CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 35/PUU-XXI/2023

Concerning

Utilization of Small Islands and Surrounding Waters and Prohibition of Mineral Mining in the Utilization of Coastal Areas and Small Islands

Petitioner	**:**	**PT Gema Kreasi Perdana, represented by Rasnius Pasaribu as President Director**
Type of Case	**:**	Judicial Review of Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands (Law 27/2007) as amended by Law Number 1 of 2014 concerning Amendments to Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands (Law 1/2014), hereinafter referred to as the MCASI Law against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	**:**	Judicial Review of Article 23 paragraph (2) of Law 1/2014 and Article 35 letter k of Law 27/ 2007 against Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution
Verdict	**:**	To dismiss the Petitioner's petition in its entirety
Date of Decision	**:**	Thursday, March 21, 2024
Overview of Decision	**:**	

Whereas the Petitioner is a legal entity in the form of a limited liability company. Whereas the Petitioner believes that his constitutional rights have been impaired due to the ambiguity in the meaning of Article 23 paragraph (2) of Law 1/2014 and Article 35 letter k of Law 27/2007, in the Decision No. 57P/HUM/2022 dated 22 December 2022, the Supreme Court of the Republic of Indonesia interpreted these two articles as unconditional prohibition against mining activities in the coast areas and small islands, especially in the Konawe Islands Regency area, however the norms of Article 35 letter k are conditional prohibition norms;

Whereas regarding the Court's authority, because the Petitioner petitions for a review of the constitutionality of the norms of law, *in casu* material review of Article 23 paragraph (2) of Law 1/2014 and Article 35 letter k of Law 27/2007 against the 1945 Constitution, the Court has the authority to hear the *a quo* petition.

Whereas in relation to the Petitioner's legal standing, the Court is of the opinion that the Petitioner has been able to describe specifically and actually his constitutional rights which are believed to have been impaired due to the enactment of the legal norms being petitioned for review. This is because the Petitioner may not implement the Mining Business Permit he already has even though he has paid the fees or costs for the permit because the

norms of the article being petitioned for review are ambiguous in interpreting the prohibition on mining in the coastal area and small islands. The Petitioner's presumed injury arises because it has a causal relationship (*causal verband*) with the norms being petitioned for review. So, if the Petitioner's petition is granted then such injury will no longer occur. Therefore, regardless of whether the unconstitutionality of the norms of Article 23 paragraph (2) of Law 1/2014 and Article 35 letter k of Law 27/2007 being petitioned for review is proven or not, the Court is of the opinion that the Petitioner has the legal standing to submit the *a quo* petition.

Whereas before further considering the arguments of the *a quo* petition of the Petitioner, the Court will first consider the Petitioner's petition in relation to the provisions of Article 60 of the Constitutional Court Law and Article 78 of the Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Judicial Review Cases (Constitutional Court Regulation 2/2021), so that the *a quo* norms may be resubmitted. There are differences in the legal basis for review in the petition for Case Number 3/PUU-VIII/2010 and the legal basis for review in the *a quo* petition, namely in the *a quo* petition, the legal bases used for review are Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, these articles were not used as the legal bases for review in Case Number 3/PUU-VIII/2010. Therefore, regardless of whether the Petitioner's *a quo* petition is legally justifiable or not, pursuant to the provisions of Article 60 of the Constitutional Court Law and Article 78 of Constitutional Court Regulation 2/2021, the *a quo* petition may be re-submitted.

Whereas in relation to environmental protection, especially regarding natural resources, as has been affirmed in the 1945 Constitution, these matters must be controlled by the state and used for the greatest prosperity of the people [*vide* Article 33 paragraph (3) of the 1945 Constitution] Management of natural resources must not solely pay attention to the principle of efficiency to obtain as much profit as possible, let alone only to benefit a small group of capital owners, but must be able to improve people's welfare in a fair manner. Therefore, the management of coastal areas and small islands which are very vulnerable must be carried out carefully so that these activities do not cause any dangerous damages or any abnormally dangerous activities.

