

Analysis of the Rule of Law and the Decision of the Constitutional Court on the Governance of the Country's Electricity Business

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Abstract

Indonesia's constitution related to the economy limits the practice of liberalization to essential commodities in the form of the provision of electricity. The regulatory dialectic that leads to privatization and power wheeling has been expressly canceled by the Constitutional Court through Decision Number 39/PUU-XXI/2023. However, the centralization of electricity operational authority in the hands of the state after the decision triggered a new vulnerability, namely the vulnerability of the National Strategic Projects (PSN) of electricity to contract manipulation and corruption. Based on Law Number 30 of 2009 in conjunction with Government Regulation Number 23 of 2014, the existing administrative supervision instruments have proven to be inadequate to mitigate losses in projects worth trillions of rupiah preventively. This study aims to examine in depth the operational design of the Prosecutor's Office law enforcement intelligence—based on Law Number 11 of 2021—as a framework for complementary legal rules to ensure the governance of the country's electricity business. Using normative legal research methods based on the Welfare State Theory and the Theory of Authority, this study found that to secure electricity PSN, a shift in supervision towards preventive justice is needed. The execution of the Strategic Development Safeguard (PPS) by the Prosecutor's Office is legally operating in the pre-design phase to neutralize malicious intent (*mens rea*), so that clean and sovereign electricity governance can be realized.

Keywords: *Electricity Governance; Supervision; Intelligence Prosecutor's Office; Constitutional Court Decision; National Strategic Projects.*

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2nd International Conference on Islamic Community Studies (ICICS)

Theme: History of Malay Civilisation and Islamic Human Capacity and Halal Hub in the Globalization Era

<https://proceeding.pancabudi.ac.id/index.php/ICIE/index>

Introduction

Indonesia's constitution on the economy expressly puts energy sovereignty under state control. This is manifested imperatively in Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia [1]. The juridical consequence of the doctrine of the Right to Control the State (HMN) limits liberalization to essential commodities in the form of the provision of electricity. State intervention is required to prevent the exploitation of people's livelihoods by free market mechanisms. This approach is in line with the Welfare State Theory initiated by W. Friedmann [2], where the state is required not to be just a night watchman (*nachtwachterstaat*), but to actively intervene in the economy in order to realize social justice.

However, the regulatory dialectic often shows that there are efforts to reduce state sovereignty through the narrative of privatization and the practice of unbundling (separation of electricity installations). This constitutional friction was finally canceled and binding by the Constitutional Court through Decision Number 39/PUU-XXI/2023 [3]. Through its legal considerations, the Court affirms that the state, through the State-Owned Enterprises (SOEs) entity, is bound by the imperative mandate to directly carry out operational execution.

In the midst of the massive centralization of operational authority by SOE entities after the ruling, there is a crucial juridical vulnerability in the phase of Procurement of Goods and Services and the execution of the National Strategic Project (PSN) of electricity. Based on Law Number 30 of 2009 concerning Electricity [4], which is further regulated in Government Regulation Number 23 of 2014 concerning Electricity Supply Business Activities [5], the function of coaching and supervision in the electricity sector has actually been regulated. However, the classic monitoring instrument still has limitations because it focuses more on the technical aspects of electricity and administrative compliance (post-audit-based), so it is not able to detect the potential for state capture corruption or malicious intent (*mens rea*) in the contract formulation phase.

The limitations of this monitoring instrument require the presence of law enforcement authorities who are able to carry out preventive interventions. This is where the relevance and legal relationship between the Prosecutor's Intelligence and the electricity sector lies. Considering that electricity infrastructure is a National Strategic Project (PSN), the Prosecutor's Office is present based on the authority mandated in Article 30B of Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia [6]. In the regulation, the Prosecutor's Office is given the authority of law enforcement intelligence to create conditions that support and secure the implementation of national development. The causal relationship is very clear: the state mega-electricity project (PLN) requires safeguards from potential legal failures and corruption, and the Prosecutor's Office executes these safeguards through the Strategic Development Security (PPS) scheme.

