CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 30/PUU-XX/2022

Concerning

Constitutionality of the Number of Members, Selection Process and Recruitment of Members of the Human Rights Commission (*Komisi Hak Asasi Manusia*)

Petitioner	**:**	**Achmad Kholidin and Tasya Nabila**
Type of Case	**:**	Examination of Law Number 39 of 1999 concerning Human Rights (Law 39/1999) against the 1945 Constitution of the Republic of Indonesia (UUD 1945).
Subject Matter	**:**	Regulation of the number of members of Komnas HAM (Human Rights Commission) in Article 87 paragraph (1) of Law 39/1999 and its Elucidation; regulation on the election, termination of Komnas HAM Members, by the DPR (House of Representatives) and not involving the President in Article 85 of Law 39/1999; the regulation on the procedure for the selection, appointment and termination of the members and leaders of Komnas HAM as stipulated in the Komnas HAM Rules of Conduct and the right of Komnas HAM Members to nominate the candidates for Komnas HAM members in the Plenary Session in Article 86 and Article 87 of Law 39/1999 are in contrary to the principle of presidential system in Article 4 paragraph (1) of the 1945 Constitution, the guarantees of protection and legal certainty as guaranteed by Article 28D paragraph (1) of the 1945 Constitution, the guarantees of equal opportunities in government as regulated in Article 28D paragraph (3) of the 1945 Constitution, the guarantees of government responsibility in the protection, promotion, enforcement and fulfilment of human rights as regulated in Article 28I paragraph (4) of the 1945 Constitution.
Verdict	**:**	1. To grant the Petitioners' petition in part; 2. To declare that the word "a number of" in Article 83 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, (State Gazette of the Republic of Indonesia of 1999 Number 165, Supplement to the State Gazette of the Republic of Indonesia Number 3886) is in contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted as "a number of, at maximum,"; 3. To order the recording of this decision in the State Gazette of the Republic of Indonesia as appropriate; 4. To dismiss that the Petitioners' petition for the remainder
Date of Decision	**:**	Monday, June 20, 2022.

Overview of Decision :

Petitioner I is an individual Indonesian citizen who is an advocate and a lecturer/teacher at the Undergraduate and Postgraduate Faculty of Law, Universitas Muhammadiyah Jakarta. He is also a speaker for various seminars related to law and human rights (*hak asasi manusia* or HAM); an activist and an environmental activist; and he is active and also serves as the Vice Chairman for Law and Human Rights of DPP Forsa. Petitioner I is also active and serves as the Chairman of the Legal Advocacy and Human Rights Division of the DPP Forum Ulama dan Habaib Jakarta (FUHAB Jakarta). Petitioner II is an Indonesian citizen who is a member of the NGO Lentera HAM in Ciputat and has attended the 2017 Law and Human Rights Advocacy Education, the 2018 *Kamu Bela Hak Asasi Manusia* Program held by the Amnesty International Indonesia. Petitioner II is also active in the Pergerakan Mahasiswa Islam Indonesia (PMII) organization which considers that the promulgation of the provisions of Article 83 paragraph (1) and its Elucidation, Article 85 paragraph (1), Article 86 and Article 87 paragraph (2) letter d of Law 39/1999 have caused the loss to the constitutional rights of the Petitioners as guaranteed in Article 4 paragraph (1), Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), and Article 28I paragraph (4) of the 1945 Constitution;

Regarding the authority of the Court, because the petition is to examine the constitutionality of legal norms, *in casu* Law 39/1999 on the 1945 Constitution, the Court has the authority to hear the petition of the Petitioners;

Regarding the legal standing of the Petitioner, in explaining his legal standing as described above, the Court is of the opinion that Petitioner I and Petitioner II have been able to describe their qualifications as individual Indonesian citizens who are lecturers and human rights activists who have the potential to nominate themselves as members of Komnas HAM. In their description, the Petitioners believe that according to reasonable reasoning, their constitutional rights to participate in the government, *in casu* to become the members of Komnas HAM, are prejudiced, if the system of recruitment and selection of candidates is proposed by the members of Komnas HAM. This is because the recruitment and selection system for Komnas HAM members has the potential to lead to nepotism. Therefore, the Petitioners have been able to describe the existence of a causal relationship (causality) between the perceived potential loss of the Petitioners' constitutional rights and the promulgation of the norms being petitioned for review, so that if the Petitioners' petition is granted, such loss will no longer occur. Accordingly, based on the description of the legal considerations, regardless of whether or not the arguments of the Petitioners' petition regarding the unconstitutionality of the legal norms being petitioned for review are proven, the Court is of the opinion that the Petitioners have the legal standing to act as Petitioners in the *a quo* petition.

