

**THE RIGHT TO VOTE FOR PEOPLE WITH MENTAL / MEMORY
DISORDERS IN LAW NO. 07 OF 2017 ON ELECTIONS
(Study of Fiqh Siyasah Analysis)**

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ABSTRACT

The subject matter discussed is how the right to vote for people with mental / memory disorders in Law No. 07 of 2017 on General Elections and fiqh Siyasah's analysis of the law. The type of research method used is a method of literature research that is normative juridical, with a statute approach (statute approach) that is to examine all laws related to the subject that aims to see consistency and perness between one regulation with another. From the results of this study it can be concluded that Law No. 07 of 2017 on General Elections has differences regarding voting rights for people who are mentally disturbed / memory of the Constitutional Court Decision No. 135 / PUU / -XIII / 2015. This is because the general election law does not limit the right to vote for people who are disturbed by the soul / memory so that they experience legal vacancies and legal uncertainties that cause multi-interpretation of the law, while the Constitutional Court Decision No. 135 / PUU / -XIII / 2015 clearly and unequivocally ruled that people with mental disorders / memories cannot vote in general elections. and technically it is proven through the certificate of a health expert.

Keywords: Consistency, Right, Vote, Siyasah.

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INTRODUCTION

Elections are a means of people's sovereignty to elect members of the House of Representatives, members of the Regional Representative Council, President and Vice President, and elect members of the Regional People's Representative Council which is carried out directly, publicly freely, secretly, honestly and fairly in the Unitary State of the Republic of Indonesia based on Pancasila and the Constitution of the Unitary State of the Republic of Indonesia in 1945.

Pancasila as the philosophy of life of the nation which is also the source of all legal sources has high-dimensional values and is in accordance with the values that live in society, because Pancasila is also a national character that can distinguish Indonesian

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people from other nations so that Pancasila also becomes a reference against various rules which are then followed by the constitution and various other organic regulations.¹

Amendments to the Constitution of the Republic of Indonesia in 1945 were the culmination of a fundamental change achieved by the power of the people after the New Order government. Amendments to the 1945 Constitution of the Republic of Indonesia have made major changes, especially in the general election.²

In the provisions of Article 1 number 1 of Law Number 10 of 2008 concerning General Election of Members of the People's Representative Council, Regional Representative Council, and Regional People's Representative Council, it is stated: General election is a means of exercising people's sovereignty which is carried out directly, publicly, freely, in secret, honest and fair in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia. So that all election implementation processes must be carried out according to the principles of direct, general, free, secret, honest and fair elections. Therefore, the implementation of elections in Indonesia should follow the principles contained therein.³

In the general election there is the right to vote and be elected, while those who can vote in the general election are:⁴

1. Indonesian citizens who on the day of the vote are already 17 (seventeen) years old or older, have married, or have been married have the right to vote.
2. Indonesian citizens as referred to in paragraph (1) are listed 1 (one) time by the election organizers in the voter list.
3. Indonesian citizens who have been deprived of their political rights by the courts do not have the right to vote.

Looking from the above article it can be said that related to the right to vote in elections is not explained in detail, then how is the right to vote for people with mental disorders / memory? In this case it turns out that the KPU issued a General Election Commission (PKPU) Regulation related to the right to vote for people with mental / memory disorders, following the urain:⁵

1. To be able to exercise the right to vote, Indonesian citizens must be registered as voters except as otherwise specified by law.
2. Voters as referred to in paragraph (1) shall be eligible:
 - a. Even 17 (seventeen) years or older on polling day, married, or married.

¹ Cynthia Hadita, Regional Autonomy Political Politics Of Regional Liability Reports To Regional Representatives In The Implementation Of Local Government, *Nomoi Law Review*, Volume 1, Issue 1, May 2020, p. 91.

² Mhd. Anzor Lubis. Fifth Amendment Consolidation Of The 1945 Constitution Of The Republic Of Indonesia. *Nomoi Law Review*. Vol. 1. No. 1. (May, 2020).

³ Eka N.A.M Sihombing, Pemberlakuan "Parliamentary Threshold" dan Kaitannya dengan Hak Asasi Manusia, *Jurnal Konstitusi*, Vol. 1, No. 1, Juni (2009), p. 31.

