



## LEGAL ASPECTS OF STATE CONTROL RIGHTS IN MINING SECTOR AFTER THE RENEWAL OF MINERAL AND COAL LAW IN INDONESIA

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### ABSTRACT

The concept of State Control Rights, as constitutionally attributed in Article 33 Paragraph (3) of the 1945 Constitution, constitutes a fundamental paradigm. The dialectics of mining policy formulation in Law No. 3 of 2020, which updated the regulation of minerals and coal, ushered in a series of transitions and consequences for the development of the concept of State Control in Indonesia, particularly concerning the substance of Article 4 Paragraph (2) of Law No. 3 of 2020, which introduced the policy of re-centralization. This research employs a juridical-normative method, utilizing a legislative approach and norm analysis pertaining to the concept of State Control Rights. The findings of this study indicate that, firstly, the formulation of state control in Law No. 3 of 2020 aligns intending to implement the concept of State Control as established by the Constitutional Court's decision, emphasizing the permit system as a replacement for the contract system. Secondly, the centralization of authority over mineral and coal mining does not contradict the concept of State Control, as long as it can optimally generate an ideal and effective mining management system in advancing the prosperity of the people. The objective of this research is to provide a comprehensive overview of the application of State Control Rights in the revision of mining legislation, thereby offering policy insights for the development of substantive and just mining law in Indonesia.

**Keywords:** Contract of Work; Licensing; Minerba; Mining; State Control Rights

### 1. PRELIMINARY

Mining legal policy formulation determines Indonesia's capability to optimize the use of natural resources in its territory. Indonesia is a country with a very high level of mineralization, with a significant contribution to the circulation of world industrial needs, including nickel, tin, copper, gold, coal, and iron ore. Indonesia's geographical location is in the meeting zone of tecto-volcanic valleys and the convergence of Eurasia, Indo-Australia, and the Pacific, resulting in active mountain ranges with important mineral resources. The utilization of mineral and coal resources produces a positive contribution to Indonesia's national economy.<sup>1</sup>

The mineral and coal mining sector contributes significantly as a pillar of the national economy. The contribution of the extractive sector from the mineral and coal sector to the national and regional economies in 2018-2019 was 4.5% and 5% of total Gross Domestic Income (GDP), respectively. Indonesia's total mining GDP in 2018 amounted to IDR 710,311 billion and in 2019 amounted to IDR 738,817 billion. Meanwhile, the royalty value from the mineral and coal sector in the same year amounted to IDR 1.75 trillion and IDR 2.25 trillion. After the pandemic and the implementation of the downstream policy, in 2022, Non-Tax State Revenue (PNBP) in the mineral and coal sub-sector reached the highest value of IDR 183 trillion, with the main contribution from coal royalties amounting to IDR 85.7 trillion, nickel amounting to IDR 4.8 trillion, and gold amounting to IDR 3.8 Trillion. The increase in the value of state revenue from the 2018-2019 period to

1 Vania Shafira Yuniar, "Legal Protection For Foreign Investment In The Mineral And Coal Mining Sector In Indonesia," *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 12, no. 2 (April 20, 2021): 102–14, <https://doi.org/10.28932/di.v12i2.3555>.

2022 shows efficiency in the mining management mechanism carried out by the government. The downstream strategy produces a positive surplus in the PNPB calculation.<sup>2</sup>

The utilization of mineral and coal resources in Indonesia through policy transitions carried out by the government from time to time is built into the supersystem of welfare state thinking which is codified in Article 33 Paragraph (3) of the 1945 Constitution, that “the earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people”. The substance of this article confirms the conceptual existence of the state control right.<sup>3</sup> Conceptually, state control rights establish the state’s position as a single entity that has control rights over resources, so that several exclusive rights are applied to it that are not owned by other companies or countries in its territorial area.<sup>4</sup> The function of the state control right in Indonesia is associated to create people’s welfare, which means that the state control rights of resources as capital, to be used for the greatest prosperity of the people.

The formulation of the state control right in Article 33 Paragraph (3) of the 1945 Constitution is the highest constitutional basis for the management of mineral and coal mining in Indonesia. According to Constitutional Court Decision Number 002/PUU-I/2003, the phrase ‘controlled by the state’ is interpreted as “... includes the meaning of control by the State in a broad sense which originates and is derived from the concept of sovereignty of the Indonesian people over all sources of earth and water and natural wealth contained therein, also includes the meaning of public ownership by the people’s collective of the sources of wealth in question. The collective people were constructed by the 1945 Constitution of the Republic of Indonesia which gave a mandate to the state to carry out its functions in implementing policies (beleid), and management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad), and supervision (toezichoudensdaad) by the state...”<sup>5</sup>

In the development of mining law along with changes in government regimes, the legal orientation and politics of regulations related to state control rights continue to fluctuate. There is a phenomenon of tug-of-war of authority between the central and regional governments in line with changes in the land regime and the implementation of regional autonomy in Indonesia. Mineral and coal matters are a fundamental and urgent issue because the extraction results have a direct impact on the lives of many people. In recent developments, the enactment of Law No. 3 of 2020 concerning Amendments to Law No. 4 of 2009 concerning Mineral and Coal has gradually restored the central government’s hegemony in monopolizing mining control matters. Article 4 Paragraph (2) Law no. 3 of 2020 explicitly confirms that: “Control of Mineral and Coal by the state as intended in paragraph (1) is carried out by the Central Government following the provisions of this Law.” The legal political ratio of Article 4 Paragraph (2) is oriented towards withdrawing the authority to control mineral and coal which in Law No. 4 of 2009 is partially attributed to regional governments. This norm formulation produces a recentralization phenomenon in contemporary Indonesian mining legal politics.<sup>6</sup>

