

# *The Role of Indonesian Constitutional Court In Protecting Energy Security*

## **Perlindungan Hukum terhadap Ketahanan Energi Nasional Melalui Putusan Mahkamah Konstitusi**

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### ***Abstract***

*After more a decade, Indonesian Constitutional Court (ICC) has importantly played a significant role in the law reform, such as protecting energy security through their judgements. ICC comes out of the box, creating unpredictable judgements, and ensuring the justice values. In protecting energy security ICC makes important breakthrough with reviewing Act Number 22 of 2001 on the Oil and Earth Gas, Act Number 4 of 2009 on the Mineral Mining and Coal, and invaliding Act Number 20 of 2002 on the Electrical Power. Those acts contradict the basic norm in the 1945 Constitution. Although creating public debate, ICC judgment should be appreciated.*

**Keywords:** *Role Indonesian Constitutional Court, Energy Security, Protecting*

### **Abstrak**

Selama lebih sepuluh tahun Mahkamah Konstitusi (MK) Indonesia telah memainkan peran dalam reformasi hukum, serta memastikan nilai-nilai keadilan. Peran ini dapat terlihat khususnya dalam melindungi ketahanan energi nasional melalui putusan-putusannya. MK telah membuat beberapa terobosan-terobosan

penting terkait ketahanan energi nasional seperti menguji UU Nomor 22 Tahun 2001 Tentang Minyak dan Gas, UU Nomor 4 Tahun 2009 Tentang Mineral dan Batubara, serta membatalkan secara keseluruhan UU Nomor 20 Tahun 2002 Tentang Ketenagalistrikan. Undang-undang tersebut sebelumnya terindikasi banyak merugikan kepentingan rakyat banyak. Meskipun putusan-putusan tersebut melahirkan kontroversi dikalangan akademisi dan masyarakat banyak, namun putusan-putusan MK tersebut patut diberikan apresiasi mendalam, karena MK telah melindungi kepentingan rakyat yang telah dijamin konstitusi.

**Kata kunci:** Peran Mahkamah Konstitusi, Ketahanan Energy, Perlindungan,

## A. RESEARCH BACKGROUND

After a decade of its establishment, Indonesian Constitutional Court (ICC) has shown a significant improvement in Indonesia law reform. ICC has tested several acts to assure that those acts not against the highest norm within the Constitution.<sup>1</sup> This research was conducted to see on how ICC has played its important role in protecting energy security through its power to review and interpret acts indicating against the Constitution.

The energy security issues become one of the popular topics in the global discussion. Each country develops their own treatments and method on solving the energy security problems.<sup>2</sup> Without exception, Indonesia also faces the same problem. The first and most is that the oil and gas requirement sharply increased along the enhancing of the person's income in Indonesia, in additional, the people growth every year. The accomplishment of basic energy is more difficult to fulfil, because of lack infrastructure and capacity, such as oil-mill and its maintenance. It needs a huge concern in the infrastructure, in particular, to make an important linkage among Indonesian islands. This problem cannot be tackled in the short period seriously.

In the second place, the energy diversification has to prepare as soon as possible.<sup>3</sup> In this case, Indonesia has to look for the other resources, such as geothermal, solar energy, coal, wind, bio fuel, and so forth. Equally, the management of mineral energy can be increased to enhance state revenue, with exporting a high quality of basic material to the world market.

<sup>1</sup> Simon Butt, *The Constitutional Court and Democracy in Indonesia*, Netherlands: BRILL, 2015, h. 1-10

<sup>2</sup> See also Douglas R. Bohi, and W. David Montgomery, *Oil Prices, Energy Security, and Import Policy*, New York: Routledge, 2015, h. 20

<sup>3</sup> Lee Cheuk Wing and Zhong Jin, "Risk Management Methods Applied To Renewable And Sustainable Energy: A Review," *Journal of Electrical and Electronic Engineering*, Volume 3, Nomor 1, 2015, 1-12.

