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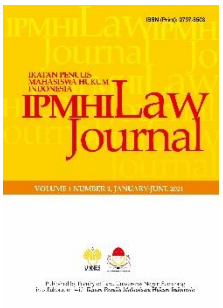

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The Legal Challenges to Regulate New Energy in Indonesia: A Context of Green Legislation Vs State Control

Tantangan Hukum dalam Pengaturan Energi Baru di Indonesia: Konteks Legislasi Hijau Vs Penguasaan oleh Negara

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Abstract The Legislation of Indonesian New Energy and Renewable Energy Law (RUU EBET) received a negative response from various circles of society and academia. Main concept of the EBET Bill as green legislation is expected could encourage the energy transition and low-carbon development by reducing fossil

energy and increasing the role of renewable energy. However, the internalization of new energy sources in the formulation of the EBET Bill, which is a product of fossil energy derivatives, is considered to hinder the energy transition process, so it is encouraged to be abolished. Nevertheless, the academic paper of the EBET Bill actually reveals that there is a national interest that is also urgent to be regulated in the EBET Bill, which is state control of new energy sources whose governance is still unclear. Therefore, this paper aims to explain the juridical conflict in the position of the EBET Bill as green legislation and at the same time as an instrument of state control over natural resources. The method used is normative juridical with statutory and conceptual approaches. The results of the research show that the EBET Bill should have two complementary goals, namely mitigating climate change through accelerating the energy transition and managing new energy sources that are still not organized in an orderly manner. The two goals are not to contradict one another, but serve as mutually reinforcing roadmaps.

Keywords New Energy, Green Legislation, State Control, EBET Bill, New Energy Sources

Abstrak Perancangan Undang-Undang Energi Baru dan Energi Terbarukan (RUU EBET) mendapatkan respons negatif dari berbagai kalangan masyarakat dan akademisi. Hal ini dikarenakan konsep RUU EBET sebagai legislasi hijau diharapkan mampu mendorong transisi energi dan pembangunan rendah karbon melalui pengurangan energi fosil dan memperbesar peranan energi terbarukan. Namun, internalisasi sumber energi baru dalam formulasi RUU EBET, yang merupakan produk turunan energi fosil dianggap menghambat proses transisi energi, sehingga didorong untuk dihapuskan. Di lain sisi, naskah akademik RUU EBET justru mengungkap bahwa terdapat kepentingan nasional yang juga urgen untuk diatur dalam RUU EBET, yakni penguasaan oleh negara terhadap sumber energi baru yang masih belum jelas tata kelolanya. Oleh karena itu, tulisan ini bertujuan menjelaskan pertentangan yuridis pada posisi RUU EBET sebagai legislasi hijau dan sekaligus sebagai instrumen penguasaan negara terhadap sumber daya alam. Metode yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan dan konseptual. Hasil penelitian menunjukkan bahwa tujuan diaturnya sumber energi baru dari turunan energi fosil dalam RUU EBET adalah untuk memberikan penegasan penguasaan oleh negara guna menciptakan pengaturan yang terorganisasi dan konstitusional.

Kata kunci Energi Baru, Legislasi Hijau, Penguasaan Oleh Negara, RUU EBET, Sumber Energi Baru

A. Introduction

The June 14, 2022 edition of the New Energy and Renewable Energy Bill (RUU EBET) caused debate due to the inclusion of the concept of nuclear energy and other new energy sources into the normative content of the EBET Bill[1]. Both types of energy are derivative products of fossil energy[2]. Philosophically, this norm is counterproductive to the purpose of promulgating the EBET Bill which is oriented towards energy transition and achieving the *Net-Zero Emission* target in 2060[3]. The inclusion of the new energy concept in the EBET Bill is also considered as *an eco-myopia*[4] of low-carbon development goals in the energy sector. Thus, there was a push to eliminate the new energy charge from the construction of the EBET Bill.

However, if examined further, the EBET Bill should be formed to guarantee national interests in clean energy management steps in line with the climate change mitigation agenda. The Academic Paper of the EBET Bill implicitly states that there are two factors underlying the formation of this draft regulation. These factors are external factors or foreign conditions and internal factors or domestic conditions[5]. The Academic Paper of the EBET Bill emphasizes the existence of this external factor in the participation of the Government of Indonesia in the Paris *Agreement* which was later ratified through Law Number 16 of 2016 concerning the Ratification of the *Paris Agreement to the United Nations Framework Convention on Climate Change (Paris Agreement to the United Nations Framework Convention on Climate* Change). In this agreement, the Government of Indonesia is committed to reduce greenhouse gas emissions by 29% by 2030 to reduce the limit of temperature increase to 1.5 degrees Celsius above the earth's temperature in pre-industrial times.