Whereas because the subject matter which is petitioned for a decision is clear, the Court is of the opinion that there is no relevance to hear the statements of the parties as referred to in Article 54 of the Constitutional Court Law.

Regarding the subject matter of the Petitioner's petition, the Court is of the opinion that the guarantee of protection and respect for human rights (HAM) is one of the important elements in the rule of a state of law system. Regarding the enforcement of human rights, the New Order Government has established the National Human Rights Commission (Komnas HAM) through Presidential Decree No. 50/1993 concerning National Human Rights Commission (Keppres 50/1993). Furthermore, the existence of Komnas HAM is strengthened by Law 39/1999 which is referred to as an independent institution whose position is at the same level as other state institutions whose function is to carry out studies, research, counselling, monitoring, and mediation of human rights [*vide* Article 1 point 7 of Law 39/1999]. Although the existence of Komnas HAM is not explicitly mentioned in the 1945 Constitution, instead it is regulated in Law 39/1999, but it has constitutional importance because it is stated in Article 24 paragraph (3) of the 1945 Constitution that "other bodies whose functions are related to judicial power are regulated by law", and Komnas HAM has

functions related to judicial power;

Regarding constitutional issues in relation to the number of Komnas HAM members which consist of 35 people and the method of election which the Petitioners argue as did not provide legal certainty, since the previous decisions of the Court, the Court has held the opinion that the determination a certain number in the norms of a law is the authority of the legislators. The legislators can make the choice of policy, as long as the choices made do not exceed the authority of the legislators, do not constitute an abuse of authority, and do not actually conflicted with the 1945 Constitution. The Court is also of the opinion that the determination of the number must not be in contrary with the rationality, therefore the legislators should have rational calculations and measures in determining the number.

The regulation concerning the number of Komnas HAM members which was added to Law 39/1999 is a reflection of efforts to deal with the increasing demands for human rights protection in the reform era, from 25 (twenty-five) members to 35 (thirty-five) members. The number of Komnas HAM members is often associated with the area and population of Indonesia which is considered to be in need of many members to solve various human rights problems. However, the problem is, there is a regulation on the number of Komnas HAM members who use the diction or the word “a number” of 35 (thirty-five) people, but in fact the number of Komnas HAM members is never fully filled up to 35 (thirty-five) people.

Based on the fact that so far the number of Komnas HAM members has never been fully filled up to 35 (thirty five) people, the Court is of the opinion that the regulation regarding the word “a number of” 35 (thirty five) people shall be a legal uncertainty, because literally the word “a number of” has an imperative nature that must be fulfilled. Meanwhile the fact that so far the 35 members of Komnas HAM have never been fulfilled and this, when considered as a justification, shall actually create legal uncertainty. Whereas the norms of Article 83 paragraph (1) of Law 39/1999 imperatively regulates that the Komnas HAM members because they use the word “a number of” instead of the phrase “a number of, at maximum,” 35 (thirty-five) people [*vide* number 256 Attachment II of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations]. Regardless of whether this imperative norm is not fulfilled because there are few candidates who fulfil the requirements, or it is indeed the policy of Komnas HAM to propose it, the Court is of the opinion that in order to provide fair legal certainty, the norm of Article 83 paragraph (1) of Law 39/1999 should not be imperative, but instead facultative, so that when it cannot be fulfilled it does not violate the imperative norm. Nevertheless, the determination of the number in the norms of the law is an open legal policy for legislators, but in its determination it must provide legal certainty. Whereas based on the aforementioned considerations, the Court is of the opinion that to provide legal certainty, the word “a number of” in Article 83 paragraph (1) of Law 39/1999 shall be interpreted as “a number of, at maximum”.

Regarding the constitutionality issues in relation to the election, termination of Komnas HAM Members, by the DPR without involving the President, for which the Petitioners argue that such procedure has harmed the presidential system in Indonesia, the Court is of the opinion that the arrangements that appear to be very heavily under the authority of DPR (House of Representatives) and leaving the role of executive power cannot be separated from the history of the founding of Komnas HAM. As previously described above, Komnas HAM which was established based on Presidential Decree 50/1993, has caused Komnas HAM to be initially considered only as an extension of the President, so that it would not cover the human rights violations committed by the incumbent President at that time. In line with the spirit of reform in 1998, which became the background for the establishment of Law 39/1999, it was intended to limit the enormous power of the President during the New Order government. The facts behind the promulgation of Law 39/1999 have caused the norms in relation to the membership of Komnas HAM to be kept away from the intervention of the President, so that the role of the President was only to inaugurate the Komnas HAM members as regulated in Article 83 paragraph (1) of Law 39/1999 and its Elucidation. Likewise, in the process of selecting, appointing and terminating the members and leaders of Komnas HAM as regulated in Article 85 paragraph (1) and Article 86 of Law 39/1999, the