Ultimately, the increasing of the electric power infrastructure is a must. The government has to make sure that mains-operated power could reach the remote areas, where people living with their economic activity. Furthermore, as the sovereign state, the price of the electric power has to be controlled by government, which cannot freely depend on the market price.<sup>4</sup> Importantly, the law enforcement has been significantly playing the crucial role on the protecting energy security. The discussion on the law enforcement might be focused on the three main issues, namely; the enforcement of the regulation, institution, and social culture. For those reasons, the ICC, as the guardian of the constitution and the last castle of the law enforcement, also has the jurisdiction to ensure the law enforcement process.

## **B. RESEARCH QUESTION**

There are two substantial research questions that will be answer in this research; firstly, how ICC has played his role in protecting energy security? Secondly, what are the examples of ICC achievement in protecting energy security? The answer of research questions will explain in research finding after using the appropriate research method.

## **C. RESEARCH METHOD**

The method used in this research is black-letter law.<sup>5</sup> It refers to the basic standard elements or principles of law, which are generally known and free from doubt or dispute. It describes the basic principles of law that are accepted by a majority of judges in most states. For example, it can be the standard elements for a contract or the technical definition of assault. This research method is characterised by the study of legal texts, including case law. When people use this term, generally the implication is that the law in question is accepted and not open to argument. On the other hand, with other types of laws, it may be widely open to interpretation.<sup>6</sup>

<sup>4</sup> One of significant reasons of the annulment Electrical Power Act is lack of government role in the Act.

<sup>5</sup> See also David Gilchrist and Kylie Coulson, "8 Pragmatism, Black Letter Law and Australian Public Accounts Committees," in *Making Governments Accountable: The Role of Public Accounts Committees and National Audit Offices*, London: Routledge, 2015, h. 141-147.

<sup>6</sup> Joseph M. Perillo, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review," *Fordham Law Review*, Volume 63, 1994, h. 281.

Since lawyers often question, challenge, and reinterpret the law as part of their work, it is important to distinguish black letter law from other types of law. There is sometimes debate in the legal community about whether or not a law should really be considered uncontroversial. Generally, the older a law is and more frequently it has been upheld in court and in legal treatises, the more likely it is to be evaluated as generally accepted. Changing societies call for changing laws and differing interpretations on existing legal precedent. Black letter law often lies at the foundation of the law, and is used in arguments to support various interpretations of the law. This method of research is an essentially descriptive analysis of a large number of technical and co-ordinate legal rules to be found in main sources.<sup>7</sup>

In the context of Indonesia, likewise, the ICC judgements are primary source material for black-letter law. There are about several judgments, which will be explored deeply using the black letter law method. To enrich research method, researcher also uses socio-legal method, defined as law written the wider social and political structure. The separation between the sociology of law and socio-legal studies underlines the development of the social scientific studies of law.<sup>8</sup> Socio-legal researchers are more sophisticated alert, than before, of different approaches in sociology, and the role methodological debate. Sociologists and social anthropologists are, increasingly, recognising the need to address and understand the content of law. What binds the socio-legal community is an approach to the study of legal phenomena, that is multi or inter-disciplinary, informed by research undertaken in other disciplines. Traditionally, socio-legal scholars have bridged the divide between law and sociology, social policy, and economics.

## RESEARCH FINDING AND DISCUSSION

### A. ICC role in protecting energy security

The ICC's jurisdictions are clearly regulated in the 1945 Constitution and also in the several ICC acts.<sup>9</sup> Those jurisdictions are namely: a) testing

<sup>7</sup> Lawteacher, "Writing Law Dissertation," [http://www.lawteacher.net/dissertation\\_help/writing-law-dissertation-methodology.php](http://www.lawteacher.net/dissertation_help/writing-law-dissertation-methodology.php), downloaded 26 May 2014.

<sup>8</sup> Stefan Larsson, "Karl Renner and (Intellectual) Property—How Cognitive Theory Can Enrich a Sociolegal Analysis of Contemporary Copyright," *Law & Society Review*, Volume 48, Nomor 1, 2014, h. 3-33.