Legal problems arising from the norm formulation of Article 4 Paragraph (2) of Law no. 3 of 2020 is the compatibility of recentralization policies with the vision of the state control right which is mandated in the 1945 Constitution. Even though it is dynamic, the variable of examination of the implementation of the right to control the state in Indonesia cannot be seen merely as a formulation but must be seen from the perspective of maximum benefit for the prosperity of the people. This is because the etymological reading of the state control right in Article 33 Paragraph (3) does not stand alone, but is directly linked to its teleological goal, namely welfare. In other words, as long as the implementation of the state control right is linear with welfare, the

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2 Muhammad Tanzil Aziz Rahimallah, “Pengelolaan Minerba Dalam Persepektif Good Governance (Tinjauan Teoritik Dan Normatif),” preprint (Open Science Framework, November 2, 2022), <https://doi.org/10.31219/osf.io/f2jr6>.

3 Ahmad Redi, “Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam,” *Jurnal Konstitusi* 12, no. 2 (May 20, 2016): 401, <https://doi.org/10.31078/jk12210>.

4 J Ronald Mawuntu, “Konsep Penguasaan Negara Berdasarkan Pasal 33 Uud 1945 Dan Putusan Mahkamah Konstitusi,” n.d.

5 Nabilla Desyalika Putri and Dian Agung Wicaksono, “Implikasi Legislasi Pengambilalihan Kewenangan Di Bidang Pertambangan Mineral Dan Batubara Oleh Pemerintah Pusat,” *Jurnal Legislasi Indonesia* 13, no. 1 (2016): 19–32.

6 Muhammad Salman Al Farisi, “Desentralisasi Kewenangan Pada Urusan Pertambangan Mineral Dan Batubara Dalam Undang-Undang Nomor 3 Tahun 2020,” *Jurnal Ilmiah Ecosystem* 21, no. 1 (April 30, 2021): 20–31, <https://doi.org/10.35965/eco.v21i1.699>.

policy can obtain theoretical validation and become a strategic policy, in addition to the normative validation obtained through the mechanism of forming legislation.<sup>7</sup> For this reason, the potential for achieving benefits from changes in the implementation of state control right in the renewal of the Mineral and Coal Law has a high urgency to be elaborated, with a focus on Article 4 Paragraph (2) of Law no. 3 of 2020.

Previous research conducted by Alfredo Risano (2020), explained that it was related to the disharmony between Law No. 3 of 2020 and Law No. 4 of 2009 in the dimension of the state control right. The results of this research showed that the state control right after Law No. 3 of 2020 tends to be centralized, with most of the authority in the hands of the central government. This condition is contrary to the spirit of regional autonomy and decentralization which was previously accommodated by Law No. 4 of 2009. The next research by Ayuk Suryaningsih et al (2021), explains the changes to Law No. 3 of 2020 which changed Indonesia's position from inferior in mining matters to superior by changing the work contract system to licensing. The results of this research identify significant changes in the implementation of state control right after the government abolished the work contract system and made the licensing system the sole procedure for mining permits. A linear licensing system with the mandate of Article 33 Paragraph (3) of the 1945 Constitution.<sup>8</sup> Conclusively, the two research literature above has provided an overview of the mining policy transition after Law No. 3 of 2020 with centralization and use of a licensing system to replace work contracts. However, there has been no comprehensive discussion of the state control right and the factors that can be used to assess the linearity of the implementation of the state control right in Law No. 3 of 2020 concerning Mineral and Coal.

The novelty in this research is the in-depth elaboration of Article 4 Paragraph (2) of Law No. 3 of 2020 which confirms the implementation of recentralization in Indonesian mining politics, and tests its compatibility with the concept of state control right. This research aims to determine the legal aspects of implementing the state control right in Law No. 3 of 2020 so that linearity can be identified between the goal orientation built into the formulation of the law reform and the goal of maximizing people's prosperity in the constitution.

## 2. METHOD

The writing in this research uses a normative juridical method with a statutory approach.<sup>9</sup> The research was carried out using literature study, through objective elaboration of primary legal materials in the form of statutory regulations, and review of secondary materials from journals, books, and literature relevant to the research topic to produce a research synthesis that is credible and academically accountable, comprehensive, systematic and integrated in nature. The analysis was carried out by comparing the substance of the norms in Law No. 3 of 2020 concerning Mineral and Coal with the concept of state control rights, and formulations related to state control rights in previous laws. This analysis is aimed at obtaining a comprehensive picture regarding the development of state control rights in various mining regimes in Indonesia, as well as identifying the linearity of the formulation of state control in the latest regulations towards the concept of constitutive state control rights.