Whereas the Petitioner questions the meaning of the norm of Article 23 paragraph (2) of Law 1/2014 which prohibits the use of coastal areas and surrounding waters for purposes other than priority interests and thus it does not provide a guarantee of the right to recognition, protection and fair legal certainty which are actually guaranteed by 1945 Constitution. Regarding such matter, one of the substances of Article 23 of Law 1/2014 is "Utilization of small islands and surrounding waters which are "prioritized" for the benefit of...". By referring to the Indonesian Language Dictionary, the word "prioritized" means "placed in a higher rank or take precedence over others". In accordance with this meaning, the prioritized interests must take precedence over other interests. In this regard, the priority interests for utilizing small islands and the surrounding waters are for: conservation; education and training; research and development; mariculture; tourism; fisheries and marine businesses and the fisheries industry in a sustainable manner; organic agriculture; farm; and/or national defense and security. These utilizations must also be carried out based on a comprehensive and integrated ecological and economic unity with the nearby large island [*vide* Article 23 paragraph (1) and paragraph (2) of Law 1/2014]. Meanwhile, apart from the prioritized interests in the form of conservation, education and training as well as research and development, it is still possible to utilize small islands and the surrounding waters to the extent that they do not threaten the environmental sustainability. These interests must fulfill the cumulative requirements, namely, fulfill the environmental management requirements by paying attention to the capacity and sustainability of the local water management system; and use environmentally friendly technology. The importance of establishing mandatory requirements cannot be separated from the aim of formation of Law 27/2007, namely to protect, conserve, rehabilitate, utilize and enrich the

resources in the coastal areas and small islands and to manage their ecological systems in a sustainable manner; to create harmony and synergy between the Government and regional governments in the management of the resources of the coastal areas and small islands; to strengthen the role of the community and government institutions and to encourage community initiatives in managing the resources of the coastal areas and small islands in order to achieve justice, balance and sustainability; and to increase the social, economic and cultural values of society through community participation in the utilization of the resources of the coastal areas and small islands [*vide* Article 4 of Law 27/2007].

Whereas Law 1/2014 determines the existence of a licensing mechanism for the utilization of the resources of the coastal areas and small islands, it is important for the Court to emphasize that there are many things that must be considered and fulfilled in order to obtain the said permit. This is in line with the application of the principle of sustainability in the management of coastal areas and small islands which is intended so that: (1) the utilization of these resources does not exceed the regeneration capacity of biological resources or the rate of substitution innovation for coastal non-biological resources; (2) the utilization of Coastal Resources must not sacrifice (quality and quantity) the needs of future generations for coastal resources; and (3) the use of resources whose impacts are unknown must be carried out carefully and must be supported by adequate scientific research [*vide* Elucidation to Article 3 letter a of Law 27/2007]. It is important to do these things in obtaining permits because the coastal areas and small islands are very vulnerable and can easily be damaged and changed due to human activities (anthropogenic) or disaster. To mitigate the phenomenon of biological, geological and physical (bio geophysical) degradation of the resources of the coastal area and small island, which is continuously increasing and expanding, thus causing a decrease in the productivity of coastal ecosystems and reducing the carrying capacity of human life, any activities other than the priority activities must be implemented with very strict requirements in the coastal areas and small islands.

One of these requirements is related to the granting of permits which must take into account not only the MCASI Law but also the laws related to it, namely the laws relating to spatial planning as stated in the General Elucidation [*vide* General Elucidation to Law 27/2007]. Without the Court's intention to review the concrete case experienced by the Petitioner, the failure to implement the permit obtained by the Petitioner was because the regional spatial planning regulations as the basis for the issuance of the permit were not in line with the spatial planning in the utilization of coastal areas and small islands. Deliberately allowing any issuance of permits that are not in line with the spatial planning in the utilization of small islands will actually harm in the community's rights to environmental sustainability and this is contrary to Article 28H paragraph (1) of the 1945 Constitution. In addition, it would also threaten the environmental sustainability of coastal areas and small islands as a buffer for the sovereignty of the Republic of Indonesia. Therefore, in issuing any permits for the utilization of small islands outside of the priority interests, the regional governments are required to pay serious attention to the cumulative requirements contained in the provisions of Article 23 paragraph (3) of Law 1/2014 along with the related laws and regulations, especially the laws relating to spatial planning. This is because Law 1/2014 has determined that other than the priority interests for the purposes of conservation, education and training as well as research and development, the utilization of small islands and surrounding waters must: *first,* fulfill the environmental management requirements, because environmental sustainability is one of the human rights as guaranteed by Article 28H paragraph (1) of the 1945 Constitution; *second,* pay attention to the capacity and sustainability of the local water management system, so that any utilization of small islands and surrounding waters must not disturb, override or even eliminate the people's right to water because the earth, water and natural resources contained therein must be controlled by the state and their allocation is used for the greatest prosperity of the people [*vide* Article 33 paragraph (3) of the 1945 Constitution]; and *third,* use environmentally friendly technology which is an important factor so that the