In addition to its commitment to *the Paris Agreement*, the Government of Indonesia is also committed to the *Sustainable Development Goals* (SDGs). The Sustainable Development Goals, or Global Goals, are a set of goals in the universal agreement to end poverty, protect all that makes the planet habitable, and ensure

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1 Luh De Suriyani, "Keganjilan di RUU Energi Baru dan Terbarukan", *Mongabay*, Mongabay, 2022 https://www.mongabay.co.id/2021/09/02/keganjilan-di-ruu-energi-baru-dan-terbarukan/

2 Yurika Yurika, "RUU Energi Baru dan Energi Terbarukan Dinilai Tidak Efektif dan Rancu", *Dunia Energi*, Dunia Energi, 2022 https://www.dunia-energi.com/ruu-energi-baru-dan-energi-terbarukan-dinilai-tidak-efektif-dan-rancu/

3 Anisatul Umah, "RUU EBET, IESR: DPR akomodasi kepentingan industri batu bara", *Alinea*, Alinea, 2022 https://www.alinea.id/bisnis/ruu-ebt-iesr-dpr-akomodasi-kepentingan-industri-batu-bara-b2fgH9Cdx

4 *Eco-Myopia* or Ecological Myopia *or* Environmental Myopia is a term in environmental policy studies that means failure of observation and long-term planning of environmental problems. This is characterized by the mere "green" labeling of policy products to make them look as if they support environmental sustainability, even though they are just labels. This failure to map long-term vision is analogous to nearsightedness/myopia, hence the name of this term. For further discussion. *See also* Jonathan Silvertown, et al. "Environmental myopia: a diagnosis and a remedy." *Trends in Ecology & Evolution* 25.10 (2010): 556-561.

5 Badan Keahlian DPR RI, "Naskah Akademik Rancangan Undang-Undang Energi Baru Dan Terbarukan" (Jakarta: DPR RI, 2018).

that all people enjoy peace and prosperity, now and in the future[6]. In the context of the EBET Bill, it is related to Goal 7, namely Clean and Affordable Energy.

Meanwhile, internal factors that influence the formation of the EBET Bill can be seen in the presentation of the fact that Indonesia has abundant potential sources of fossil and non-fossil energy. However, when referring to *the energy sustainability index*, the condition of energy management in Indonesia has not achieved optimal results. *The energy sustainability index* in 2013 states that Indonesia is ranked 73rd out of 129 countries for the best energy management. This indicates that national energy governance, both renewable and non-renewable, has not reached an optimal level of energy consumption efficiency[7]. In addition, state control over energy sources as stipulated in Law Number 30 of 2007 concerning Energy (Energy Law) does not include new energy sources in its norms. The vagueness of this rule causes juridical implications in the form of multiple interpretations of the governance of new energy sources. Therefore, the affirmation of state control over new energy sources in the EBET Bill is an action that should answer legal uncertainty due to blurring norms in the Energy Law.

Teleologically, the EBET Bill was formed as a regulatory umbrella to regulate and organize the potentials of new and renewable energy sources spread throughout Indonesia to be optimally utilized to support national development. The regulation should also not abandon the principles of environmental sustainability as its integral part. So in this case, it can be seen that there is a disparity in positioning the EBET Bill in the ideals of energy transition and low-carbon development mandated by the Paris Agreement and SDGs. On the one hand, the EBET Bill is green legislation because it is a *channel* for clean energy policies aimed at mitigating climate change. Meanwhile, on the other hand, there is a national interest to clarify the role of the state in the management of new energy sources as mandated by the constitution.

Prior research by Abel Parvez et al. addressed the same subject, aiming to reevaluate the EBET Bill, which was argued to be at odds with green legislation. However, this current study delves deeper into the fundamental essence of incorporating new energy within the EBET Bill. Essentially, it seeks to articulate a juridical framework capable of harmonizing the imperative of green legislation with the state's regulatory control over new energy sources. To achieve this, the study poses two fundamental questions: *First*, does the Regulation of New Energy Sources in the EBET Bill align with Green Legislation? *Second*, what model of State Mastery is envisioned for the Governance of New Energy Sources? Through these formulations, the paper endeavors to navigate the complex intersection between green legislation and state authority in the regulation of emerging energy sources.

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6 Joachim Monkelbaan, *Governance for the Sustainable Development Goals Exploring an Integrative Framework of Theories, Tool, and Competencies*. (Singapore: Springer Singapore, 2019).