## 3. RESULTS AND DISCUSSION

Compatibility of recentralization policies in mining legal politics Article 4 Paragraph (2) Law no. 3 of 2020 concerning Mineral and Coal regarding the concept of state control right, in this discussion, it will be elaborated through two aspects of the discussion, namely aspects of licensing forms and aspects of the division of authority. First, the form of licensing aspect is a policy format applied by the state to bind mining business actors, with an orientation towards increasing state revenue to support the achievement of people's welfare.

7 Marilang Marilang, "Ideologi Welfare State Konstitusi: Hak Menguasai Negara Atas Barang Tambang," *Jurnal Konstitusi* 9, no. 2 (May 20, 2016): 259, <https://doi.org/10.31078/jk922>.

8 Ayuk Suryaningsih, Allena Marvelia Silalahi, and Aqila Herdinyanto Sanjaya, "Hak Penguasaan Negara dalam Bidang Pertambangan Mineral dan Batubara Sesuai dengan UU Minerba," *SUPREMASI: Jurnal Hukum* 5, no. 2 (April 3, 2023): 144–58, <https://doi.org/10.36441/supremasi.v5i2.1262>.

9 Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

Second, the aspect of dividing central and regional authority is a policy strategy in optimizing mining systems and management, in order to produce an ideal mineral and coal mining ecosystem in Indonesia.

### 3.1 Compatibility of State control right According to the Mining Licensing System

The history of mineral and coal mining in Indonesia goes back long before the independence era.<sup>10</sup> Massive resource exploitation was carried out by the Dutch East Indies colonial government for various strategic minerals, including nickel, tin, petroleum, coal, and iron ore. To manage mining affairs, the Indische Mijn Wet (IMW) or Dutch East Indies Mining Law was formed in 1899.<sup>11</sup>

After independence, Article II of the 1945 Constitution Transitional Regulations gave legitimacy to the government to adopt a number of provisions of colonial-era legislation to prevent a legal vacuum (*rechtvacuum*) and would be updated after a new law or legal entity was formed by the government in the future. One area that later adopted colonial law was mining. Law no. 1 of 1967 concerning Foreign Investment (FDI Law) and Law no. 11 of 1967 concerning Basic Mining Provisions (Mining Law) adopts an open door policy and grants mining concessions through the Contract of Work scheme.

Normatively, there are no provisions in the PMA Law and the Mining Law that define the meaning of a work contract. For this reason, Salim H.S defines a work contract as “an agreement made between the Indonesian Government/regional government (province/district/city) and a foreign contractor solely and/or is a joint venture between a foreign legal entity and a domestic legal entity to carry out activities exploration and exploitation in the general mining sector, following the time period agreed by both parties.”

The implementation of the work contract system in mining affairs is associated with the open-door legal politics implemented by the New Order government<sup>12</sup>. After the enactment of the PMA Law, a large number of foreign investors contributed to economic circulation and extractive industries in the country, one of which was PT Freeport-McMorant which carried out exploration and exploitation of copper and gold in Grasberg, Papua, two years after the PMA Law was passed using a work contract system. However, the implementation of the work contract system has caused widespread criticism because it is considered not ideal for the mineral and coal mining ecosystem in Indonesia<sup>13</sup>. This criticism is mainly related to the small percentage distribution of royalties from mineral and coal mining obtained by the state and agreements that indicate the state’s position is ‘equal’ to private companies.<sup>14</sup> In fact, in the concept of state control right, the state is the ‘master’ or ‘controller’ of resource wealth, so the form of agreement does not show relevant compatibility.<sup>15</sup>

Accumulated criticism of the work contract system became the dominant discussion agenda leading up to the collapse of the New Order in 1998. The impact of environmental damage after more than 30 years of exploitation by foreign companies, uneven development, the economic crisis, and the community’s powerlessness to participate in mining activities made the mining sector not free from opposition criticism.<sup>16</sup> In several segments, the threat of regional disintegration also occurs in several resource-rich provinces, such as Aceh and Papua due to economic disparities and high exploitation of natural resources. After the collapse of the New Order, the government opened a decentralization policy and reformulated mining policy based on the consequent state control right.

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10 Redi, “Dinamika Konsepsi Penguasaan Negara Atas Sumber Daya Alam.”

11 Redi.

12 Arman Nefi, Irawan Malebra, and Dyah Puspitasari Ayuningtyas, “Implikasi Keberlakuan Kontrak Karya PT. Freeport Indonesia Pasca Undang-Undang No 4 Tahun 2009 Tentang Pertambangan Mineral dan Batubara,” *Jurnal Hukum & Pembangunan* 48, no. 1 (March 29, 2018): 137, [https://doi.org/10.21143/.vol48.no1.1604.Special Mining Business License \(IUPK](https://doi.org/10.21143/.vol48.no1.1604.Special Mining Business License (IUPK)

13 Ali Imron, “Analisis Terhadap Kekuatan Bargaining Position Pemerintah Indonesia Dalam Kontrak Karya P.T. Freeport Indonesia,” *Jurnal Cakrawala Hukum* 18, no. 2 (2013), <https://doi.org/10.26905/idjch.v18i2.1115>.

14 Mercy Maria Magdalena Setlight, “Divestasi Sebuah Langkah Progresif Dalam Kontrak Karya Di Indonesia,” *Jurnal Hukum Prioris* 5, no. 1 (2015), <https://doi.org/10.25105/prio.v5i1.397>.

