CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 67/PUU-XXII/2024

Concerning

Customary Affairs

Petitioners	:	**The Association of Customary Law Lecturers (APHA), Yanto Eluay, et al.**
Type of Case	:	Judicial review of Law Number 39 of 2008 concerning State Ministries (Law 39/2008) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	:	Judicial review of Article 5 paragraph (2) of Law 39/2008 against Article 28D paragraph (1), Article 28G paragraph (1), and Article 28G paragraph (2) of the 1945 Constitution
Verdict	:	To dismiss the Petitioners' petition entirely.
Date of Decision	:	Tuesday, 20 August 2024
Overview of Decision	:	

Whereas Petitioner I is a Legal Entity, Petitioner II is an individual citizen serving as an Ondofolo, Petitioner III is an individual citizen serving as the Secretary-General of the National Dayak Customary Judges Council (MHADN), Petitioner IV is an individual citizen actively advocating for the affairs of the Osing Customary Community, Petitioner V is an individual citizen serving as the Head Village of the Tengger Customary Community in Ngadas Village, and Petitioner VI and Petitioner VII are individual citizens.

Regarding the authority of the Court, since the Petitioners' petition is a material review of Article 5 paragraph (2) of Law 39/2008 against the 1945 Constitution, the Court has the authority to hear the *a quo* petition.

Regarding the legal standing of the Petitioners, the Petitioners have sufficiently demonstrated alleged constitutional loss that is specific and actual, or at least potential, resulting from the enactment of the norms being petitioned for review. Moreover, the Petitioners have established a causal relationship between the alleged constitutional loss and the enactment of the legal norms being petitioned for review, particularly related to the absence of customary affairs from the mention of governmental affairs within the norms of Article 5 paragraph (2) of Law 39/2008. Both Petitioner I, as a legal entity, and Petitioners II through VII, as individual citizens, have an interest in advancing and protecting the rights of customary law communities. Therefore,

if the *a quo* petition is granted, the alleged constitutional loss would no longer occur or be prevented. Accordingly, regardless of whether the unconstitutionality of the norms petitioned for review is proven, the Court is of the opinion that the Petitioners have legal standing to act as Petitioners in the *a quo* petition.

Whereas since the Petitioners' *a quo* petition is clear, there is no urgency or necessity to hear the statements of the parties as referred to in Article 54 of the Constitutional Court Law.

Whereas regarding the petition for judicial review of Article 5 paragraph (2) of Law 39/2008, the Court has previously adjudicated cases regarding the constitutionality of the *a quo* norms, namely Constitutional Court Decision Number 42/PUU-XI/2013, pronounced in a plenary session open to the public on 10 September 2013, and Constitutional Court Decision Number 155/PUU-XXI/2023, pronounced in a plenary session open to the public on 31 January 2024. When compared to the *a quo* case, the Petitioners' petition has differences concerning both the constitutional issue and the grounds for review compared to case Number 42/PUU-XI/2013 and case Number 155/PUU-XXI/2023. Therefore, regardless of whether the substance of the Petitioners' petition is legally justifiable or not, under the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 paragraph (2) of CCR 2/2021, there exist differences in the grounds and reasons for the review between the *a quo* petition and the previous petitions that have been adjudicated by the Court as considered above. Accordingly, the judicial review of the norms of Article 5 paragraph (2) of Law 39/2008 is not barred by the enactment of Article 60 of the Constitutional Court Law and Article 78 of CCR 2/2021, thus it may be re-submitted.

Whereas the provisions of Article 5 paragraph (2) of Law 39/2008 being petitioned for review constitute norms regulating types of governmental affairs whose scope is mentioned in the 1945 Constitution. In these norms, governmental affairs include religion, law, finance, security, human rights, education, culture, health, social, labor, industry, trade, mining, energy, public works, transmigration, transportation, information, communication, agriculture, plantations, forestry, animal husbandry, maritime, and fisheries affairs.

Whereas the Court has consistently held that the norms of formation and determination of governmental affairs under a ministry, as mandated by Article 17 paragraph (4) of the 1945 Constitution, constitute open legal policy by the legislators. Such policy may be amended at any time according to the demands of prevailing developments, the development of the scope of governmental affairs, or through legislative review, provided that the norms do not explicitly conflict with the 1945 Constitution, do not exceed the legislative authority, and do not constitute an abuse of power.