⁴ Article 198 paragraph (1)(2) and (3) of the Law No. 07 of 2017 on General Elections.

⁵ Article 4 PKPU No. 11 of 2018 on the preparation of domestic voter lists in election organizers Common.

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- b. Not being disturbed by the soul/ memory.
 - c. It is not being disenfranchised based on the decision of a court that already has permanent legal force.
 - d. Domiciled in the administrative region of the electorate as evidenced by KTP-el.
 - e. In the event that the voter does not have an ID card as referred to in the letter d, can use a certificate issued by the office that organizes population affairs and local civil records, and
 - f. Not currently a member of the Indonesian National Army, or the State Police of the Republic of Indonesia.
3. Voters who are disturbed by their soul / memory as referred to in paragraph (2) letter b, while not qualifying as voters, must be proven by a doctor's certificate.
 4. Indonesian citizens who have been registered on the electoral register, it turns out that they no longer qualify as referred to in paragraph (2), the Indonesian citizen in question cannot exercise his or her voting rights.

Reviewing from the PKPU that people with mental / memory disorders cannot choose, but PKPU No. 11 of 2018 only lasted a few days and was replaced by PKPU No. 37 of 2018 which contains the following:⁶

1. To be able to exercise the right to vote, Indonesian citizens must be registered as voters except as otherwise specified by law.
2. Voters as referred to in paragraph (1) shall be eligible:
 - a. Even 17 (seventeen) years or older on polling day, married, or married.
 - b. Deleted.
 - c. It is not being disenfranchised based on the decision of a court that already has permanent legal force.
 - d. Domiciled in the administrative region of the electorate as evidenced by KTP-el.
 - e. In the event that the voter does not have an ID card as referred to in the letter d, can use a certificate issued by the office that organizes population affairs and local civil records, and
 - f. Not currently a member of the Indonesian National Army, or the National Police of the Republic of Indonesia.
3. Deleted.
4. Indonesian citizens who have been registered on the electoral register, it turns out that they no longer qualify as referred to in paragraph (2), the Indonesian citizen in question cannot exercise his or her voting rights.

Clearly seen in article 4 paragraph (2) in point "b" above regarding the right to vote for people with mental disorders / memory in "deleted" resulting in unclear law because no one regulates it. With the change of PKPU above then with the principle of legal interpretation *lex posteriori derogat legi priori* (the latest law overrides the old one) then of course PKPU No. 11 of 2018 no longer applies by replacing PKPU No. 37 of 2018. That way, the position of voting rights for people who are disturbed by soul / memory both in Law No. 07 of 2017 on general elections and PKPU does not regulate it or does not limit rights for people with mental disorders / memories.

⁶ Article 4 PKPU No. 37 In 2018 about Changes to The Election Commission Regulation No. 11 of 2018 concerning Preparation of The Electoral Register in the Election Organizers Common..

Related to the right to vote in elections it turns out that not only positive laws govern it, but there are several hadiths that can be used as analogies such as the description of the hadith below:

حَدَّثَنَا أَبُو سَعِيدٍ حَدَّثَنَا حَمَّادُ بْنُ سَلَمَةَ عَنْ عَطَاءِ بْنِ السَّائِبِ عَنْ أَبِي ظَبْيَانَ أَنَّ عَلِيًّا رَضِيَ اللَّهُ عَنْهُ قَالَ لِعُمَرَ يَا أَمِيرَ الْمُؤْمِنِينَ أَمَا سَمِعْتَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنِ الصَّغِيرِ حَتَّى يَكْبُرَ وَعَنِ الْمُبْتَلَى حَتَّى يَعْقَلَ

Abu Sa'id had told us Hammad bin Salamah of 'Atho bin As Saib of Abu Zhabyan that Ali Radhiallah 'anhu said to Umar; "O Amirul Mukminin! Have you not heard the Prophet shallallahu 'alaihi wasallam say: "The pen is lifted from three people: from the one who sleeps until he wakes up, from the little boy that he becomes an adult and the madman until he is intelligent."⁷