15 Imron, “Analisis Terhadap Kekuatan Bargaining Position Pemerintah Indonesia Dalam Kontrak Karya P.T. Freeport Indonesia.”

16 Nazruddin Lathif, “Tinjauan Yuridis Tentang Kewenangan Pemerintah Provinsi Dalam Penerbitan Izin Usaha Pertambangan Batubara,” *Jurnal Panorama Hukum* 2, no. 2 (December 9, 2017): 149, <https://doi.org/10.21067/jph.v2i2.2076>.

Gradual development occurred with the enactment of Law No. 4 of 2009 concerning Mineral and Coal, which consequently abolished the contract of work system and replaced it with a licensing system based on Mining Business Permit (Izin Usaha Pertambangan ‘IUP’) and Special Mining Business Permit (Izin Usaha Pertambangan Khusus ‘IUPK’). Although this change does not apply retroactively, while still recognizing a number of work contracts whose concession period has not expired, it has limited the issuance of similar contracts after they have been stipulated.<sup>17</sup> Thus, all permits issued after Law No. 4 of 2009 are in the form of a licensing system, not an agreement. The transition of mineral and coal mining regulation from a contract system to a licensing system brings with it the consolidation of state control rights in a more consistent dimension. The strengthening of the implementation of state control rights can be explained in two main aspects, namely the compatibility between the licensing system and the function of state control rights and the implementation of divestment to increase economic added value for the state.

First, the suitability between the licensing system and the state control rights function. In Constitutional Court Decision Number 002/PUU-I/2003, the function of state control over natural resources is defined as the absolute position of the state to implement five control functions. The five mastery functions can be seen in the following table:

**Table 1. Functions of control by the state based on the Constitutional Court Decision**

| <b>Function</b>                   | <b>Explanation</b>  |
|-----------------------------------|---|
| Policy (beleid)                   | Carried out by the government, this task involves the process of formulating and implementing policies by the state. This process includes the formation and implementation of policies necessary to achieve the goals set by the government.   |
| Management Actions (bestuursdaad) | Carried out by the government through its authority in issuing and revoking necessary permits, licenses, and concessions. This process involves the authority possessed by the government to issue permits, licenses, and concessions to individuals, companies, or other entities. Apart from that, the government also has the authority to revoke the permit if necessary, for example, if violations or non-compliance with applicable regulations occur. This action aims to supervise and regulate business activities and operations that require official permits to run following the regulations and norms applicable in the country.   |
| Arrangement (regelendaad)         | The state is responsible for this regulatory function through two main processes. First, through legislative authority given to the People’s Representative Council (DPR) in collaboration with the Government. Second, through regulatory mechanisms managed by the Government, which is part of the executive branch of government. The legislative process involves the DPR in drafting laws and regulations that apply to various aspects of public life. The DPR, as representatives of the people, plays an important role in presenting the community’s perspective in the process of forming laws. The government, meanwhile, contributed with technical knowledge and practical implementation in formulating the law. On the other hand, regulations produced by the Government involve the executive branch in issuing more detailed regulations to implement existing laws. This process helps fill in technical details and provides practical guidance in implementing laws that have been passed by the DPR. The types of regulations referred to in Article 7 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations include regulations detailing the procedures and conditions for implementing laws, as well as other rules necessary to manage government efficiently and under applicable law. |

<sup>17</sup> Imas Novita Juaningsih, “Polemik Revisi Undang-Undang Minerba dalam Dinamika Tata Negara Indonesia,” *ADALAH* 4, no. 3 (July 15, 2020), <https://doi.org/10.15408/adalah.v4i3.16502>.

|                                   |   |
|-----------------------------------|---|
| Management (beheersdaad)          | This function is carried out through two main mechanisms, namely share ownership and direct involvement in the management of State-Owned Enterprises (Badan Usaha Milik Negara ‘BUMN’) as an institutional instrument. Through this mechanism, the state or government uses its control over wealth resources to promote the greatest welfare of the people. Share ownership refers to ownership of part or all of the shares in companies operating in strategic sectors. In this way, the state has significant control over the policies and direction of these companies, intending to generate greater economic benefits for society. Apart from that, direct involvement in BUMN management is another strategy used by the state. In this case, the government has an active role in managing and directing BUMN to ensure efficient use of resources and provide maximum contribution to the prosperity of the people. In the context of regional government administration, this function is carried out by Regional Owned Enterprises (Badan Usaha Milik Daerah ‘BUMD’). BUMD has the responsibility to manage regional assets and run businesses that support local economic development and improve the welfare of local communities. Thus, BUMD plays an important role in carrying out the function of managing state wealth resources for the greatest benefit of the people’s prosperity at the regional level. |
| Supervisor (toezicht houden daad) | This action is carried out by the state, which in this context includes the government, as part of efforts to supervise and control the management of state wealth resources. The main aim of this supervision and control is to ensure that state control rights over these sources of wealth is truly carried out in good faith and for the greatest prosperity of all the people. This supervision and control includes various measures and policies, such as close monitoring of natural resource extraction or management activities, careful auditing of revenues generated from the exploitation of these resources, as well as the development of transparent regulations and laws to regulate the use and allocation of these resources. The state and government are responsible for ensuring that the country’s rich resources do not only benefit a handful of parties or certain interest groups but are truly managed and utilized fairly and efficiently for the welfare of all citizens. In other words, the government must ensure that these resources are not misused or exploited to the detriment of the general public, and must strive to allocate the benefits of these sources of wealth evenly for the greatest prosperity of all the people. This is one of the important aspects of the state’s duties in carrying out a fair and just government.   |