President also only stipulates such matter through a Presidential Decree, or only carries out the administrative functions. The Court can understand the choice of the policy makers to give authority to the DPR (House of Representatives) to elect the Komnas HAM members because the DPR is the representative of the people who represents the people's voice, therefore the election of Komnas HAM members is returned to the people's representative institution. However, regardless of the Petitioners' argument regarding the choice of the Komnas HAM member election system which cannot balance the powers of the DPR and the President, the Court is of the opinion that the procedure to elect the Komnas HAM members is an open legal policy of the legislators.

Regarding the constitutionality issues in relation to the procedure for selecting, appointing and terminating Komnas HAM members and leaders as stipulated by the Komnas HAM Rules of Conduct and the right of Komnas HAM Members to nominate the candidates for Komnas HAM members in the Plenary Session which the Petitioners argue will weaken the checks and balances system, thus preventing other people from getting the same opportunity in the government, the Court is of the opinion that the arguments of the Petitioners in principal refer to the issue of election procedures which cannot be separated from the history of the establishment of the Komnas HAM. Because this is related to procedural arrangements which, the Court is of the opinion that are the choice of policy that can be taken by legislators, of course, by carefully considering the risks of the choice of policy taken, and based on rationality by taking into account the conditions as determined by the Court, namely as long as the choices made do not exceed the authority of the legislators, do not constitute an abuse of authority, and do not actually conflicted with the 1945 Constitution. In practice, the Court is aware of the concerns that the Petitioners' arguments could occur, such as the possibility that there may be Komnas HAM members who take advantage of this policy loophole to perpetuate their power to practice nepotism by including the people who are close to them, thereby closing other people's opportunities. However, the Court is of the opinion that the Petitioners' concerns are not a matter of the constitutionality of the norm, even if such a problem occurs, *quod non*, this is a matter of implementing the legal norms.

Based on the aforementioned legal considerations, the Court is of the opinion that the arguments of the Petitioners' petition as long as it is related to the word “a number of” as regulated in Article 83 paragraph (1) of Law 39/1999 shall create legal uncertainty. Therefore, the Court will give the interpretation as set out in the verdict below. Meanwhile, regarding the other arguments of the Petitioners’ petition in relation to Article 85 paragraph (1), Article 86 and Article 87 paragraph (2) letter d of Law 39/1999 are in contrary to Article 4 paragraph (1), Article 28D paragraph (1), Article 27 paragraph (1) and Article 28D paragraph (3), as well as Article 28I Paragraph (4) of the 1945 Constitution, such matter is an open legal policy which determination is within the authority of the legislators. Therefore, it must be declared as legally unjustifiable.

Although the Court declares that Article 85 paragraph (1), Article 86, and Article 87 paragraph (2) letter d of Law 39/1999 are constitutional, the Court considered the importance of monitoring and reviewing Law 39/1999, the results of which could be a proposal in the preparation of the National Legislation Program (*Prolegnas*). Regardless of whether Law 39/1999 has been monitored and reviewed, the position of the *a quo* Law since 2015 has been included in the 2015-2019 Prolegnas list and even now the *a quo* Law included in the 2020-2024 Prolegnas list. Therefore, the legislators can prioritize the process of amendment to Law 39/1999. However, it is important for the Court to emphasize that in determining the choice of policy to amend Law 39/1999, it is also necessary to pay attention to the selection/recruitment procedures for the Komnas HAM members with the democratic values of justice that are developing in the society, the development of dynamics of state politics and adapting them to the model/process of filling in the positions of other state commission members by taking into account the specificity of Komnas HAM which are different from the commissions of other countries. The choice of policy taken need to consider the risk of violations or abuse at the implementation level, so that the goal of increasing the human

rights protection for Indonesian citizens can be achieved and the Komnas HAM can carry out its duties and functions effectively and efficiently.

Therefore, the Court concludes that the petition of the Petitioners is legally justifiable in part. Subsequently, the Court issued a decision which verdicts are as follows:

1. To grant the Petitioners' petition in part;
2. To declare that the word "a number of" in Article 83 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, (State Gazette of the Republic of Indonesia of 1999 Number 165, Supplement to the State Gazette of the Republic of Indonesia Number 3886) is in contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted as "a number of, at maximum,";
3. To order the recording of this decision in the State Gazette of the Republic of Indonesia as appropriate;
4. To dismiss that the Petitioners' petition for the remainder