<sup>9</sup> The ICC jurisdictions are also stipulated in the Act No. 24 of 2003 on the Indonesian Constitutional Court.

a law against the 1945 Constitution of Indonesia; b) deciding disputes of the state institutions authorities granted by the Constitution of the Republic of Indonesia Year 1945; c) dissolution of political parties; and d) deciding disputes over the election results. Furthermore, the ICC also obliges to examine the alleged violations of law committed by the President and/ or Vice President that is proposed by the House of Representatives; this obligation is known as impeachment. The impeachment processes have also synchronized in the 1945 Constitution.<sup>10</sup>

With those jurisdictions, the ICC has played an essential role as the state organ implementing law reform,<sup>11</sup> including protecting energy security through interpretation an act against the Constitution. The ICC can use the Article 33 of the Constitution as a stepping stone, and reviewing an act which indicates not protecting energy security.<sup>12</sup> In this regards, can be said that the rules confined in the Constitution are superior; the rules personified in legislation are inferior. In the occasion that bill passed by parliament clashes with the Constitution, the inferior rules should provide way to the superior ones. The provisions of the Constitution have to overcome over legislation legislated by the parliament.<sup>13</sup>

As the guardian of the constitution, ICC concurrently functions as the interpreter of the constitution. The function as the guardian and interpreter of the constitution are performed through its making and issuing of decisions based on the authorities. All the ICC's judgments should represent legal considerations and arguments; and the Constitution provisions should be interpreted and executed in the form of law and in any other forms according to the authorities and obligation granted to the ICC.<sup>14</sup>

The existence of ICC has placed the Constitution 1945 as the supreme law that has to be implemented with high consistency. The ICC holds the court in an open way by summoning and sending for various parties for judicial hearing; automatically encourages people and the community to be involved

<sup>10</sup> See also the 1945 Constitution, in Article 7A and 7B.

<sup>11</sup> Timothy Lindsey, "The IMF and Insolvency Law Reform in Indonesia," *Bulletin of Indonesian Economic Studies*, Volume 34, Nomor 3, 1998, h. 119-124.

<sup>12</sup> Article 33 (3) of the 1945 Constitution states that *the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.*

<sup>13</sup> Philip Norton, and Louise Thompson, "Parliament and the Constitution: The Coalition in Conflict," in *The Conservative-Liberal Coalition*, United Kingdom: Palgrave Macmillan, 2015, h.129-144.

<sup>14</sup> See also Martin H. Redish, and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a Controlled Activism Alternative," *Florida Law Review*, Volume 64, 2012, h. 1485.

or at least to be interested in following how a constitution provision should be interpreted. The parties involved in the ICC are also allowed to air their thoughts regarding the law interpretation, although in the end all decision belongs to judgement and thoughts of the ICC's judges.

The positive reform of ICC has encouraged the development of governance administrative law theories.<sup>15</sup> In the past, the governance administrative law only focused on the political activities within the institutions of parliament and the Presidential administration; and its discussions were merely around the issues of governmental institutions, the relationship between them and human rights. After the reform, the current issues of the constitution start to touch some wider aspects of real life involving more parties who not restricted to the legal experts.<sup>16</sup>

## **B. ICC achievement in protecting energy security**

As the last castle of the law-enforcement institution, ICC has tested over hundreds of acts, and some of them included act relating to energy security. Although the ICC judgment has potential debate, they have a strong legal binding, which close chance to appeal. This research takes three examples of important judgments, generating a crucial impact on energy security policy.

*Firstly* is the review on the Act of mineral mining and coal.<sup>17</sup> This Act has faced several times of judicial review in ICC. It could be understood that act has a significant impact on the economic perspective. The mining issue is not only the energy issue, but also can be a business issue. The national and multinational corporation has their own interest on mineral and coal energy.<sup>18</sup> Therefore, the state has to have a protective mechanism, in handling energy security, such as mineral mining and coal.