Whereas regarding the *a quo* petition, the constitutional issue that must be addressed is whether the absence of explicit mention of customary affairs in Article 5 paragraph (2) of Law 39/2008 is contrary to the 1945 Constitution due to failing to acknowledge the recognition of indigenous law communities and the government's responsibility for the protection, advancement, enforcement, and fulfillment of the rights of indigenous communities, as well as fair legal certainty. Regarding the *a quo* Petitioners' arguments, even though the norms of Article 5 paragraph (2) of Law 39/2008 specifically lists governmental affairs mentioned in the 1945 Constitution, in practice, the assignment or delegation of authority to ministries responsible for these affairs lies within the President's discretion, adjusted according to governmental developments and needs to achieve the objectives of the state as outlined in the Preamble to the 1945 Constitution. This discretion also extends to the scope of governmental affairs delegated to specific ministries. In other words, implementing governmental duties through ministries as stated in Article 5 paragraph (2) of Law 39/2008 must adhere to the mandate of the 1945 Constitution. The constitutional mandate in Article 18B paragraph (2) of the 1945 Constitution must be interpreted as a broadly applied mandate ensuring that the rights of indigenous law communities and their traditional rights, to the

extent that they are still alive, must be recognized and respected by the state. In this context, the rights of indigenous law communities that must be protected, respected, and fulfilled are determined to the extent that the indigenous law community still exists, and the existence is recognized, the community rights are granted under statutory regulation, and they are not contrary to national interests. Consequently, ministries handling any affairs related to indigenous law communities must protect, respect, and fulfill the rights of these indigenous law communities. The Petitioners' argument petitioning to establish customary affairs as an "exclusive matter" with the formation of a separate ministry independent of other relevant ministries would create ambiguity regarding what is truly meant by "customary affairs" as proposed by the Petitioners.

Regarding the above, customary matters are not only about law but encompass all aspects and levels of life. Therefore, customary affairs should be understood as inherently connected with various relevant governmental affairs as outlined in Article 5 of Law 39/2008. In other words, religion, law, finance, security, human rights, education, culture, health, social, labor, industry, trade, mining, energy, public works, transmigration, transportation, information, communication, agriculture, plantations, forestry, livestock, maritime, and fisheries affairs, as mentioned in Article 5 paragraph (2) of Law 39/2008, inherently include customary matters when implemented in adherence to the 1945 Constitution. Therefore, the Court finds no issue of legal uncertainty as regulated in Article 28D paragraph (1) of the 1945 Constitution if customary affairs are not explicitly listed in Article 5 paragraph (2) of Law 39/2008. On the contrary, designating customary affairs as a separate or exclusive matter would constrain the scope of various ministries in handling affairs related to the rights of indigenous law communities and could lead to sectoral impacts on these matters, which should be avoided in government administration.

Whereas the absence of a specific ministry for "customary affairs" does not mean that the state, in this case, the government, can neglect efforts to recognize and respect indigenous law communities. In this regard, establishing a ministry specifically for customary affairs would complicate coordination and create overlapping authorities since, when implemented, many governmental affairs would intersect with the interests of indigenous law communities or inherently involve "customary affairs." The issue argued by Petitioners about insufficient attention and protection for the rights of indigenous law communities should instead be addressed by improving coordination among ministries whose governmental affairs intersect with the interests of indigenous law communities.

Concerning this, the coordination of government administration to protect indigenous law communities requires strong legal support in the form of law. Therefore, legislators must prioritize the drafting and enactment of a law specifically addressing indigenous law communities. Moreover, the Bill on Indigenous Law Communities has been included multiple times in the National Legislation Program (*Prolegnas*). This aligns with the recognition of indigenous law communities and their traditional rights as stated in Article 18B paragraph (2) of the 1945 Constitution, which requires to be further regulated by law and should be understood as a constitutional mandate to form a law on indigenous law communities. Accordingly, the specific issues and problems presented by the Petitioners in their argument could be resolved through such a law. This would enable better coordination of governmental affairs related to indigenous law communities already undertaken by various ministries. These issues do not provide a basis for interpreting or inserting the term "customary" into governmental affairs as outlined in Article 5 paragraph (2) of Law 39/2008. Therefore, the Petitioners' argument that Article 5 paragraph (2) of Law 39/2008 is contrary to Article 18B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution is legally unjustifiable.

According to the above legal considerations, the Court concludes that Article 5 paragraph (2) of Law 39/2008 is not contrary to the assurance of fair legal certainty guaranteed under Article 28D paragraph (1) of the 1945 Constitution, nor is it contrary to the principle of recognition and respect for indigenous law communities as stated in Article 18B paragraph (2) of the 1945 Constitution, not as argued by the Petitioners. Accordingly, the Petitioners' argument is entirely legally unjustifiable.

Thus, the Court subsequently passed down a decision in which the verdict was to dismiss the Petitioners' petition entirely.