utilization of small islands and surrounding waters continues to maintain and prioritize environmental sustainability [*vide* Article 23 paragraph (3) of Law 1/2014]. The fulfillment of mandatory requirements is in line with several principles within the concept of sustainable development as stipulated in the Rio Declaration.

Whereas the Court will consider the Petitioner's *petitum* which, among other things, requests the Court to declare mining activities as one of the activities that are not prohibited in the utilization of small islands and surrounding waters as regulated in Article 23 paragraph (2) of Law 1/2014. Regarding this, it is still possible to utilize small islands and the surrounding waters for other purposes apart from the prioritized interests as stated in Article 23 paragraph (2) of Law 1/2014, provided that the management of small islands does not threaten environmental sustainability. Therefore, any interests other than the prioritized interests must fulfill the cumulative requirements, namely fulfilling environmental management requirements, paying attention to the capacity and sustainability of the local water management system; and using environmentally friendly technology and paying attention to any laws and regulations related to the utilization of small islands and surrounding waters. The said requirements aim to prevent small islands and the surrounding waters from being exposed to any interests that could damage environmental sustainability and harm the people's constitutional rights as guaranteed by the constitution, including those that could threaten the sovereignty of the Republic of Indonesia. Such threats include any activities that constitute the abnormally dangerous activities which could cause extensive and ongoing damages, and it would be impossible to restore the environment to its original state. This cannot be separated from the aim of establishing the MCASI Law, namely to protect, conserve, rehabilitate, utilize and enrich the resources of coastal areas and small islands and their ecological systems in a sustainable manner. Furthermore, regarding whether or not mining activities are prohibited in the utilization of small islands and surrounding waters, this matter is regulated in the provisions of Article 35 letter k of Law 27/2007 which will be considered in the next paragraph.

Therefore, pursuant to the description of the legal considerations above, the Petitioner's argument that the norm of Article 23 paragraph (2) of Law 1/2014 does not provide the right to recognition, protection and fair legal certainty is legally unjustifiable.

Whereas regarding the norm of Article 35 letter k of Law 27/2007, the Court considers that the existence of Article 35 letter k of Law 27/2007 is intertwined with the norm of Article 23 of Law 1/2014 because its substance contains a prohibition regarding the utilization of coastal areas and small islands, the norm states, "In utilizing coastal areas and small islands, every person is directly or indirectly prohibited from: k. carrying out mineral mining in any areas which could technically and/or ecologically and/or socially and/or culturally cause environmental damage and/or environmental pollution and/or harm the surrounding community." The formulation of "which could technically and/or ecologically and/or socially and/or culturally cause environmental damage and/or environmental pollution and/or harm the surrounding community" in the norm of Article 35 letter k of Law 27/2007 is a requirement that when it is fulfilled, the mineral mining activities will be considered as prohibited activities. This means that if the said requirement is not fulfilled, then the mineral mining activity is not a prohibited mineral mining activity under the Article 35 letter k of Law 27/2007. This is in line with the reasons for the formation of the *a quo* Law*,* among other things, so that the management of coastal areas and small islands may be carried out based on sustainability, respecting the rights of indigenous/local communities and eliminating any factors that are able to cause natural damage. In this regard, it is important to understand what is meant by ecological aspects, social aspects and technical aspects as stated in Article 35 letter k of the *a quo* Law 27/2007. The ecological aspects are aspects that influence the sustainability of the environment/ecosystem on small islands. Meanwhile, what is meant by "social aspects" are aspects that influence the lives (socio-cultural systems) of communities on the small islands [*vide* Elucidation to Article 26A paragraph (4) letter h of Law 1/2014]. What is meant

by "technical aspects" are the bio-geophysical aspects of the island in the form of diversity of the biological resources, area, topography and typology of the island affecting the carrying capacity and vulnerability of the small islands.