7 DPR RI, "Naskah Akademik Rancangan Undang-Undang Energi Baru Dan Terbarukan."

B. Method

Normative juridical methods are used in this study along with statutory and conceptual approaches. The legal sources used are primary and secondary. In this study, the academic manuscript of the EBET Bill and the draft of the EBET Bill will be the main foundation of legal analysis. Coupled with the main content of the Energy Law, the National Energy Policy PP, and several Constitutional Court Decisions will be analytical instruments. The author will also explain the concept of green legislation, green constitution, and control by the state comprehensively based on an analysis of applicable laws and regulations.

C. Results and Discussion

1. Discourse on New Energy Sources and Green Legislation

Characteristics of New Energy Sources

The earliest juridical definition of new energy is found in Article 1 lift 5 of the Energy Law. New energy is energy that comes from new energy sources. Furthermore, new energy sources are defined in Article 1 point 4 of the Energy Law, namely energy sources that can be produced by new technology, both from renewable energy sources and non-renewable energy sources. These include nuclear, hydrogen, *coal bed methane*, liquified coal, and gasified coal. Similarly, the EBET Draft Bill in Article 9 paragraph (1) classifies new energy as follows;

a. Nuclear;
b. Hydrogen;
(a) the gas station;
d. Liquefied Coal;
e. Coal Asserted;
f. Other New Energy Sources.

When viewed from its characteristics, new energy sources are derivative products of fossil energy, which is non-renewable energy. However, this new energy source has undergone a type change through the help of new technology, resulting in a relatively new energy source. While new energy is a product or processing result of new energy sources. For example, *gasified coal* as a new energy source has a product in the form of new energy, namely *Dimethyl Ether* (DME). Although coal as the main ingredient has been a source of energy for a long time, this derivative product has not been developed massively and has not been used. This new energy source also does not have a complete and clear legal arrangement as a basis for its management. Therefore, the EBET Bill needs to regulate specifically about new energy sources.

EBET Bill as a Manifestation of Green Legislation

The EBET Bill is designed as a product of green legislation. Green legislation is a set of related regulatory drafting policies by the government aimed at creating a process of protecting and/or restoring the environment[8]. Green legislation is expected to effectively limit environmental destruction and play an important role in protecting the environment. Therefore, the legal rules in green legislation must be in line with the objectives of environmental restoration and protection[9]. Starting from the principles, objectives, institutions, funding, to the main substance of the regulation[10]. Green legislation must be designed to provide long-term protection to the environment. In this case, it is worth considering the principle of *intergenerational equity*[11]. The substance must be kept away from *eco-myopia*, a short-term solution that ignores the principle of intergenerational justice[12]. *Eco myopia* also stems from the failure of legislators or governments to formulate a long-term vision for environmental conservation[13].

Green legislation that is unable to encourage the long-term process of environmental conservation will result in degradation of people's rights to the environment which are generally guaranteed by the constitution[14]. This axiom can be seen from the consideration section of the EBET Bill which includes article 28H of the 1945 NRI Constitution. In paragraph (1) it is the implementation of the concept of green constitution in Indonesia. It is affirmed that everyone has the right to a good and healthy environment. This statement is a guarantee of the people's right to a clean and healthy environment. According to Jimly Asshiddiqqie, *the green constitution* applies environmental sovereignty or ecocracy in state life[15]. With the inclusion of the article guaranteeing the right to the environment in the constitution, it is ensured that in addition to adhering to people's sovereignty as reflected in Article 1 paragraph (2) of the NRI Constitution of 1945, Indonesia also adheres to

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8 Green legislation covers all regulations that support the improvement process and environmental regulations. However, it must be distinguishable from the Green Constitution which has its own meaning. *See* Fansheng Meng, Ye Xu, and Gang Zhao. "Environmental regulations, green innovation and intelligent upgrading of manufacturing enterprises: Evidence from China." *Scientific Reports* 10, no. 1 (2020): 14485.

9 Meng, Xu, and Zhao. p.3

10 Meng, Xu, and Zhao. p.4

11 Intergenerational justice is the right of future generations to guarantee the legal interest of environmental protection. *See* Ana Leah Tabios, "Intergenerational Equity: Assessing the Future Generations' Role in Environmental Protection and Standing to Sue in Cases of Environmental Harm", *Jurnal Kriminologi Indonesia*, 9 no. 1 (2013).

