that, energy independence can be accomplished by not ignoring the function of the State (in this case is PLN) to carry out the constitution by controlling vital objects in the electricity sectors.

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