Whereas the norm of Article 35 of Law 27/2007 in its entirety in principle regulates the prohibition on every person, either directly or indirectly, from utilizing the coastal areas and small islands. The prohibition regulated in Article 35 letter k of Law 27/2007 is followed by penalty, as specified in Article 73 paragraph (1) letter f of Law 27/2007 which states, "Shall be sentenced with imprisonment for a minimum of 2 (two) years and a maximum of 10 (ten) years and a minimum fine of IDR 2,000,000,000.00 (two billion rupiah) and a maximum fine of IDR 10,000,000,000.00 (ten billion rupiah) for every person who deliberately carries out mineral mining as referred to in Article 35 letter k". Such regulation on prohibition followed by penalty is intended as a form of control over mineral mining activities in coastal areas and small islands because philosophically the small islands are very vulnerable and limited and therefore require special protection. Including protection against activities categorized as abnormally dangerous activities which according to environmental law doctrine must be prohibited because such activities will threaten the lives of all creatures and the ecosystem therein. Several indicators that can be used to categorize an activity as abnormally dangerous activity are generally have been described in Sub-paragraph **[3.18.4]** above. Henceforth, it is the duty of the justices to determine concretely whether an activity is categorized as abnormally dangerous activity or not by considering these indicators. In this regard, without the Court's intention to assess the concrete case experienced by the Petitioner as stated in the Decision of the Supreme Court No. 57P/HUM/2022 dated 22 December 2022 which revokes Article 24 letter d, Article 28, and Article 36 letter c of Konawe Islands Regency Regional Regulation 2/2021 because they are contrary to Article 23 paragraph (2) of Law 1/2014 and Article 35 letter k of the Law 27/2007, regarding all activities that are not intended to support the life of the ecosystem therein, including but not limited to any interests outside of the prioritized interests, *in casu* mining activity, which can be categorized as an abnormally dangerous activity which must be prohibited in accordance with the environmental law doctrine .

Whereas the word "Exception" in Article 35 letter k of Law 27/2007 is formulated with the requirements "which could technically and/or ecologically and/or socially and/or culturally cause environmental damage and/or environmental pollution and/or harm the surrounding community", it cannot be separated from a comprehensive interpretation of Law 1/2014, especially Article 23 of Law 1/2014 which determines the obligation to fulfill cumulative requirements to utilize the small islands and surrounding waters outside of the priority interests for the purposes of conservation, education and training as well as research and development, the utilization of small islands and surrounding waters, namely with the obligation to fulfill environmental management requirements; it must pay attention to the capability and sustainability of the local water system; and use environmentally friendly technology and comply with the provisions of any related laws and regulations, as considered in Paragraph **[3.9]** above. Thus, the fulfillment of mandatory requirements does not rule out the possibility of carrying out other interests outside of the prioritized interest provided that the mandatory requirements are fulfilled. However, fulfilling this is not easy because the key is how well the regional government designs the regional spatial planning arrangements in accordance with the statutory regulations so that any permit issued under such regional spatial planning regulations does not become a commodity which would be detrimental to the generations to come. This means that the Petitioner's argument, which states that the differentiation of activities in the utilization of small islands and the surrounding waters between the prioritized activities and those which are not prioritized is a form of discrimination, is unjustifiable, instead it is a mitigation to protect and regulate which aims at ensuring the sustainability of ecosystems on the small island and the surrounding environment.

Whereas regarding the Petitioner's argument, which states that the *a quo* provisions do not provide guarantees of the rights to recognition, protection and fair legal certainty as well as equal treatment before the law and thus it is considered contrary to the 1945 Constitution, is unjustifiable. Instead, the *a quo* provisions were established with the aim of providing recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law by providing balance, protecting, conserving, rehabilitating, utilizing and enriching the resources of the coastal areas and small islands and their ecological systems in a sustainable manner, this is in line with the aim of regulating the management of coastal areas and small islands, specifically as regulated in Article 4 letter a of Law 27/2007, which states that in principle the management of coastal areas and small islands is carried out with the aim of protecting, conserving, rehabilitating, utilizing and enriching the resources of the coastal areas and small islands and their ecological systems in a sustainable manner.