On the first reviewed applied by WALHI, the ICC annulled the Article 10 (b), due to it cannot protect people living within the mining area. In its decision, the Court asserted that the Act should protect, respect and fulfil people interest, whose area and land ownership, will be occupied in the mining area, and the people affected from the mining impact.<sup>19</sup> In another

<sup>15</sup> Taufi Qurrohman Syahuri, "Putusan Mahkamah Konstitusi Tentang Perselisihan Hasil Penghitungan Suara Pemilihan Umum Berdasarkan Undang-Undang No. 24 Tahun 2003," *Jurnal Konstitusi*, Volume 2, Nomor 1, Maret 2009, h.14.

<sup>16</sup> Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia*, Cambridge: Cambridge University Press, 2013, h. 89-99.

<sup>17</sup> See also the Act Number 4 of 2009 on the Mineral Mining and Coal

<sup>18</sup> Toby EG Hewitt, "A Progress Report On Indonesian Coal Bed Methane Development," *The Journal of World Energy Law & Business*, Volume 7, Nomor 5, September 2014, h. 468-469.

<sup>19</sup> ICC Judgement No.32/PUU-VIII/2010.

reviewed, the ICC annulled the Article 22 (e/f), 55 (1) & 61 (1), which asserts about the area of exploration. The Court also annulled the Article 51, 60, and Article 75 (4), which asserts about the bidding process.<sup>20</sup> The ICC also annulled and revised the Article 6 (1e), Article 9 (2), Article 14 (1), and Article 17. Those articles have the unclear meaning on the authority of giving permission for the exploration, whether it belong to regional authority or central government. So, in this decision, the ICC states that provincial level does not have authority to issue the permission for the exploration.<sup>21</sup> In fact, the Act contains several provisions contradicting each other,<sup>22</sup> causing loss benefit for Indonesian welfare.

The Act principles provides a legal basis for renewal, realignment of management activities, mineral exploitation and mining. It was also designed to adjust a change of strategic environment both in national and international environment, which giving legal certainty for everyone chiefly minerals and mining businesses.

This Act similarly obligates company exploring in Indonesia to purify or refine a number of ores in Indonesia territory instead of bringing the raw material abroad. With this consequence, coal and mining companies must build smelter in Indonesia. This regulation creates a significant economic growth, including in the area where mining explored. So that mining sector will produce multiplayer role that absorb a lot of human resources from various circles.

However, mining company has not fully agreed with the Act, arguing that the Act can create serious risk for the companies. They will face regulatory risks, because changing the existing regulations will create impact on changes in the company activities. Banning on exporting raw material makes company obligate to add smelter production and procurement processes, and supporting further production process.<sup>23</sup>

With these restriction and obligation, consequently, a company will also face a significant risk, emerging from adverse business decisions or improper

<sup>20</sup> ICC Judgement No. 30/PUU-VIII/2010. ICC stated that those article is unconstitutional, because the mechanism process in the bidding and the exploration do not guarantee the rights of citizen. See also ICC Judgement No.25/PUU-VIII/2010.

<sup>21</sup> ICC Judgement No. 10/PUU-X/2012.

<sup>22</sup> The contradicting can be found in the Article 169 of the Act Number 4 of 2009 on the Mineral Mining and Coal, that still giving chance to not amending previous contract made before this Act, or called non-retroactive.

<sup>23</sup> Marina Welker, *Enacting The Corporation: An American Mining Firm in Post-Authoritarian Indonesia*, California; University of California Press, 2014, h.67-71.

implementation that lead to earning or capital. In this case, company income level may gradually decrease, caused by the banning of exports and supplying for the smelter facilities.<sup>24</sup> If company does not meet smelter procurement until the time limit given by the government, will result in the closure of company. Another risk faced by mining companies incur losses a market share that has already accommodated by Indonesian companies supplying raw materials; though, companies need to find new markets for their products. For this consequences, mining companies will also cut their deficit with work termination for their employee.<sup>25</sup>

Mining companies will also face a significant obstacle relating to building smelter, such as bureaucracy and spatial planning. Bureaucracy and regulation in Indonesia quite often hamper up-streaming process. Cumbersome licenses, land acquisition, overlapping of regulations are the common barrier, chiefly regulation relating to mining divestment.<sup>26</sup> This regulation forces mining companies to divest their stock for government (provincial government, state-owned enterprises, and province-owned enterprises) after ten years of exploration. If a mining has integrated with a smelter, investor will have a great loss, because smelter is worth and huge investment that must be divested.