In terms of numbers, at each general election held, sometimes it multiplies, sometimes decreases. In terms of ideology, in its development now there are religious and nationalist ideologies. Legislation prohibits political parties with communist ideology or Marxism Leninism. Independence of association and assembly guaranteed by the 1945 Constitution of the Republic of Indonesia encouraged various parties to establish political parties. The requirements regarding the establishment of political parties have been discussed in the previous sub-chapter.⁸

Reviewing from the hadith above it can be said that the person who is disturbed by the soul / memory cannot be charged because he cannot understand the law because he does not have common sense as a means of understanding the proposition, so it is not charged with sin because he cannot be responsible for his actions before Allah SWT. Based on the above problems in accordance with Law No. 7 of 2017 and PKPU No. 37 of 2018 which basically does not regulate or does not give limits on voting rights for people with mental / memory disorders and this is contrary to the hadith above, so with this researchers make as the background of the problem.⁹

METHOD

Marzuki dalam Eka NAM Sihombing (2019) menyatakan bahwa metode penelitian hukum yuridis normatif yaitu metode yang menggunakan pendekatan yang dilakukan berdasarkan bahan hukum utama dengan cara menelaah teori-teori, konsep-konsep asas-asas hukum, norma, kaidah dari peraturan perundang-undangan, putusan pengadilan, perjanjian. Adapun sifat penelitian yang dipergunakan dalam tulisan ini adalah preskriptif, berpegang pada karakteristik ilmu hukum sebagai ilmu terapan, preskripsi yang diberikan di dalam kegiatan penelitian hukum harus dapat dan mungkin

⁷ Ali Marwan HSB Eka N.A.M. Sihombing, *Ilmu Perundang-Undangan* (Medan: Pustaka Prima, 2017).

⁸ Abdul Hakim Siagian. Extension Of The Constitutional Court Authority In The Dissolution Of Corrupted Political Parties. *Nomoi Law Review*. Vol. 1. No. 1. (May, 2020).

⁹ Musnad Ahmad, *Sepuluh Sahabat Yang Dijamin Masuk Surga Bab Musnad Ali Bin Abu Thalib Radliyallahu'anhu No. Hadits 1290.*, n.d.

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untuk diterapkan. Oleh karena itu yang dihasilkan oleh penelitian hukum, sekalipun bukan asas hukum yang baru atau teori baru, paling tidak argumentasi baru.¹⁰

DISCUSSION

Voting Rights for People With Mental Disorders / Memory in Law No. 07 of 2017 concerning General Elections

Law No. 07 of 2017 on General Elections describes the right to vote and the conditions of voting in elections precisely in article 198 paragraph (1), (2), (3) which reads:

1. Indonesian citizens who on the day of the vote are already 17 (seventeen) years old or older, have married, or have been married have the right to vote.
2. Indonesian citizens as referred to in paragraph (1) are listed 1 (one) time by the election organizers in the voter list.
3. Indonesian citizens who have been deprived of their political rights by the courts do not have the right to vote.

Looking at the above articles it can be understood that there are some weaknesses in these articles are governed only universally, then how is the right to vote for people with mental disorders / memories? In this case, the law doesn't talk about it. In the absence of rules regarding the right to vote for people with mental disorders / memory based on the above laws, there is no limit to the right to vote for people with mental disorders / memories, in other words the occurrence of legal vacancies and legal uncertainties.

Legal certainty is interpreted as clarity of norms so that it can be used as a guideline for the community imposed by this regulation, the understanding of certainty can be interpreted that there is clarity and firmness to the enactment of the law in society. Furthermore, according to Maria S.W. Sumardjono normatively legal certainty requires the availability of a device of laws and regulations that operationally and support its implementation and empirically the existence of laws and regulations need to be carried out consistently, in other words a regulation is made and enacted with certainty because it regulates clearly and logically, clearly in the sense that it does not cause doubt (multi-interpretation) and logical so that it becomes a a system of norms with other norms that do not clash or cause conflicting norms. So based on the principle of legal certainty, Law No. 07 of 2017 on General Elections, especially those that discuss the right to vote or the conditions of voting can be said to have been legal uncertainty, because it contains multi-interpretation of law or doubt, by not affirming the right to vote for people with mental / memory disorders.¹¹

Furthermore, to look more broadly at Law No. 07 of 2017 related to voting rights for people with mental / memory disorders, the author hereby also outlines the Election

¹⁰ Eka N.A.M Sihombing, Eksistensi Paralegal dalam Pemberian Bantuan Hukum bagi Masyarakat Miskin (The Existence of Paralegals in Providing Legal Aid to the Poor), *Jurnal Ilmiah Penegakan Hukum*, Vol. 6, No. 1, June(2019).