12 Silvertown et al., "Environmental Myopia: A Diagnosis and a Remedy." p. 55.

13 Silvertown et al. h. 34.

14 Bingbing Zhang, Lan Yu, and Chuanwang Sun, "How Does Urban Environmental Legislation Guide the Green Transition of Enterprises? Based on the Perspective of Enterprises' Green Total Factor Productivity", *Energy Economics* 110, no. April, (2022). https://doi.org/10.1016/j.eneco.2022.106032.

15 Jimly Asshiddiqie, *Green Constitution: Nuansa Hijau Dalam Undang-Undang Dasar 1945*, 1st ed. (Jakarta: Rajawali Press, 2010).

the principle of environmental sovereignty. The state positions the environment not as an object of development but the environment is a subject that has its own rights to be preserved and also protected from damage[16].

Philosophically, the concept of green / *green, both in the green constitution and* green legislation has the meaning of efforts to grow, design, produce, and work to lead to a better life, in this case the preservation and restoration of the environment.[17] Both legislation and green constitutions strongly consider the interests of public health through efforts to guarantee environmental quality in national development[18]. This green concept has the essence of driving the implementation of policies that are truly pro to the environment as a tool for the improvement process, not just a label embedded in the title of the policy. Therefore, green legislation must be understood as the formation of laws and regulations that have the substance of regulating environmental improvement processes that are in harmony with the green constitution[19].

Green legislation is also strongly encouraged to be formulated in energy regulations, both national and international obligations, because this concept is the antithesis to the problem of climate change[20]. The implications of this green concept are also in line with the background of the formation of the EBET Bill which has been discussed in academic papers. Where the EBET Bill is a follow-up to the commitment of the Government of Indonesia in fulfilling the mandate of the *2015 Paris Agreement*. Moreover, the international agreement has been ratified through Law Number 16 of 2016 concerning the Ratification of the *Paris Agreement To The United Nations Framework Convention On Climate Change*. Thus, the Government of Indonesia is obliged to improve national energy management regulations based on the concept of green legislation as a form of climate change mitigation.

2. Meeting Point between New Energy Source Regulation and Green Legislation in EBET Bill

The importance of implementing the green concept in energy legislation raises problems in the form of conflict between the green concept and the substance of new energy sources in the EBET Bill. This problematic view has been conveyed in the *Indonesian Center for Environmental Law* (ICEL) policy paper on the EBET Bill. ICEL states that new energy is not similar to renewable energy. Especially in the

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16 Asshiddiqie. p. 45.

17 Thomas L. Friedman, *Hot, Flat, and Crowded: Mengapa Dunia Butuh Revolusi Hijau Dan Bagaimana Cara Memperbaharui Masa Depan Global Kita*, ed. Alex Tri Kantjono 1st edition. (Jakarta: Gramedia Pustaka Utama, 2019).

18 Yu Zhang, and Sun, "How Does Urban Environmental Legislation Guide the Green Transition of Enterprises? Based on the Perspective of Enterprises' Green Total Factor Productivity."

19 Suparto Wijoyo, *Konstitusionalitas Hak Atas Lingkungan*, 1st ed. (Surabaya: Airlangga University Press, 2009).

20 Silvertown et al., "Environmental Myopia: A Diagnosis and a Remedy."p. 50.

perspective of energy transition which should be brought in the EBET Bill. Article 17 paragraph (1) of the EBET Draft Bill provides ease of business licensing in the exploitation of new energy[21]. In fact, with the difference between new energy constituent materials and renewable energy, such as nuclear and coal derivative products, different and stricter licensing mechanisms should be given. This is also influenced by the environmental impact potentially caused by these new energy sources. Thus, the regulation of the ease of licensing new energy does not bring the spirit of environmental improvement as the concept of green legislation and does not strengthen the agenda of energy transition and carbon emission reduction as mandated by the *2015 Paris Agreement.*

In addition, there is also criticism of the regulation of new energy sources in the EBET Bill from a juridical perspective. Abel Parvez, et al mentioned that the EBET Bill is not in line with the concept of green legislation that requires a pro-environment orientation in laws and regulations[22]. New energy, especially coal-derived products, is considered as an entry point for the perpetuation of non-renewable energy that is counter-sustainable with the aim of environmental protection and reducing carbon emissions in the context of mitigating climate change[23]. Coal and nuclear derivative products as part of new energy are actually contrary to other articles in the EBET Bill itself. But unfortunately, bills that are in harmony with green legislation can not only be supported by norming principles and objectives, but also optimal mechanism arrangements. The mechanism that should be the main discussion in the EBET Bill is a proven transition effort to renewable energy in line with transition efforts to prevent climate change and *depleting resources[24]*.