Then, spatial planning also creates another problem in mining industries. It still has overlapped area among forestry maps, mining maps and spatial planning maps, generating legal uncertainty among those maps.<sup>27</sup> Another obstacle is infrastructure.<sup>28</sup> A smelter requires an infrastructure support such as electricity to run factories, road to transport materials and to processed products, and port to distribute smelter results. Unfortunately, those infrastructures can be provided easily by government.

Responding disagreement from mining companies, government must be firm. The spirit of the mining act positions government as regulator and licensor, which does not equal to a mining corporation. Although government has a part as a shareholder, this would not have to go through divestment

<sup>24</sup> Samuel J. Spiegel, "Governance Institutions, Resource Rights Regimes, and the Informal Mining Sector: Regulatory Complexities in Indonesia," *World Development*, Volume 40, Nomor 1, 2012, h.189-205.

<sup>25</sup> See also Lolah Nkosi, "Social Impact of Mining," Dissertation in University of Johannesburg, 2015, h.9-17.

<sup>26</sup> Carol Warren, and Kylie Elston. *Environmental Regulation in Indonesia*, Australia: University of Western Australia Press/Asia Research Centre on Social, Political and Economic Change, Murdoch University, 1994, h.40.

<sup>27</sup> Michael K McCall, and Christine E. Dunn. "Geo-Information Tools for Participatory Spatial Planning: Fulfilling the Criteria for Good Governance?," *Geoforum*, Volume 43, Nomor 1, 2012, h. 81-94.

<sup>28</sup> Peter McCawley, "Infrastructure Policy In Indonesia, 1965-2015: A Survey," *Bulletin of Indonesian Economic Studies*, Volume 51, Nomor 2, 2015, h. 263-285.

mechanism. When giving a permit of mining exploration, government may directly set the percentage of government ownership as an obligation, which must be fulfilled by foreign or domestic investors.

It is not easy job government as the regulator to create a perfect mining law. This still need to be tested, whether able answering a number of issues in mineral mining or not, particularly when facing strategic environment challenges in national and international level. But upgrading the mining act stating government's position as the regulator instead of shareholder is important. Because a shareholder role in mining company is slightly vulnerable, chiefly in facing legal issues.

If a case arises, government will be automatically sued by other parties, such as happened previously in the Churchill's case. This case was started when the East Kutai district revoked the mining licenses given to Ridlatama Group (mining group acquisitioned by Churchil Mining). Feeling disadvantaged, Churchill Mining filed a lawsuit versus the Government of Indonesia to International Centre for Settlement of Investment Disputes (ICSID), demanding compensation of US\$ 1.1 billion dollars.<sup>29</sup>

Preventing this case, government as state institution should play role only as a licensor instead of a shareholder, whilst a shareholder, particularly in foreign mining company, can be delegated to national corporation or province corporation as a barrier. With this mechanism all of legal cases in the future will not have a crucial impact to the government.

*Secondly* is judicial review on the oil and earth gas. ICC has significantly made other breakthroughs in protecting energy security, most importantly, the annulment some articles in the Act Number 22 of 2001 on the Oil and Earth Gas. One of the Court's reasons in the Act is that the function of the executive organ (*Badan Pelaksana = BP*) in the Act is against the Constitution.<sup>30</sup> The judgement considers BP, representing the state in exploring energy resources, has right to interpret the meaning of owning state's resources. The existence of BP has created a potential occurrence and inefficiency. In fact it has opened up an opportunity to abuse of power.<sup>31</sup>

<sup>29</sup> Mérida Hodgson, "Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia: Procedural Order No 15 Reconsideration under the ICSID Convention: No Award Required," *ICSID Review Foreign Investment Law Journal*, Volume 31, Nomor 1, January 2016, h.1-8.

<sup>30</sup> ICC Judgement No. 36/PUU-X/2012.