Whereas in relation to the above, the norm of Article 23 paragraph (2) of Law 1/2014 which regulates the word "prioritized", it does not violate the Petitioner's constitutional rights as citizen to uphold the law and government and to obtain fair legal certainty and equal treatment before the law. Therefore, there is absolutely no relevance in the Petitioner's argument which assumes that the provisions of the *a quo* Article reduces the constitutional rights of citizens, including the constitutional rights of the Petitioner. Moreover, the Petitioner then stated that the constitutionality issue of the norm of Article 35 letter k of Law 27/2007 is an act of discrimination. In this regard, the meaning of discrimination has been affirmed in the Decision of the Constitutional Court Number 024/PUU-III/2005 which was declared in a plenary session open to the public on 29 March 2006 which was then reaffirmed in various decisions including the Decision of the Constitutional Court Number 97/PUU-XIV/2016 which was declared in a plenary session open to the public on 7 November 2017, in principle, these Decisions stated that discrimination can be considered to occur if there is any restriction, harassment or exclusion that is directly or indirectly conducted based on human differentiation on the basis of religion, tribe, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs, which results in reduction, deviation or elimination of recognition, implementation or utilization of human rights and fundamental freedoms in both individual and collective life in the political, economic, legal, social, cultural and other aspects of life. Pursuant to this interpretation, upon careful examination of Article 35 letter k of Law 27/2007 by the Court, the *a quo* article does not contain any elements of discrimination. Moreover, in this regard, it is important for the Court to emphasize that the MCASI Law was established to protect the continuity and preservation of coastal areas and small islands in the Republic of Indonesia.

Whereas pursuant to the description of the legal considerations above, the Petitioner's argument, which states that Article 35 letter k of Law 27/2007 does not provide a guarantee of the right to recognition, protection and fair legal certainty without discrimination and it is contrary to the 1945 Constitution, is a legally unjustifiable argument.

Whereas pursuant to the entire description of the legal considerations above, the Court is of the opinion that the provisions of Article 23 paragraph (2) of Law 1/2014 and Article 35 letter (k) of Law 27/2007 do not contradict with fair legal certainty, they are not discriminatory treatments and they are in line with the provisions of Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. Therefore, the Petitioner's arguments are entirely legally unjustifiable.

The Court subsequently passed down a decision which verdict states to dismiss the Petitioner's petition in its entirety.

Concurring Opinions

Whereas regarding the decision of the *a quo* case, 4 (four) Constitutional Justices, namely Constitutional Justice Suhartoyo, Constitutional Justice Anwar Usman, Constitutional Justice Daniel Yusmic P. Foekh, and Constitutional Justice M. Guntur Hamzah provided concurring opinions, as follows:

Concurring Opinion of Constitutional Justice Suhartoyo

Pursuant to the description of the legal considerations, I agree that the *a quo* petition should be dismissed because this petition wishes to interpret the ambiguity of the provisions of the norms of Article 35 K of Law 27/2007 as an absolute prohibition. However the Court should also partially grant it if the Court is of the opinion that the provisions of the norms of Article 35 letter k of Law 27/2007 are interpreted as allowing mining business activities provided that the certain requirements are fulfilled, namely provided that technically and/or ecologically and/or socially and/or culturally, the activities do not cause environmental damage and/or environmental pollution and/or do not harm the surrounding community, as specified in the provisions of the norms of Article 35 letter k of Law 7/2007. In this way, the ambiguity regarding the provisions of the norms of Article 35 letter k of Law 7/2017 can be eliminated.

Concurring Opinion of Constitutional Justice M. Guntur Hamzah, Constitutional Justice Daniel Yusmic, and Constitutional Justice Anwar Usman

The last but not least, we as the constitutional justices consider that eco development that is conducted based on sustainable environment (green development), **smart and environmentally sound development is the key to achieving shared progress and prosperity conditcio sine qua non for the progress and prosperity of the people. We believe that with careful planning and supported by broad community participation and optimal supervision, we can build a better future for all Indonesian people.** Therefore, in accordance with the principle ***progredi sine sacrificio futuri terrae nostrae***, Therefore, the a quo norm is constitutional because it is not contrary to the 1945 Constitution, instead it is more a matter of implementing norms, while the prohibitory provisions referred to in the a quo article, within the limits of reasonable reasoning, are the norms of conditionally prohibited, therefore their implementation are carried out selectively in order to uphold the principle of fair legal certainty.