¹¹ R. Tony Prayogo, “Penerapan Asa Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang,” *Jurnal Legislasi Indonesia* 13 (n.d.): 194.

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Commission (PKPU) Regulations as a special rule in the implementation of elections. Regulation of the Election Commission of the Republic of Indonesia No. 11 of 2018 concerning the Preparation of The Electoral Register in the General Election Organizer precisely in chapter two (2) regarding the right to vote, namely in article 4 with the condition:

1. To be able to exercise the right to vote, Indonesian citizens must be registered as voters except as otherwise specified by law.
2. Voters as referred to in paragraph (1) shall be eligible:
 - a. Even 17 (seventeen) years or older on polling day, married, or married.
 - b. Not being disturbed by the soul/ memory.
 - c. It is not being disenfranchised based on the decision of a court that already has permanent legal force.
 - d. Domiciled in the administrative region of the electorate as evidenced by KTP-el.
 - e. In the event that the voter does not have an ID card as referred to in the letter d, can use a certificate issued by the office that organizes population affairs and local civil records, and
 - f. Not currently a member of the Indonesian National Army, or the National Police of the Republic of Indonesia.
3. Voters who are disturbed by their soul / memory as referred to in paragraph (2) letter b, while not qualifying as voters, must be proven by a doctor's certificate.
4. Indonesian citizens who have been registered on the electoral register, it turns out that they no longer qualify as referred to in paragraph (2), the Indonesian citizen in question cannot exercise his or her voting rights.

But the ABOVE PKPU has undergone changes, namely by being replaced by PKPU No. 37 of 2018, precisely in article 4. The contents of the vote about the right to vote are:

1. To be able to exercise the right to vote, Indonesian citizens must be registered as voters except as otherwise specified by law.
2. Voters as referred to in paragraph (1) shall be eligible:
 - a. Even 17 (seventeen) years or older on polling day, married, or married;
 - b. Deleted.
 - c. It is not being disenfranchised based on the decision of a court that already has permanent legal force.
 - d. Domiciled in the administrative region of the electorate as evidenced by KTP-el.
 - e. In the event that the voter does not have an ID card as referred to in the letter d, can use a certificate issued by the office that organizes population affairs and local civil records, and
 - f. Not currently a member of the Indonesian National Army, or the National Police of the Republic of Indonesia.
3. Deleted.
4. Indonesian citizens who have been registered on the electoral register, it turns out that they no longer qualify as referred to in paragraph (2), the Indonesian citizen in question cannot exercise his or her voting rights.

It is clearly seen in article 4 paragraph (2) in the letter "b" above regarding the right to vote for people with mental disorders / memory in "deleted" resulting in legal

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vacancy and legal uncertainty because no one regulates it. With the change of pkpu above then with the principle of interpretation of the law *lex posteriori derogat legi priori* (the latest law overrides the old). Then of course PKPU No. 11 of 2018 no longer applies by being replaced by PKPU No. 37 in 2018. Thus, the position of voting rights for people who are disturbed by soul / memory both in Law No. 07 of 2017 on General Election and PKPU does not regulate it or does not limit rights for people with mental disorders / memories.¹²

Furthermore, it turns out that not only Law No. 07 of 2017 which talks about the right to vote in elections but also there is a Decision No. 135 / PUU / - XIII / 2015 related to article 57 paragraph 3 of Law No. 08 of 2015 on the right to vote for people who are disturbed by their soul / memory and the contents of the verdict:

1. article 57 paragraph 3 letter a Law No. 8 of 2015 concerning changes to Law No. 1 of 2015 concerning the establishment of Government Regulation In lieu of Law No. 1 of 2014 concerning the election of Governors, Regents, and Mayors into Law (State Gazette of the Republic of Indonesia Number 57, Supplementary State Gazette of the Republic of Indonesia Number 5678) contrary to the Constitution of the Republic of Indonesia year 1945, to the longtime the phrase "disturbed soul/or memory" does not mean "experiencing a mental disorder and/or permanent memory impairment which according to mental health professionals has eliminated a person's ability to vote in elections";
2. article 57 paragraph 3 letter a Law No. 8 of 2015 on changes to Law No. 1 of 2015 on the establishment of Government Regulation In lieu of Law No. 1 of 2014 concerning the election of Governors, Regents, and Mayors into Law (State Gazette of the Republic of Indonesia Number 57, Supplementary State Gazette of the Republic of Indonesia Number 5678) has no binding legal force as long as the phrase "disturbed soul / memory" is not interpreted as "experiencing mental disorders" and/or permanent memory impairment that mental health professionals say has deprived a person of the ability to vote in elections."

In its consideration the Constitutional Court explained that mental disorders and memory disorders are two different characteristics. Memory disorders are problems caused by deterioration or decrease in physical quality, namely the brain as a vehicle for memory storage and processing, while mental disorders are not always caused by problems of decline in human physical quality, each type of disorder, both mental disorders and memory disorders, has various derivatives. Thus according to the Court the use of punctuation marks "/" (slashes) in the phrase "mental disorders / memories" contained in article 53 paragraph (3) letter a must be affirmed not in the context of equalizing mental disorders with memory disorders, but rather is a grouping of two categories as a set that is excluded from citizens who are entitled to be listed on the electoral register.

Reviewing the Constitutional Court Decision No. 135/PUU/-XIII/2015, it can be concluded that those who cannot be registered as voters and are also unable to exercise their rights or in other words do not have the right to vote in elections, namely people with mental disorders and/or permanent memory impairment, which according to mental health professionals has eliminated a person's ability to vote in elections, This can be

¹² Eka N.A.M. Sihombing, *Ilmu Perundang-Undangan*, (Medan: Pustaka Prima, 2017), p. 106.

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proven by a doctor's certificate. That there is a fundamental difference in the right to vote for people who are disturbed by the soul / memory, on the one hand in Law No. 07 of 2017 on General Elections of people with mental disorders / memory is not limited in terms of voting rights in other words the existence of a legal vacuum, but in the Constitutional Court Decision No. 135 / PUU / XIII / 2015 it is clearly said that people with mental disorders / memory cannot choose and it is evidenced by expert certificates. health. Thus it can be said that there is a conflict between Law No. 07 of 2017 and constitutional court decision No. 135 / PUU / -XIII / 2015. The provisions of article 10 of Law No. 12 of 2011 concerning the Establishment of Laws and Regulations have determined that the content material that must be regulated by the Act contains:¹³

- a. Further arrangements regarding the provisions of the Constitution of the Republic of Indonesia of 1945.
- b. Order a law to be governed by law.
- c. Ratification of certain international agreements.
- d. Follow-up to the Constitutional Court's decision.
- e. And the fulfillment of legal needs in society,

The correlation between is with the formal law to make a legislation in Indonesia. Based on the provisions of Law No. 12 of 2011 concerning the Establishment of Laws and Regulations above, the constitutional court's decision is one part of the consideration in the establishment of laws and regulations. But in fact, in Law No. 07 of 2017 on General Elections, Constitutional Court Decision No. 135 / PUU / -XIII / 2015 is not included as a consideration, so the right to vote for people with mental disorders / memory in Law No. 07 of 2017 on General Elections is not limited by the regulation. The Constitutional Court or commonly called *the guardian of the constitution*¹⁴ is the guardian of the constitution, so the unfulceceable decision of the Constitutional Court as it should cause a delegitimization process against the 1945 Constitution, which in essence can shake the stability of the implementation of national and state life, therefore it is important that in the end the decision of the Constitutional Court that is very basic will be implemented. The constitutional court's decision that is not included in the consideration of making laws and regulations is a conflict that occurs that resulted in the law experiencing a legal vacuum. In this case it seems clear that the enforcement of the constitutional court judge's decision is flawed, even though the constitutional court's decision concerning the testing of the law is *algemene verbindende voorschriften* (a generally binding rule) on prohibitions and obligations that are declared contrary to the 1945 Constitution and no longer have binding legal force, has in itself prevailed and binding by reading it in front of a hearing open to the public the verdict. which is declaratively constitutive. But in reality we can still meet as well as Law No. 07 of 2017

¹³ Radita Ajie, "Batasan Pilihan Kebijakan Pembentukan Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturab Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi (Limit To Open Legal Policy In Legislation Making Based On Constitutional Court Decision)," *Jurnal legislasi Indonesia* 13, no. 02 (n.d.): 112.