Based on the anatomy of the background above, this study formulates the main problem and objective, which is to analyze the rule of law and the design of the operationalization of law enforcement intelligence of the Prosecutor's Office as a preventive justice instrument to supervise and mitigate contracts in the National Strategic Electricity Project, especially when analyzed based on Law Number 30 of 2009 [4] in conjunction with Government Regulation Number 23 of 2014 [5] and Constitutional Court Decision Number 39/PUU-XXI/2023 [3].

Literature Review

A search of the previous literature shows a significant research gap. Research conducted by Y. R. Arifin & S. Hermawan [7] and G. Cristo S. & F. A. K. [8] massively discusses the liberalization of the electricity sector, but is trapped in the narrative of investment dichotomy without analyzing the instruments of law enforcement supervision.

On the other hand, the research of T. I. A. Husny, et al. [9] has discussed the intelligence function of the Prosecutor's Office as a preventive shield, but its object is still very limited to the microadministrative realm such as the Village Guard Program.

Departing from this scientific gap, the scientific novelty of this study is dissecting, in-depth, and synchronizing the legal certainty of the electricity monopoly after the Constitutional Court's Decision [3] with the design of the operationalization of the Prosecutor's Office intelligence based on Law No. 11 of 2021 [6]. By operationalizing the Theory of Authority from Philipus M. Hadjon [10], this study analyzes how the intelligence authority of the Prosecutor's Office becomes an instrument for mitigating contract anomalies at the macro-infrastructure level of electricity that complements the existing classic supervision regulations [6].

Research Methodology

This research is normative law research, which is focused on examining the application of rules or norms in positive law. Methodologically, this research is designed as a scientific roadmap that guides researchers in uncovering and answering legal problems comprehensively without being swayed by speculation. The nature of this research is descriptive-analytical, which aims to describe in detail and analyze legal rules related to electricity governance and the authority of state institutions. The research approach used includes two main elements: the statute approach to comprehensively examine the slices of authority in Law No. 30 of 2009 [4], Government Regulation No. 23 of 2014 [5], and Law No. 11 of 2021 [6]; and the Case Approach to dissect the ratio decidendi from the Constitutional Court Decision Number 39/PUU-XXI/2023 [3]. The sources of legal materials consist of primary and secondary legal materials collected through library research. Furthermore, the analysis is carried out qualitatively using the deductive reasoning method, specifically applying the Theory of Authority [10] and the Welfare State Theory [2] to dissect written legal facts.

Results

The provision of electricity, as a branch of production that controls the livelihood of many people, is classified as public goods. Dogmatically speaking, the state's control of the electricity sector is based on the Welfare State Theory [2]. The manifestation of this theory is realized through a positive legal instrument, namely Law Number 30 of 2009 concerning Electricity [4]. The state's authority in executing electricity operations is delegated to State-Owned Enterprises (SOEs), namely PT PLN (Persero). On the other hand, the authority to supervise the implementation of electricity is specifically regulated in Government Regulation Number 23 of 2014 [5]. However, the supervision mandated is very technical and administrative, failing to reach supervision in the pre-agreement realm or mitigation of malicious intent (*mens rea*) in the preparation of contracts for the procurement of National Strategic Projects (PSN).

The vulnerability due to the weak design of preventive supervision has been further escalated after the birth of the Constitutional Court Decision Number 39/PUU-XXI/2023 [3]. Through the ruling, the Court absolutely canceled the practice of liberalization (power wheeling) and reaffirmed that SOE entities are the absolute holders of control, which creates a massive centralization of power. In constitutional law, absolute control without being balanced by commensurate supervision will lead to bureaucratic pathology. To map where the weaknesses of the authority lie, the elaboration of the Right to Control the State (HMN) in the electricity sector can be constructed as follows:

Table 1. Matrix of Layers of Authority of the Right to Control the State (HMN) in the Electricity Sector

HMN Authority Layer	Manifestations in Electricity Governance (Based on Law 30/2009 & PP 23/2014)	Implementing Entities	Legal Vulnerability Status
1. Policy (<i>Beleid</i>)	Determination of the direction of the energy transition and the National Electricity General Plan (RUKN).	Central Government (Ministry of Energy and Mineral Resources) & House of Representatives	Low (Political domain of law).
2. Arrangement (<i>Regelendaad</i>)	Issuance of technical regulations, licensing (IUPTL), and standardization.	Ministry of Energy and Mineral Resources	Low (Administrative compliance).