These views inspired the author to further analyze the alignment between new energy sources and the EBET Bill. Understanding the *raison d'être* of regulating fossil energy derivative products in the EBET Bill which should be green legislation is not enough if only capitalized on the EBET Bill itself. This is because the EBET Bill is a regulatory umbrella that harmonizes previous energy sectoral regulations. In this case, the author realizes that there is a meeting point between the concept of green legislation and the urgency of regulating new energy sources. Where new energy sources are not as dirty as thought. In the academic paper of the EBET Bill, it can also be seen that the facts captured are not only the issue of climate change

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21 Grita Anindarini, Etheldreda ELT Wongkar, and Mahawira S. Dillon. "Dua Isu Krusial dalam Rancangan Undang-Undang Energi Baru Terbarukan." *Policy Brief* 2 (2021): 7-8.

22 Abel Parvez, et al. "Reformulation Rancangan Undang-Undang Energi Baru Terbarukan for Transition to Eco-Friendly Energy Based by Green Legislation." *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 3, no. 1 (2023): 94-112.

23 Parvez et al. p. 98.

24 Zuhda Mila Fitriana, Dhea Veranica Isabella, and Lupita Sari. "Konsep Legislasi Hijau Regional (Regional Green Legislation): Mendukung Capaian TPB 2030 Nomor 7 tentang Energi." *Jurnal Hukum Lingkungan Indonesia* 8, no. 2 (2022): 431-454.

mitigation, but also the national interest in utilizing new energy sources as energy reserves that have been processed through clean technology. It is known as clean coal technology.

The regulation of new energy sources as part of the use of clean coal technology is contained in Presidential Regulation Number 22 of 2017 concerning the General Plan of National Energy (PERPRES RUEN). In annex I, it is stated that the national energy policy as the foundation of the RUEN has set reducing greenhouse gas emissions as one of the objectives of the national energy policy. The reduction in GHG emissions is driven by four factors;

1. Substitution of fuel to natural gas
2. Energy conservation
3. Energy diversification
4. Utilization of clean coal technology

In the context of new energy sources, the use of *clean coal technology* is in line with the coal utilization and/or development policy mandated by Article 102 of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Minerals and Coal (Mineral and Coal Law). Where the result of this clean coal technology is a new energy source that has been mentioned in the EBET Bill. This clean technology is what is meant as a new technology in the construction of the definition of new energy sources in the EBET Bill. The use of clean technology justifies that new energy sources are needed in the process of reducing carbon emissions, because although they come from fossil energy, they have undergone a process of quality improvement with the help of clean technology[25].

So it can be concluded that, the green concept in green legislation in Indonesia also focuses on the development of clean fossil energy as part of the low-carbon development process. This low-carbon development also still has the same goals as mitigating climate change and encouraging environmental improvement and preservation. Meanwhile, the development of clean coal technology is in line with the downstream policy intensified by the Government of Indonesia through the Mineral and Coal Law. The development of energy transition in Indonesia cannot run optimally if it is not accompanied by the development of low-carbon technology that is able to transform fossil energy that is still widely used in Indonesia. This is the meeting point between green legislation and the urgency of regulating new energy sources in Indonesia. Namely as a unified roadmap for low-carbon development and energy transition in Indonesia that is just.

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[25] Jose Antonio Ordonez, Marek Fritz, and Johannes Eckstein. "Coal vs. renewables: Least-cost optimization of the Indonesian power sector." *Energy for Sustainable Development* 68 (2022): 350-363.

3. State Control Model of New Energy Sources

Legal Considerations in State Control of New Energy Sources

State control over natural resources is regulated in Article 33 paragraph (2) of the 1945 NRI Constitution, "the branches of production that are important to the state and that control the livelihoods of many people are controlled by the state". Regarding the branches of production as stipulated in Article 33 paragraph (2) of the 1945 Constitution, for strategic economic branches, private ownership is not allowed[26]. In this context, the Constitutional Court in Constitutional Court Decision Number 002 / PUU-I / 2003 concerning the Examination of Law Number 22 of 2001 concerning Oil and Gas (Oil and Gas Law) has made three classifications of production branches, namely (i) the branches of production are important to the state and control the livelihoods of many people; or (ii) important to the state but not controlling the livelihoods of the people; or (iii) it is not important to the state but controls the livelihoods of the people. The three branches must be controlled by the state and used for the greatest prosperity of the people.