¹⁴ Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi* (Jakarta: Kencana Prenada Media Grup, 2012).

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on Elections that do not contain the Breakup of the Constitutional Court No. 135 / PUU / -XIII / 2015.¹⁵

The weakness of the Constitutional Court as a *matter of checks and balance* is that by not equipped with an instrument that can force that the ruling must be carried out, either through its own power or by other means, then in the dynamics of political interests among forces in society that can encourage or hinder the implementation of constitutional court decisions, which are not always acceptable to all parties, will face the Constitutional Court. with other state powers, namely the legislature together with the executive, as a body of lawmaking, which is also not always interested in carrying it out, at least if the ruling harms their respective interests, therefore the tendency to ignore, fight or oppose the constitutional court's ruling also occurs in the constitutional court, especially if the constitutional court's decision harms the political interests of the executive. or the legislature consisting of the forces of political parties that have seats in the Dpr. Such resistance or challenges will be able to take shape by ignoring the ruling or rejecting the revision of the law that has been tested.¹⁶

Fiqh Siyashah's Analysis of Law No. 07 of 2017 concerning General Elections

People with mental disorders are people who experience disturbances in thoughts, behaviors, and feelings that manifest in the form of a set of symptoms and/or meaningful behavioral changes, and can cause suffering and obstacles in carrying out people's functions as human beings. Another definition of mental disorders is a disorder in the way of thinking, willpower, emotions, actions of a collection of abnormal circumstances both related to physical and mental. So that people with mental disorders have a high risk of violations.¹⁷

People who experience mental disorders / memories due to disruption of mental health in the self, further mental health is a condition that allows physical (biological), intellectual (ratio / cognitiv), emotional (affective) and spiritual (religious) optimal of a person and the development is in harmony with the development of others. According to Muhammad Mahmud there are several characteristics for people who have mental health:¹⁸

1. Sustainability (al-sakinah), calmness and inner relax in carrying out obligations both to him, society and God.
2. Adequate in activity.
3. Accept the circumstances of himself and others.
4. There is the ability to take care of yourself.
5. The ability to assume responsibilities, both family, social, and religious responsibilities.
6. Have the ability to sacrifice and make amends.

¹⁵ Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum* 3 (16AD): 363.

¹⁶ *Ibid.*

¹⁷ Nopyawati, "Hubungan Pengetahuan Tentang Gangguan Jiwa Terhadap Sikap Masyarakat Kepada Penderita Gangguan Jiwa Di Wilayah Kerja Puskesmas Colomadu 1," *Skripsi, Surakarta: : Universitas Muhamadiyah Surakarta* (2013): 3.

¹⁸ Suhaimi, "Mental Disorders in the Islamic Mental Health Perspective," *Journal of Treatise*, Vol. 26, No.4 (December 2015:197-205): 202.

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7. An individual's ability to form good social relationships is based on mutual trust and mutual filling.
8. Have a realistic desire so that it can be achieved well.

Based on the above explanation, what is fiqh Siyasa's view of the right to vote in elections for people with mental / memory disorders based on Law No. 07 of 2017? As for the hadith that can provide little information about the rights of people with mental disorders / memory in choosing. Here's the urain:

حَدَّثَنَا أَبُو سَعِيدٍ حَدَّثَنَا حَمَّادُ بْنُ سَلَمَةَ عَنْ عَطَاءِ بْنِ السَّائِبِ عَنْ أَبِي ظَبْيَانَ أَنَّ عَلِيَّ رَضِيَ اللَّهُ عَنْهُ قَالَ لِعُمَرَ يَا أَمِيرَ الْمُؤْمِنِينَ أَمَا سَمِعْتَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنِ الصَّغِيرِ حَتَّى يَكْبُرَ وَعَنِ الْمُبْتَلَى حَتَّى يَعْقَلَ