3. Management (<i>Management Act</i>)	Operational execution, procurement of goods/services of megaprojects, and electricity purchase and sale agreements.	BUMN (PT PLN Persero)	Very High (Risk of manipulation of predesign contracts).
4. Supervision (<i>Act of Supervision</i>)	Technical supervision of K3 (based on Government Regulation 23/2014) and state financial audits.	Electricity Inspector, BPK, LKPP	Late (<i>Post-Factum</i> / Administrative).

Based on the mapping in Table 1, it is clear that the vacuum of oversight occurs in the "Management" layer. The existing supervision is post-factum. The Audit Board (BPK), based on Law No. 15 of 2004 [11], operates purely on a post-audit paradigm—they only calculate losses when state money has been indicated to be leaking. This gap between technical administrative compliance and postincident audit is the fertile gap for contract anomalies.

The impasse of administrative supervision is accommodated through the legal politics of the renewal of the Prosecutor's Law. Considering that electricity infrastructure is a National Strategic Project (PSN), the Prosecutor's Office is given extra-judicial authority based on Article 30B of Law Number 11 of 2021 [6] to carry out law enforcement intelligence functions. This shifts the role of the Prosecutor's Office towards a paradigm of preventive justice, operationalized through the Strategic Development Security (PPS) scheme as regulated in the Guidelines of the Attorney General Number 5 of 2023 [12]. To demonstrate the superiority of the Prosecutor's intelligence authority compared to conventional surveillance instruments, a comparison is presented below:

Table 2. Comparative Matrix of Supervisory Authority in National Electricity Strategic Projects

Legal Analysis Parameters	LKPP (Procurement Policy Institute)	BPK (Financial Audit Agency)	Intelligence of the Prosecutor's Office (PPS Function)
Legal Basis of Authority	Presidential Regulation No. 16 of 2018	Law No. 15 of 2004	Law No. 11 of 2021 Article 30B
Intervention Phase	Pre-Implementation (Auction Stage).	Post-Audit.	Pre-Design to PostImplementation.
Surveillance Detection Objects	Compliance with administrative procedures.	State Financial Losses (KKN) that have actually occurred.	Detection of Malicious Intent (<i>Mens Rea</i>) and prevention of contract irregularities.

Nature of Authority	Regulatory and Administrative.	Auditory and Repressive (Recommendation).	Preventive, Educational, and Mitigative (Early Detection of AGHT).
Legal Output	Procurement Documents/Certifications.	Inspection Results Report (LHP).	Legal Opinion and Project Clearance.

Based on Table 2 above, the Prosecutor's intelligence operationalization design covers the legal loopholes. In the pre-design phase, the intelligence is authorized to conduct background checks on the beneficial ownership of the vendor company to prevent tender conspiracy. If the Prosecutor's Office detects the existence of Threats, Disturbances, Obstacles, and Challenges (AGHT), they will issue a binding Legal Opinion to revise or cancel the draft contract before causing losses to the state treasury.

Conclusion

The Constitutional Court Decision Number 39/PUU-XXI/2023 has imperatively restored absolute energy sovereignty to the state through state-owned entities for the maximum prosperity of the people. However, this centralization of operational authority is not balanced with commensurate supervision instruments, as the functions mandated in Government Regulation Number 23 of 2014 only focus on administrative and technical compliance. Meanwhile, conventional audit instruments operate purely on the post-audit paradigm. This gap is answered by the operationalization of law enforcement intelligence of the Prosecutor's Office based on Article 30B of Law Number 11 of 2021, which legally presents an instrument of preventive justice. Through the Strategic Development Security (PPS) scheme, the Prosecutor's Office is authorized to intervene in the pre-design phase of contracts to neutralize malicious intent (*mens rea*) and prevent contract anomalies before state losses actually occur. As an implication of these findings, it is highly recommended for the Ministry of SOEs and PT PLN (Persero) to revise their internal standard operating procedures by mandating the involvement of the Prosecutor's Office Intelligence from the feasibility study phase. Furthermore, the Attorney General's Office needs to escalate the technical capacity of their human resources by routinely presenting experts in electricity and forensic audits, ensuring that the issued Legal Opinions match the complexity of modern electricity mega-projects.

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