Furthermore, Constitutional Court Decision Number 001-021-022 / PUU-I / 2003 explains that the form of state control over these branches of production is realized through state enterprises funded by the government (state), in this case State-Owned Enterprises (SOEs), or by partnerships with national or foreign private companies that include loan funds from within and outside the country or by[27] involving national/foreign private capital with a good and mutually beneficial partnership system[28]. In addition, in the same decision, the meaning of being controlled by the state in Article 32 paragraph (2) is that the state must strengthen the position of companies, branches of production, so that they can gradually be able to provide the needs that are the livelihood of many people independently and replace the position of private companies, both national and foreign[29].

Then Article 33 paragraph (3) which also still deals with the concept of control by the state has a broader understanding. Jimly Asshiddiqqie argues that the provisions of Article 33 paragraph (3) of the 1945 Constitution contain three important things[30], namely (i) Earth and water and the natural resources contained therein; (ii) Controlled by the state; (iii) used for the greatest prosperity of the people. The definition in Article 33 paragraph (3) of the 1945 NRI Constitution, "earth, water, and all natural resources contained therein" must be given

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[26] Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945." *Jurnal Konstitusi* 13, no. 1 (2016): 195-212.

[27] Abi Suroso, Djoko Santoso, et al. "Revisiting the role of international climate finance (ICF) towards achieving the nationally determined contribution (NDC) target: A case study of the Indonesian energy sector." *Environmental Science & Policy* 131 (2022): 188-195.

[28] Yance Arizona, "Perkembangan konstitusionalitas penguasaan negara atas sumber daya alam dalam putusan Mahkamah Konstitusi." *Jurnal Konstitusi* 8, no. 3 (2011): 257-314.

[29] Arizona.

[30] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, 1st ed. (Depok: Rajawali Press, 2019). p. 120.

extensification of interpretation, which includes land, land, sea, seabed, and land below, including regarding wealth in the airspace[31]. In the Constitutional Court Decision Number 001-021-022 / PUU-I / 2003 concerning the Examination of Law Number 20 of 2002 concerning Electricity, the Constitutional Court interpreted that state control in a broad sense comes from the sovereignty of the Indonesian people over all sources of earth, water, and natural resources contained therein, including the understanding of public ownership by the people collectively over natural resources[32]. The people collectively are constitutionally oriented to give full mandate to the state to perform the following functions;

TABLE 1. The Function of State Control over Natural Resources According to the Constitutional Court

Function	**Implementation**
Policy	Formulate and conduct policies in the form of government programs.
Management	Grant and revoke natural resource licensing instruments, licenses, and concessions.
Settings	Legislative authority is in the form of forming laws and regulations and/or decrees issued by the government to regulate.
Management	Authority of majority shareholding and direct involvement of management through SOEs
Supervision	Supervise and control the implementation by the state in accordance with the mandate of the constitution

Source: Author, 2023

This is then implemented in Article 5 paragraphs (1) and (2) of the EBET Draft Bill, where new energy sources are included in the state control regime and run through five policy functions, regulation, management, management, and supervision.

Furthermore, Decision Number 36 / PUU-X / 2012 Regarding the Examination of Law Number 22 of 2001 concerning Oil and Gas (Oil and Gas Law), the Constitutional Court affirmed that the phrase "controlled by the state" cannot be separated from the phrase "as much as possible for the prosperity of the people". If the two phrases are not directly linked together, it can give rise to an incorrect constitutional meaning. Therefore, the phrase "for the greatest prosperity of the people" is used as an instrument measuring the constitutionality of state control[33]. Furthermore, the five roles of the state / government in the sense of state control if not interpreted as a unity of action, must be interpreted in stages based on their

[31] Tri Hayati, "Hak penguasaan negara terhadap sumber daya alam dan implikasinya terhadap bentuk pengusahaan pertambangan." *Jurnal Hukum & Pembangunan* 49, no. 3 (2019): 768-787.

[32] Hayati.

[33] Ahmad Redi, "Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam." *Jurnal Konstitusi* 12, no.2 (2015): 401-421.

effectiveness to achieve the greatest prosperity of the people, so that the order of state control ranks is as follows[34].

1) The State directly manages natural resources (*beheersdaad)*
2) The state makes policies and management (*beleid* and *bestuurdaad*)
3) Regulatory and supervisory functions (*regelensdaad* and *toezichthoudensdaad*)

The mastery rank above is in terms of natural resource management. The first level of control is the direct management of natural resources by the state so that direct management by the state will ensure the greatest prosperity of the people. The second level of mastery, the state makes policies and management. Policies and management made must be oriented as much as possible to the prosperity of the people, so that the policies made are to respect, *protect* and *fulfill the* needs and human rights of the community to natural resources[35]. And the third level of mastery is regulation and supervision. As long as the state has the ability of both capital, technology, and management in managing natural resources, the state must choose to directly manage natural resources[36].