*Source: Abstract of Explanatory Tables by the Author.*

Through the licensing system, the state can carry out the five control functions in full. This can be done because the position of the state and business actors are not in an equal legal relationship, but rather a hierarchical position. Business actors are obliged to comply with mining regulations and policies set by the state so that control over the use of natural resources can be controlled by the state and oriented towards achieving people’s prosperity under the welfare state ideology in Article 33 Paragraph 3 of the 1945 Constitution.<sup>18</sup>

Second, the implementation of divestment. Improvements to open door politics accommodated in Law no. 1 of 1967 (PMA Law) in the mineral and coal mining sector were carried out by establishing a divestment policy through Law No. 4 of 2009 concerning Mineral and Coal. In general, divestment means the obligation for business actors or companies operating in the mineral and coal mining sector in Indonesia to hand over their share ownership in a certain amount to the government, BUMN, or private business entities approved by the government through a capital investment or share purchase scheme. Divestment is aimed at integrating national economic interests in the exploitation of natural resources carried out by mining companies, with the value of divestment increasing progressively.<sup>19</sup>

18 Inda Rahadiyan and Karina Amanda Savira, “Menimbang Posisi Indonesia Dalam Kontrak Karya Freeport (Problematika Hukum-Sosial Serta Kemungkinan Solusinya),” *DEFENDONESIA* 3, no. 1 (December 22, 2017): 41–55, <https://doi.org/10.54755/defendonesia.v3i1.69>.

19 Al Farisi, “Desentralisasi Kewenangan Pada Urusan Pertambangan Mineral Dan Batubara Dalam Undang-Undang Nomor 3 Tahun 2020.”

The fundamental reason for implementing the divestment policy is the lack of state revenue in the work contract scheme from companies that invest capital in Indonesia. In the case of gold mining by PT Freeport-McMoran, the government only received income worth 3.75% of the sales value in the form of Non-Tax State Revenue (PNBP). Even as long as it is still run using a work contract system, the government only receives PNBP worth 1% of the selling value of Freeport's gold. In the long term, an open-door political scheme provides space for foreign investors to obtain maximum profits with minimal shares for the government. For this reason, legal politics in Law No. 4 of 2009 coherently reduces foreign shareholding with the obligation to divest the government. This is stated in Article 112 of Law No. 4 of 2009 which emphasizes that after five years of increasing production, IUP and IUPK owners are required to divest shares. This divestment is given to the government, both central and regional governments through BUMN, BUMD, or private companies appointed by the government.

The diversification regulations require national capital participation in shares of foreign companies in the mineral and coal mining sector with a minimum value of 20% and increasing progressively. In the tenth year, the value of government share ownership in mining companies reached 51%.<sup>20</sup> This divestment provides space for the government to participate in company strategic decision-making and ensure the achievement of national interests in mining management. The prospective profits obtained through the share divestment scheme are clearly in line with the function of state control as well as the state control right.

However, divestment realization can only be applied to IUP and IUPK permits and does not apply to the work contract system. This is confirmed in Article 169 letter b of Law No. 4 of 2009 which confirms that work contracts and work agreements for mineral and coal mining businesses that have existed since before the enactment of Law no. 4 of 2009 will remain in effect until the term of the agreement is completed. The binding clauses between the state and entrepreneurs through the work contract system are completely contained in the contract itself according to the *pacta sun servanda* principle so that new provisions such as divestment are irrelevant and are not required to be implemented by companies under the work contract system.<sup>21</sup>

Changes in the mining regime with the enactment of Law no. 3 of 2020 concerning Amendments to Law no. 4 of 2009 concerning Minerba substantively strengthens the state's right to control and reaffirms the validity of the licensing system as the only single regime that can be implemented in mineral and coal mining matters. Work contracts can no longer be issued, although there are still several active work contracts that will remain in effect in the next few years. For example, in the Indonesian nickel mining ecosystem, data from the Ministry of Energy and Mineral Resources shows the distribution of permits as follows

**Table 2. Forms of active permits as of August 2022 in the nickel mining sector**

| <b>Form of Licensing</b>   | <b>Quantity</b> |
|--|-----------------|
| Production Operation Mining Business License (Izin Usaha Pertambangan Operasi Produksi 'IUP OP')                 | 278             |
| Special Production Operation Mining Business License (Izin Usaha Pertambangan Khusus Operasi Produksi 'IUPK OP') | 1               |
| Work Contract  | 5               |

*Sumber: Kementerian Energi dan Sumber Daya Mineral.*

Based on the table above, the transition from the contract system to licensing began with Law No. 4 of 2009 and continued in the era of Law No. 3 of 2020 gradually making the pattern of relations between the government and entrepreneurs more systematized in the form of a Mining Business License. The company holding the Contract of Work can continue to operate until the contract period ends, and cannot be extended

20 Ika Febriana Kuswardani and Yensy Ika Anggraini, "Revisi UU Minerba Sebagai Tonggak Baru Pertumbuhan Ekonomi Bangsa," *Jurnal Teknologi Sumberdaya Mineral (JENERAL)* 2, no. 1 (June 22, 2021): 1, <https://doi.org/10.19184/jeneral.v2i1.25880>.