<sup>31</sup> Widodo Wahyu Purwanto, Yuswan Muharam, Yoga Wienda Pratama, Djoni Hartono, Harimanto Soedirman, Rezki Anindhito, "Status and Outlook of Natural Gas Industry Development in Indonesia." *Journal of Natural Gas Science and Engineering*, Volume 29, Februari 2016, h.55-65.

As generally ICC judgment, this judgement also generates various controversies. But it has been respected and implemented by stakeholders, indicated by quick response of the president with creating president regulation,<sup>32</sup> transferring all of BP functions the Ministry of Energy and Mineral Resources.

Previously, BP was a state organ formed by government to manage and supervise in exploration, exploitation, and marketing oil and gas in Indonesia.<sup>33</sup> In another word this organ has reduced several Pertamina's authorities. The cooperative contracts that previously handled by Pertamina has switched to BP as government representatives. Companies involved in cooperative came from domestic and foreign companies, and also joint venture between domestic and foreign company. The list of companies has always developed yearly, following concession tender arranged by BP. Unfortunately, the BP function has reduced stated role, in ensuring and controlling the distribution of the oil and gas, which could have a deep impact on the providing energy security in Indonesia.<sup>34</sup>

The BP functions as a tender agent have created more critics regarding transparency and clean government. The corruptions have been indicated in several sectors such as cost recovery, mark up prices, and bribery. This happened because BP has been fully delegated the authority to control oil and gas production, from upstream until downstream production.<sup>35</sup>

On its decision, ICC explains that the Act was unconstitutional and does not have a binding power. The Court asserted that the Act had openly liberated the oil and gas management, due to be influenced by foreign parties. The unbundling<sup>36</sup> method, separating upper course and lower course, indicated that the strange parties want to split national industry on oil and gas, so, it is easily occupied the oil and gas industry in Indonesia.

Thus, oil and gas industry must create a significant improvement, particularly in two crucial points. First and most are institutional management of oil and gas industry, legislating a strong regulation regarding in oil and

<sup>32</sup> See also the Presiden Decree No. 95 Year 2012 on the Assignment of Tasks and Functions of Upstream Oil and Gas.

<sup>33</sup> See also the Government Decree No. 42 Year 2002 on the BPMIGAS

<sup>34</sup> ICC Judgment No.36/PUU-X/2012. See also ICC Judgment No. 002/PUU-I/2003.

<sup>35</sup> Jamie S. Davidson, "The Demise of Indonesia's Upstream Oil and Gas Regulatory Agency: An Alternative Perspective," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, Volume 37, Number 1, 2015, h. 109-133.

<sup>36</sup> Unbundling is to sell related products and services separately, rather than as one unit. See also Macmillan Education, *Macmillan English Dictionary for Advanced Learners*, Oxford: Macmillan Publishers, 2007, h. 1622.

gas industry. Both parliament and government has to complete the new oil and gas law by involving stakeholders such communities, local governments, and prominent people in legislating process. The next important step is the law enforcement for everyone breaking the law. The deviation of oil and gas industry can not only be resolved in private case (such a set off, over / under lifting), but also must be treated as a criminal case that similarly with corruption, criminal tax, and money laundry, if deliberately proven breaking the law that affected financial losses of a country.

The management of oil and gas, so far, has degraded an interpretation of state control over natural resources, including oil and gas.<sup>37</sup> Consequently the government cannot directly manage, or pointing directly state-owned corporation, to manage the entire exploration area of oil and gas, such as happening in upstream activities. After the BP has signed a contract, the state have then immediately bounded entirely within contents of contract. Thus, a country has lost their sovereignty to make regulations, or policies contradicting with contents of contract. This will not give a maximum benefit and welfare for people in that state. Therefore, a state will be a good viewer for the resource exploration in their sovereign territory.