Model of State Control of New Energy Sources

The regulation of new energy sources in the EBET Bill is based on the mandate of Article 33 paragraph (5) of the 1945 NRI Constitution. The article states that further provisions regarding the exercise of state control are stipulated in law[37]. Thus, the determination of state control over a natural resource commodity, in this case energy sources, is the authority of the framer of the law. The juridical source that can be used to refer to state control over energy sources is Article 4 of the Energy Law. However, the article only details state control over energy sources limited to fossil energy resources, geothermal, large-scale hydro, and nuclear energy sources. So in this context, new energy sources, although they are derivatives of fossil energy, are not included in the state control regime regulated in the Energy Law[38].

This condition has vague juridical implications, there are multiple interpretations of the absence of regulation on state control of new energy sources in existing regulations. First, it can be interpreted if all new energy sources that can be produced by new technologies both from renewable energy sources and non-renewable energy sources, such as, hydrogen, coal *bed methane*, liquified coal , and gasified coal), not subject to the regime of state control. This is clearly contrary to

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34 Redi.

35 Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945." *Jurnal Konstitusi* 13, no. 1 (2016): 195-212.

36 Redi, "Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam", p. 34.

37 Redi.

38 DPR RI, " Naskah Akademik Rancangan Undang-Undang Energi Baru Dan Terbarukan."

the mandate of the constitution. Second, it can be interpreted if new energy sources remain in the state control regime, by analogizing new energy sources as a unity with fossil energy. Although this second interpretation certainly conflicts with the norm explicitly with Article 4 of the Energy Law, even in the Energy Law, there is no further explanation of this article 4.

If new energy sources were positioned only under the regulatory regime, it would be unconstitutional. Given the interpretation of control by the state in the decisions of the Constitutional Court described in the previous chapter, it has been affirmed that control by the state is present in five functions, namely policy *(beleid*), regulation (*regelensdaad), management (*bestuursdaad), management (*beheersdaad*), and supervision *(toezichthoudensdaad*). Of the five functions, management is the top and first priority in state control of natural resources, in this case the government is obliged to manage its own new energy sources, not just regulate in laws and regulations[39]. The five functions must also be carried out together in order to be able to utilize new energy sources for the greatest prosperity of the people.

Moreover, state regulation and management of new energy sources must be carried out because new energy sources come from fossil energy which is limited in number and has the potential to cause carbon emissions, as well as fossil energy sources. Therefore, this new energy source needs to be controlled by the state and regulated for management in the EBET Bill regime. State control of this new energy source is intended so that the state has the authority to[40];

1. Regulate and organize the allocation, use, supply, and maintenance of new energy sources;
2. Determine and regulate legal relations between persons and new energy sources;
3. Determine and regulate legal relations between persons and legal acts concerning such energy sources.

Therefore, the model of state control over new energy sources is intended so that the state has the authority to make policies that are able to overcome technical and environmental obstacles that exist in new energy sources. The exploitation of new energy sources does require large capital and high technology. With the control of new energy sources by the state, the state can manage its own new energy sources through SOE management[41]. As a juridical consequence, the government will utilize SOEs to overcome capital and technology problems in developing new energy sources through investment mechanisms and partnerships with foreign business entities and foreign investors. Therefore, the regulation of new energy sources in

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[39] Ilham Dwi Rafiqi, "Pembaruan Politik Hukum Pembentukan Perundang-Undangan Di Bidang Pengelolaan Sumber Daya Alam Perspektif Hukum Progresif." *Jurnal Bina Hukum Lingkungan* 5 (2021): 319-39.

[40] House of Representatives of the Republic of Indonesia.

[41] Redi, "Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam".

the EBET Bill is a form of state presence to master new energy sources to be used as much as possible for the prosperity of the people.

The development of new energy sources, on the other hand, will cause large carbon emissions, because the constituent material is fossil energy which is also a carbon emitter[42]. Not to mention, the need for large water use and material fracturing methods that will later cause environmental impacts that are not simple. However, new energy sources are the future of Indonesia whose management needs to be accommodated in visionary arrangements by prioritizing the interests of the people[43]. The environmental impact of developing new energy sources can be overcome by the state, if state control of new energy sources runs optimally in the five existing functions. The state can make waste management policies for new energy sources and supervise the production of new energy sources so as not to cause greater environmental damage. The existence of the EBET Bill is an opportunity to straighten out the confusion of new energy sources by incorporating new energy governance into the state control regime. Capital, technological, and environmental challenges can be addressed by the state through the ruling regime.