"It has been told to us Abu Sa'id has told us Hammad bin Salamah of 'Atho bin As Saib of Abu Zhabyan that Ali Radhiallah 'anhu said to Umar; " O Amirul Mukminin! Have you not heard the Prophet shallallahu 'alaihi wasallam say: "The pen is lifted from three people: from the one who sleeps until he wakes up, from the little boy that he becomes an adult and the madman until he is intelligent".¹⁹

حَدَّثَنَا عَفَّانُ قَالَ حَدَّثَنَا حَمَّادٌ عَنْ حَمَّادٍ عَنْ إِبْرَاهِيمَ عَنِ الْأَسْوَدِ عَنْ عَائِشَةَ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ رُفِعَ الْقَلَمُ عَنْ ثَلَاثٍ عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ وَعَنِ الْمَجْنُونِ حَتَّى يَعْقَلَ وَقَدْ قَالَ حَمَّادٌ وَعَنِ الْمَعْتُورِ حَتَّى يَعْقَلَ

"Having told us Affan, he said; He has told us Hammad, from Hammad, from Ibrahim, from Al-Aswad, from Aisha, from the Prophet Shallallahu'alaihiwasallam saying: "The pen is lifted up (not sinned) from three things: From the one who sleeps until he wakes up, from a child to a wet dream, and from a madman until he is conscious (intelligent)." Hammad has narrated; "And from a mentally disabled person to a intelligent man."²⁰

Reviewing in the hadith above that says that a person is not subject to sin in the sense that the person is not burdened with the law in 3 (three) things / or categories that are people who sleep so that he wakes up, from a child so that he becomes an adult and a madman until he is intelligent. The burden of the law cannot be given because the three groups above are unable to be responsible for their actions due to the inability to understand the orders given such as sahalat and fasting orders.

A mukhallaf is considered legitimate to bear the burden according to *syara'* if he is able to understand *the proposition of taklif* (loading), because the person who is unable to understand the taklif proposition will certainly not be able to carry out the demands and the purpose of loading will not be achieved. The ability to understand taklif

¹⁹ Ahmad, *Sepuluh Sahabat Yang Dijamin Masuk Surga Bab Musnad Ali Bin Abu Thalib Radliyallahu'anhu No. Hadits 1290.*

²⁰ Ahmad, "Musnad Sepuluh Sahabat Yang Dijamin Masuk Surga Bab Musnad Ali Bin Abu Thalib Radliyallahu'anhu No. Hadits 1290." (n.d.).

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propositions can only be realized with good reason, because reason is a tool to understand and discover, and with reason also something want can be directed. But because reason is something vague that cannot be known by the birth sense, the syar'i binds the loading with something that can be known, namely the age of puberty (adult). Whoever arrives at puberty without any signs of damage to the power of reason is considered capable of being given the burden of the law.²¹

As for the right to choose people with mental disorders / memories, of course it provides its own burden for people who have a lack of reason, because of the inability of reason in determining their right of choice. So with the inadequacy of his intellect he was unable to achieve his goals as he should so that it could lead to fatal errors. And also people with mental disorders cannot be held accountable for their choices before Allah SWT.

Furthermore, the researcher also provided several two rules of fiqh to review related to this such as:

تَصْرُفُ الْإِمَامِ عَلَى الرَّاعِيَةِ مَنُوطٌ بِأَمَصْلَحَةِ

"A leader's policy toward his people must be benefit-oriented."

This rule means that whatever government policy both regulations and laws and regulations must consider its people, meaning that everything must be put at its capacity. Like people with mental disorders / memories who of course have shortcomings should be given more protection in terms of maintaining their lives because people like this often experience discrimination. But in terms of the right to choose a leader of course this burdens people who suffer from mental disorders, because he is not able to observe and understand the leader he chooses. And if it is forced then the fate of the nation is at stake.