The dissolution of BP has resulted to institutional, contract cooperation, and employee status. Therefore, the BP institution name must be removed in structure of state organizational, including duties and functions, the name, emblem, logo, e-mail, website, and matters relating to BP. So, if BP replaced with another institution, it cannot as same as BP in duties and functions. In contrast, after dissolution of BP, government replaces with another institution called SKK Migas,<sup>38</sup> owning BP duties and functions. In another word, government only replaces institutional name instead of the substantial problem. This indicates from the basic regulation issued by government that have no difference between BP and SKK. The name institution looks different, but duties, functions, organization, funding, assets, and personnel are still same. This means that government does not seriously concern to handle the matter oil and gas.<sup>39</sup>

<sup>37</sup> Simon Butt and Fritz Edward Siregar, "State Control over Natural Resources in Indonesia: Implications of the Oil and Natural Gas Law Case of 2012," *Journal of Energy & Natural Resources Law*, Volume 31, Nomor 2, 2013, h. 107-121.

<sup>38</sup> See also the President Decree No.9 Year 2013 on the Management Implementation of Upstream Oil and Gas.

<sup>39</sup> H. Anwar Sanusi, "Effect Of Market Orientation, Good Governance, And Professional Leadership On Managerial Performance Of Special Unit Of Upstream Oil And Gas: A Case Study Of Skk Migas Indonesia," *International Journal of Advances in Engineering & Technology*, Volume 8, Nomor 3, 2015, h. 246.

*Lastly* invalids the Act of electrical power. ICC made a brave breakthrough in annulling all over the Act Number 20 of 2002 on the Electrical Power.<sup>40</sup> In the Act mentioned that the electric power was a commodity which can be increased its price competitively. With this concept, the Constitutional Court's judges asserted, that the state does not fully have a control to enhance the benefit of electricity for the people needs, because the price might be controlled by market and private sector.<sup>41</sup>

Although only three articles contradict with constitution, those articles indicated as the heart of the Act of Electrical Power. Thus the all over of act is invalid, resulting the Act as a whole cannot be maintained, because would lead to chaos and creating legal uncertainty in its implementation. This Act regulates and provides direction for restructuring of electricity sector.<sup>42</sup> It also brings a significant change in energy business, particularly the future of electricity through industrial restructuring, implementing market mechanism, price reform, rationalization of private sector participation, and the redefinition of the role of government.

Basic philosophical formation of the Electrical Power act is competition and rivalry in the management, and unbundling in the electricity system. However, practically the act does not in accordance with the spirit of Article 33 paragraph (2) of the 1945 Constitution that is basic norms of Indonesian national economy.<sup>43</sup> The ICC in its judgment asserted that the branch productions in Article 33 of Constitution, such as in the fields of electricity, must be interpreted as a unity between transmission and distribution plants, cannot be separated each other. The Act is very vulnerable to protecting energy security, because electrical power will not fully own by state. The 1945 Constitution of the Republic of Indonesia, in the Article 33 (2) imply that sectors of production, which are important for the country and affect a life of people shall be under the powers of the state.

The core problem on this Act consists on the Article 16, 17 and 68, as the core of the Act. In the Article 16 states that the electricity supply business

<sup>40</sup> ICC Judgment No. 001-021-022/PUU-I/2003.

<sup>41</sup> Ida Bagus Radendra Suastama, "Asas Hukum Putusan Mahkamah Konstitusi Tentang Undang-Undang Migas dan Ketenaga Listrik," *Mimbar Hukum*, Volume 24, Nomor 2, Juni 2012, h.187- 375.

<sup>42</sup> Hanan Nugroho, Syamsidar Thamrin, and Gumilang Hardjakoesoema, "Electricity Industry in Indonesia after the Implementation of Electricity Law Number 20/2002: Proposed Agendas to Support Implementation of the Law," *Proceeding: International Association for Energy Economics Conference, Taipei: Juli. 2005*, h.1-14.

<sup>43</sup> See also the 1945 Constitution, Article 33 (2), stating that *sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.*

is conducted separately by different business entities. Furthermore the Article 17 states that business of power generator is based on competition and prohibiting market domination. This market share prohibition includes any action that may result in monopolistic practices and unfair business competition.