The management model of new energy sources controlled by the state can refer to the Constitutional Court Decision Number 001-021-022 / PUU-I / 2003 Regarding the Testing of Law Number 20 of 2002 concerning Electricity, it is explained that the branch of production in Article 33 paragraph (2) of the 1945 Constitution in the field of electricity must be interpreted as a unity between generation, transmission, and distribution. This means that this branch of production is a management from upstream to downstream that must be managed by the state and must not be handed over to private and/or foreign parties. Similarly, the management of energy sources must also be managed from upstream to downstream to emphasize the dominance of the state's role in developing capital, technology, and environmental protection from integrative management of new energy sources.

State control of new energy sources through SOEs in an integrative manner is the most appropriate systematics in compiling new energy governance in Indonesia. SOEs have a central role in low-carbon development, accelerating the energy transition, and developing clean technologies. Juridically, this clean technology or low-carbon technology has been included in the strategic plan of the Ministry of Energy and Mineral Resources for 2020-2024 as outlined in the Regulation of the Minister of Energy and Mineral Resources Number 16 of 2020 concerning the Strategic Plan of the Ministry of Energy and Mineral Resources for 2020-2024. In the annex to the regulation, there is an agenda for environmental

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42 Parvez et al., " Reformulation Rancangan Undang-Undang Energi Baru Terbarukan for Transition to Eco-Friendly Energy Based by Green Legislation"

43 Marthen B. Salinding, "Konsep Penguasaan Negara Terhadap Sumber Daya Mineral dan Batubara Yang Berkeadilan." *Borneo Law Review* 6, no. 2 (2022): 219-235.

development, disaster resilience, and climate change. The achievement of this agenda is realized through the role of SOEs in the energy sector in implementing various low-carbon technologies in managing fossil energy power plants.

For example, state-owned coal-fired power plants are encouraged to use low-carbon technologies, such as *Integrated Gasification Combined Cycle* (IGCC), *Carbon Capture and Storage (CCS), and* Carbon Capture *Utilization Storage* (CCUS) technologies, to reduce carbon emissions. This low-carbon technology is able to reduce carbon emissions produced by new energy sources, which in fact are derivatives of fossil energy, so as not to cause greater carbon emissions than fossil energy itself[44]. Furthermore, SOEs in the energy sector can encourage the creation of regulations that integrate the application of CCS-CCUS and IGCC into the workflow of the energy industry. Thus, the energy industry can help reduce carbon emissions, while developing new energy potential in Indonesia.

D. Conclusion

This study concluded that the nexus between the emerging concept of new energy sources and the principles of green legislation within the EBET Bill converges significantly on the paradigm of low-carbon development. In this context, Indonesia's commitment to low-carbon development transcends mere environmental considerations, extending into the technological domain. The regulation of new energy sources within the EBET Bill is crafted to systematically organize and harness their untapped potential, concurrently fostering the advancement of clean coal technology as a strategic national energy reserve. This holistic approach resonates with the essence of green legislation, wherein the government prioritizes the long-term environmental trajectory, exemplified by the emphasis on developing clean coal technology to curtail carbon emissions. Consequently, the EBET Bill manifests a normative alignment between the regulation of new energy sources and the principles of green legislation.

Furthermore, State-Owned Enterprises (SOEs) emerge as pivotal instruments for the government to assert control and orchestrate governance in the realm of new energy sources. This aligns seamlessly with the Constitutional Court's mandate, emphasizing the independent state management of natural resources. The pivotal role played by SOEs in the governance of new energy sources extends to catalyzing the integration of regulations governing Carbon Capture and Storage-Carbon Capture, Utilization, and Storage (CCS-CCUS), as well as Integrated Gasification Combined Cycle (IGCC) clean technologies, into the operational fabric of the Indonesian energy industry. Consequently, SOEs become instrumental in steering the comprehensive development of new energy sources, from upstream to

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[44] Dongdong Song, Tong Jiang, and Chuanping Rao. "Review of Policy Framework for the Development of Carbon Capture, Utilization and Storage in China." *International Journal of Environmental Research and Public Health* 19, no. 24 (2022): 16853.

downstream, adhering to the constitutional mandate. In essence, the relationship between green legislation and new energy sources within the EBET Bill should be synergistic and complementary, representing a unified roadmap rather than conflicting domains.

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Environmental stewardship doesn't demand perfection; it craves our dedication to making a difference, one mindful choice at a time.

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