21 Imron, "Analisis Terhadap Kekuatan Bargaining Position Pemerintah Indonesia Dalam Kontrak Karya P.T. Freeport Indonesia."

unless it switches to an IUP/IUPK-based licensing system. Until 2022, there will be 5 Contracts of Work remaining in the nickel mining sector.

An important paradigmatic change between the contract system and the licensing system which is strengthened by Law No. 3 of 2020 is related to ‘control’ over natural resources. As confirmed in the Constitutional Court Decision Number 002/PUU-I/2023, control is defined as the authority to implement policies (beleid), and take management actions (bestuursdaad), regulation (regelendaad), management (beheersdaad), and supervision (toezichoudensdaad). In the work contract system, the state binds itself to the company to hand over the control rights, in return in the form of royalties paid by the company. Meanwhile, in the licensing system, the control function is exclusively the right of the government, with every form of mining business having to go through a permit from the government<sup>22</sup>.

### **3.2 Compatibility of State Control right According to the Division of Central and Regional Authority**

The formulation of Article 33 Paragraph 3 of the 1945 Constitution defines the meaning of ‘state’ in the concept of state control right as an open legal policy, the technical implementation of which can be regulated in statutory regulations. The state as the party that controls mineral and coal mining does not mean that it is run by the central government but can be delegated to regional governments through decentralization. Moreover, after reform, regional autonomy has become one of the priority programs that has a legal basis in Law No. 32 of 2004 concerning Regional Autonomy and obtained several regulations in other laws and regulations.

The relationship between the central and regional governments in mining matters is based on the formulation of Article 18 Paragraph (5) of the 1945 Constitution which states that “Regional governments exercise the broadest possible autonomy, except for government affairs which are determined by law to be the affairs of the Central Government”.

The contextualization of Article 18 Paragraph (5) can be interpreted as providing two forms of legitimacy. First, legitimization of the broadest possible regional autonomy. Regions are given the authority to freely regulate and manage regional household affairs themselves and optimize the use of available natural resources, including Minerals and Coal. Regional use is proposed to improve regional welfare and development more evenly. Second, the autonomy possessed by regions can be limited by the central government, through the stipulation of statutory regulations at the level of law.<sup>23</sup> In this case, the central government has the right to determine the extent of authority, the mechanism for dividing affairs, and the classification of government affairs to be managed by the center and regions.

The implication of the formulation of Article 18 Paragraph (5) in mineral and coal mining matters is that there is a tug-of-war over authority through several mining regime changes.<sup>24</sup> In general, there are three developments in the regulation of state control right from the perspective of delegation of authority, namely the era of centralization, decentralization, and recentralization.<sup>25</sup> First, is mining centralization. Throughout the New Order era, the mining regime was based on Law no. 11 of 1967 places mining affairs within the spectrum of central government authority. During this period, matters regarding the distribution of work contracts are carried out directly through the central government and companies without involving local governments directly in making decisions related to work contracts.

Second, the era of decentralization. After the 2002 Amendment to the 1945 Constitution, the contract system was no longer compatible with Indonesian mining legal politics, so the licensing regime confirmed in Law No. 4 of 2009 became the opening for efforts to realize control by the state comprehensively and

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22 Derita Prapti Rahayu and Faisal, “Politik Hukum Kewenangan Perizinan Pertambangan Pasca Perubahan Undang-Undang Minerba,” *Pandecta* 16, no. 1 (2021), <https://doi.org/10.15294/pandecta.v16i1.28013>.

23 Wasisto Raharjo Jati, “Inkonsistensi Paradigma Otonomi Daerah di Indonesia: Dilema Sentralisasi atau Desentralisasi,” *Jurnal Konstitusi* 9, no. 4 (May 20, 2016): 743, <https://doi.org/10.31078/jk947>.

24 Juaningsih, “Polemik Revisi Undang-Undang Minerba dalam Dinamika Tata Negara Indonesia.”

25 Andri Yanto et al., “Implikasi Resentralisasi Kewenangan Pertambangan Timah Terhadap Potensi Pendapatan Daerah Di Bangka Belitung,” *Jurnal Interpretasi Hukum* 4, no. 2 (2023): 344–57, <https://doi.org/10.55637/juinhum.4.2.7756.344-357>.



consistently.<sup>26</sup> The implementation of regional autonomy in Indonesia since Law no. 32 of 2004, has the consequence that efforts to implement the five functions of control by the state above must be carried out using a decentralized system. Formulation of Article 10 Paragraph (1) of Law no. 4 of 2009 confirms that “..regional governments carry out government affairs within their authority, except for government affairs which this Law determines to be Government affairs”. The formulation of this paragraph is linear with Article 18 Paragraph (5) of the 1945 Constitution. Mining affairs, including tin mining, are categorized as Optional Affairs, thereby giving broad authority to the regions.<sup>27</sup>

Third, the era of recentralization. Changes in mining legal policy strategies after reform and regional autonomy have led to the formation of a re-centralized mining ecosystem. Regional authority gradually shifted to the central government. This transition process was carried out in four different regulatory stages, each namely Law no. 4 of 2009, Law no. 23 of 2014, Law no. 3 of 2020, as well as PP no. 96 of 2021 and Presidential Decree no. 55 of 2022 as a unit implementing Law no. 3 of 2020. The main changes in authority can be seen in the following table:

**Table 3. Changes in mineral and coal mining authority after Law No. 3 of 2020**

| Actor                         | Function  |                                    |   |   |
|-------------------------------|---|------------------------------------|---|---|
| <b>Local Government Level</b> | Law No. 4 of 2009   | Law No. 23 of 2014                 | Law No. 3 of 2020   | PP No. 96 of 2021 and Presidential Decree No. 55 of 2022  |
| <b>Provincial Government</b>  | Arrangements (Article 7 Paragraph 1 letter a)                   | Implementing policies (Article 17) | The authority of regional governments is not stated explicitly, but the Central Government can delegate authority to provincial regional governments (Article 34 Paragraph 4) | Granting Standard Certificates and Permits (Article 6 Paragraph 5 PP 96/2021 and Article 2 Presidential Decree 55/2022) |
|                               | Management Actions (Article 7 Paragraph 1 letters b, c, d, j)   | Arrangement (Appendix)             |   | Coaching (Article 2 Presidential Decree 55/2022)  |
|                               | Supervision (Article 7 paragraph 1 letter a)                    | Management Actions (Appendix)      |   | Supervision (Article 2 Presidential Decree 55/2022)   |
|                               |   | Management (Article 38, Appendix)  |   |   |
|                               | Supervision (Article 7 Paragraph 1 letters b, c, d, Attachment) |                                    |   |   |

26 Imron, “Analisis Terhadap Kekuatan Bargaining Position Pemerintah Indonesia Dalam Kontrak Karya P.T. Freeport Indonesia.”

27 Al Farisi, “Desentralisasi Kewenangan Pada Urusan Pertambangan Mineral Dan Batubara Dalam Undang-Undang Nomor 3 Tahun 2020.”

|  |  |  |  |  |
|--|--|--|--|--|
| <b>Regency /<br/>Municipal<br/>Regional<br/>Government</b> | Arrangements (Article 8 Paragraph 1 letter a)  | No longer has the function of controlling mineral and coal mining (not explicitly regulated) | No longer has the function of controlling mineral and coal mining (not explicitly regulated) | No longer has the function of controlling mineral and coal mining, as long as it does not receive delegation from the Provincial Government and/or attribution to other statutory regulations. |
|  | Management Actions (Article 8 Paragraph 1 letter b, c)   |  |  |  |
|  | Management (Article 38, Article 6 Paragraph 2 PP No. 23 of 2010/ Implementing Law No. 4 of 2009) |  |  |  |
|  | Supervision (Article 8 Paragraph 1 letters b, c, k)  |  |  |  |

Source: Abstract of Comparison Table by Author

As seen in the table above, currently regional governments only have one of the five mineral and coal control functions, namely the supervisory function. Meanwhile, granting permits and guidance cannot be categorized as a management action function (*bestuursdaad*) because they are partial and only cover a small part of the total form of licensing in mining matters. The provisions in Article 2 Paragraph (3) of Presidential Decree 55 of 2022 limit the licensing delegated to the provincial government to cover 12 forms of licensing, all of which are limited. In total, there are seven main forms of licensing in the mining sector, with the following divisions:

**Table 4. Distribution of Permits in Law No. 3 of 2020**

| <b>Actor</b>                            | <b>Form of Mineral and Coal Mining Permit</b> |
|---|---|
| <b>Central Government</b>               | Non-Metal Mineral Mining Business Permit      |
|   | Rock Mining Business Permit                   |
|   | Rock Mining Permit                            |
|   | Transportation and Sales Permit               |
|   | Mining Services Business Permit               |
|   | Mining Business Permit For Sales              |
| <b>Regional Government (Provincial)</b> | People's Mining Permit                        |

Sumber: Abstract of Comparison Table by the Author

Centralized authority arrangements as in the table above, are confirmed in Article 4 Paragraph (2) of Law No. 3 of 2020 which confirms that: "Control of Mineral and Coal by the state is carried out by the Central Government". The existence of PP no. 96 of 2021 and Presidential Decree no. 55 of 2022 as implementer of Law no. 3 of 2020 schematizes this form of control by the Central Government by delegating a small amount of authority to the regions. Thus, recentralization does not completely eliminate but still provides space for regions to be able to exercise a number of authorities related to mining, especially People's Mining Permit (*Izin Pertambangan Rakyat 'IPR'*).<sup>28</sup>

Conceptually, the policy changes that occurred in three transitions, from centralization, decentralization, and recentralization, can still accommodate the interests of implementing the state's right to control, as long as the system used is licensing<sup>29</sup>. The division of affairs between the central and regional governments is a matter of autonomy and is still within the spectrum of the state control right itself. Nevertheless, it is important to

28 Derita Prapti Rahayu and Faisal Faisal, "Eksistensi Pertambangan Rakyat Pasca Pemberlakuan Perubahan Undang-Undang tentang Pertambangan Mineral dan Batubara," *Jurnal Pembangunan Hukum Indonesia* 3, no. 3 (September 17, 2021): 337–53, <https://doi.org/10.14710/jphi.v3i3.337-353>.