The Act also indicates that state does not have responsibility to arrange electric supply for public interest, and there are no provisions stating prices affordable by people.<sup>44</sup> Moreover, the electricity price fully depends on market price, which not considering the condition of social economic. This situation is very detrimental to the public interests, citizen, and potentially harms public interest. Because of contradicting with the Constitution, the Act of Electrical Power has adversely impact on public interest, including *Perusahaan Listrik Negara* (PLN), which is no longer being a significant production branch dominating electrical power. This will also imply to state security and sovereignty, because the state has no longer obliged to manage the most important production branches for benefit and prosperity of people.

PLN is a state corporation, having corporation mission laid on commercial basis.<sup>45</sup> However, subsidizing as public service obligation can be charged to PLN if not causing profit-loss to company.<sup>46</sup> Assignment to PLN or other state corporations must be tied with an employment agreement, regulating reward and punishment from both parties on the matter rights and obligations. Thus, the parties are encouraged to demonstrate an accountable performance. Subsidizing through public service obligation is one of alternative concepts.<sup>47</sup> In this concepts government buys a services sold by state or private corporation, then through a government agency delivers for the beneficiaries. The first step in this concept identifies the amount of subsidies in each region.

## CONCLUSION

The issue on the protecting energy security in legal aspect is responsibility of whole people of Indonesia. People have their own role on the protecting energy

<sup>44</sup> It was contradicted with the previous electrical power legislated in 1985, which clearly stated the subsidizing for people having lower level income. See also the Act No.15 Year 9185 on the Electrical Power.

<sup>45</sup> See also the Act No.19 Year 2003 on the State-Owned Enterprises.

<sup>46</sup> *Ibid*, see Article 66.

<sup>47</sup> Olivier Durand-Lasserve, Lorenza Campagnolo, Jean Chateau, and Rob Dellink, *Modelling of Distributional Impacts of Energy Subsidy Reforms: An Illustration With Indonesia*, Italy: FEEM, 2015, h. 7-10.

security. Notwithstanding the government is a key actor, because of playing role as policy maker. With this point, government must put people interest in the top priority. Furthermore, ICC has jurisdictions to ensure the law enforcement process, in particular, protecting energy security on the legal aspect. As the guardian of the constitution and the last castle of the rule of law, ICC can minimize the conflict of interest that can happen during the legislation process through judicial review process.

Therefore, this research concludes that ICC has played an important role as the protector energy security through their authorities. The evidences of this achievement can be seen in several judgements. In the act of mineral mining and coal ICC has protected the general principle of public owning. ICC states that the Act must defend, esteem and justify people interest, whose area and land ownership, will be engaged in mining area, and people affected from mining impact. It also annuls articles have unclear implication on authority of giving approval for the exploration. That act surrounds several provisions disputing each other, affecting loss benefit for Indonesian welfare.

Furthermore, on the oil and earth gas ICC has considerably completed other innovations in defending energy security, most importantly, the annulment some articles in the Act of Oil and Earth Gas regarding the *BP Migas*. So far it has uncontrollably represented the state in discovering energy resources. The presence of BP has produced a possible occurrence and inefficiency. In fact has unlocked a chance to abuse of power. Beforehand, BP was a state organ formed by government to manage and supervise in exploring, exploiting, and marketing oil and gas in Indonesia. It has reduced several PERTAMINA'S authorities. The cooperative contracts that previously controlled by PERTAMINA has converted to BP on behalf government.

Another significant judgment is annulment the Act of electrical power. ICC does not agree with the Act principle stating electric power was a commodity which can be augmented its charge competitively. With this model, the state cannot control the advantage of electricity for people requests, because fee will be imposed by market and private sector.<sup>48</sup> All over of this act is invalidated, ensuing the Act as a whole cannot be kept, because would lead to confusion and generating legal indecision in its application. This Act controls and affords route

<sup>48</sup> ICC Judgement No.001-021-022/PUU-I/2003.

for restructuring of electricity sector. It also carries an important change in energy industry, particularly the future of electricity through trade restructuring, applying market mechanism, charge reform, justification of private sector participation, and re-positioning role of government.

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