دَرْءُ الْمَفَا سِيدِ مُقَدَّمٌ عَلَى الْمُخْتَلَفِ فِيهِ

"Rejecting mafsadah (destruction) takes precedence over achieving maslahat".²²

It is intended that rejecting harm (ugliness) is prioritized in the appeal of gaining benefits. In a democracy sovereignty is in the hands of the people and the law guarantees it by giving the rule that the people put the representatives of the people to determine the next policies. In the case of the people put the representatives of the people as a policy splicer then the people should understand about what he chooses because later everything produced by the representatives of the people has an impact on the people. And in this case the person with mental disorders / memory certainly can not understand well who he will put as a mouthpiece of the people in creating policies. So based on the above rules by excluding people with mental disorders / memory in terms of the right to choose representatives of the people or leaders it is classed in rejecting evil rather than taking advantage. Then not only based on hadith and rules, imam Al-Mawardi added that who can have the right in terms of having a leader should have three conditions, namely:²³ *First* fair then the conditions that accompany it, *secondly* have knowledge that can lead him able to know the person who is entitled to be appointed as imam (caliph) in

²¹ Abdul Wahhab Khallaf, *Ilmu Ushul Fikih Kaidah Hukum Islam* (Jakarta: Abdul Wahhab Khallaf, 2003).

²² A. Dzazuli, *Kaidah-Kaidah Fikih Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis* (Jakarta: Pranadamedia Group, 2019).

²³ Imam Al-Mawardi, *Al-Ahkam Sulthaniyah, Terj. Khalifurrahman Fath* (Jakarta: Al-Azhar Press, n.d.).

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accordance with legal conditions, *third* He has wise ideas and attitudes that make him able to choose the most worthy person to be appointed imam (caliph) and the most appropriate and most prudent in regulating various interests.

Based on the view of imam Al-Mawardi above it can be concluded that a person who has the right to choose a leader is a person who is able to recognize well the candidate he will choose, this is based on the first and second conditions, reviewing more deeply that the ability is certainly only possessed by people who have undisturbed or common sense. So regarding the right to vote for people who are disturbed by the soul / memory in Law No. 07 of 2017 on General Elections based on the review of fiqh siyasah using hadith, the rules of fiqh, and the view supported by imam Al-mawardi that people with mental disorders / memory are not allowed to choose because they do not have enough reason to choose, forcing people with mental disorders / memories to choose based on equal rights is a harm. This is of course contrary to the rules of fiqh above. And of course a law should provide clear rules or legal certainty and not give multi-interpretation in the law, because the law is a rule that must be implemented in the state and this is in accordance with the concept of fiqh siyasah in the field of *siyah dustu<riyyah* studies. *Siyah dustu<riyyah* is a field of jurisprudent studies that talks about legislation (law-making) while the legislative requirements are: *First* there is a government as a power to establish the law that will be applied in Islamic society. *Second*, the Islamic community will do it. *Third*, the content of the regulation or law itself that must be in accordance with the basic values of Islamic sharia. So based on the above principles of course Law No. 07 of 2017 on General Elections, especially regarding the right to vote for people with mental disorders / memory is not in accordance with the third principle because people with mental disorders / memories based on sharia do not have the right to choose leaders and the rules are clearly stated in the hadith, rules of fiqh and the views of imam al-Mawardi.²⁴

CONCLUSION

Based on the positive law that applies in Indonesia the right to vote for people with mental disorders / memory experiencing this fundamental difference can be reviewed through Law No. 07 of 2017 on Elections and Constitutional Court Decision No. 135 / PUU / -XIII / 2015. In Law No. 07 of 2017 the right to vote for people with mental / memory is not limited in the law because the law has a legal vacuum resulting in legal uncertainty, but based on the Decision of the Constitutional Court No. 135 / PUU / -XIII / 2015 people with mental disorders / permanent memory are not registered as voters and cannot vote in general elections, and technically it is proven with a health expert's certificate. Based on Fiqh Siyasah people with mental / memory disorders cannot choose leaders due to lack / inability of reason in knowing the leader he chooses, so he is not entitled to choose a leader. This is based on the fact that people with mental disorders / memories cannot account for their actions before Allah SWT. This is as narrated by Abu Sa'id. The need for revision of Law No. 07 of 2017 on General Elections, especially regarding the terms or right to vote in general elections.

²⁴ Muhammad Iqbal, *Fiqh Siyasah Kontekstualisasi Doktrin Politik Islam* (Jakarta: Prena Media Group, 2014).

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