29 Rizkyana Zaffrindra Putri dan Lita Tyesta A.L.W, "Kajian Politik Hukum Tentang Perubahan Kewenangan Pemberian Izin Usaha Pertambangan Mineral Dan Batubara," *LAW REFORM* 11, no. 2 (30 September 2015): 199, <https://doi.org/10.14710/lr.v11i2.15767>.

underline that the interest orientation of the state control right is for the prosperity of the people so that political choices related to the tug-of-war over authority can be accepted as a strategic policy in terms of improving the welfare of the people, both in general and in the regions.

Dissection of the substance of Law No. 3 of 2020 concerning the implementation of the state control right, based on the analysis above, can produce two main syntheses. First, Law No. 3 of 2020 does not reinvent the mechanism for implementing state control rights, but rather continues and reaffirms the policy strategy with a licensing system to support the function of state control rights over mineral and coal resources. It is no longer possible to issue Contracts of Work in mining matters as mandated in Law No. 4 of 2009, and again strengthened by Law No. 3 of 2020. This ensures that the state can fully act based on the five control functions, and as the only entity that has ruling authority over minerals and coal. The position of companies and foreign investors is no longer seen as equal to the government (as a representative of the state), but rather to the party submitting the licensing application. Thus, Law No. 3 of 2020 ensures full state control rights over mineral and coal resources in Indonesia.<sup>30</sup>

Second, updates in Law No. 3 of 2020 tend to be in the technicalization aspect which refers to the government's legal politics to re-centralize mining licensing authority in the mineral and coal sector. Of the 7 types of mineral and coal mining permits, regional governments are only given a single delegation of authority, namely over People's Mining Permits (IPR). The recentralization of mining policies regulated in Law No. 3 of 2020 is in line with the substance of Article 18 Paragraph (5) of the 1945 Constitution which determines the independence of regional governments in matters other than those excluded by the central government through statutory instruments.

Regarding the delegation or centralization of mining licensing authority, it is an open legal policy, so that the determination is adjusted to the needs of contemporary mining management. So, the recentralization initiated in Law no. 3 of 2020, and was previously partially preceded by Law no. 4 of 2009 and Law no. 23 of 2014, has no conflict with the state control right, and is one of the accelerators in implementing the state control right to achieve the goal of greatest prosperity for the people. In contrast to the licensing system policy to replace the standard contract system, which cannot be returned to realize the state control right, the issue of centralization and decentralization of authority is dynamic and eclectic. Problems related to mining matters require several policy changes, withdrawal of authority, introduction of regulations, and formulation of strategies that allow the central government to change schemes and procedures related to mining management. Law no. 3 of 2020 proves that the change in policy strategy by withdrawing a large amount of authority from regional governments to the central government, still maintains the concept of state control right as the orientation and paradigm of mining law. To test its compatibility, it is important to carry out an analysis from a regional autonomy perspective, in order to prove that such policy changes are linear with achieving the goal of maximizing people's prosperity.

#### 4. CONCLUSION

Determination of Law No. 3 of 2020 concerning Amendments to Law no. 4 of 2009 concerning Mineral and Coal is a policy strategy in the mining sector that has implications for strengthening the implementation of State control rights. The substance of Article 4 Paragraph (2) of Law no. 3 of 2020 implicitly confirms the recentralization policy in mineral and coal control, resulting in a fundamental transition in mineral and coal management in Indonesia. The compatibility of the substance of Article 4 Paragraph (2) with the state control right is analyzed using two components. First, in the licensing aspect, Law No. 3 of 2020 reaffirms the invalidity of the contract system in mining management and makes the licensing system the sole regime that must be used in mining matters. The implementation of the licensing system presents the state as the party that carries out the five functions of resource control under the Constitutional Court Decision Number 002/PUU-I/2023, namely implementing policies (*beleid*), and management actions (*bestuursdaad*), regulation (*regelendaad*), management (*beheersdaad*), and supervision (*toezichoudensdaad*).

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30 Zsazsa Dordia Arinandaa and Aminah Aminah, "Sentralisasi Kewenangan Pengelolaan Dan Perizinan Dalam Revisi Undang-Undang Mineral Dan Batu Bara," *Jurnal Ilmu Hukum* 10, no. 1 (February 28, 2021): 167, <https://doi.org/10.30652/jih.v10i1.8080>.

Second, in the aspect of dividing central and regional authority, Law no. 3 of 2020 formulates a political policy of recentralization in mining management authority. This reform is in line with the reduction in the role of regional governments through Law No. 4 of 2009 and Law No. 23 of 2014. In accordance with the formulation of Article 18 Paragraph (5) and Article 33 Paragraph (3) of the 1945 Constitution, the central government can limit and/or take over the authority of regional governments through statutory instruments. Specifically related to mining management authority, this can be done to ensure the achievement of higher state revenues for the greatest prosperity of the people. Regarding recentralization and the dimensions of policy change, this is an open legal policy and is dynamic. However, as long as it continues to emphasize the licensing system and is oriented toward people's prosperity, the substance of the reform of the Mineral and Coal Law is consistent with the state's right to control mineral and coal mining affairs in Indonesia.<sup>31</sup>

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31 Tody Sasmitha and Haryo Budhiawan, *Pemaknaan Hak Menguasai Negara Oleh Mahkamah Konstitusi* (STPN Press, 2014).

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