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# Medico-Legal Update

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# Controversy of the Capability of Voters with Mental Health Disorder in the General Election

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## Abstract

In the Republic of Indonesia's Constitution, Article 22E paragraph (1), it is stated that the execution of the general election must be done in a manner which is direct, general, libre, confidential, honest and fair. Every citizen has a right which is guaranteed constitutionally to participate in the general election including those who are mentally disabled.

They have the right to freely participate both directly or by electing the representatives who will be in the government. Historically, the prohibition of the voting rights for mentally disabled people is not in accordance with the Human Rights except with clear circumsance.

**Keywords:** *Voters, discrimination, mental health disorder, disabled people.*

## Introduction

The human right is a right which sticks to the human beings. It is a basic right possessed by every human being justly and it is the main right which is the most important compared to other rights.

No one can object nor limit the human rights of the citizens and the government must guarantee it. The right to participate in the government is owned by every citizen, including those who are disabled. They have the right to freely participate both directly or by electing the representatives who will be in the government.<sup>2</sup> This right is guaranteed by the government.

People with disabilities are part of the Indonesian citizens who have the right to participate actively in the political life. According to the Constitution No. 39 year 1999, Article 43 paragraph (1) regarding the Human Rights (Fascicle of the Republic of Indonesia year 1999 No. 165, Additional Fascicle of the Republic

of Indonesia No. 3886, further written as UU 39/1999), it has been regulated that every citizen has the right to obtain the same opportunity in the governmental affairs, both to elect or to be elected. Apart from that, in the Convention on the Rights of Persons with Disabilities which are stated in the Constitution No. 19 year 2011 on the Convention on the Rights of Persons with Disabilities) there has been a guarantee of the rights of the disabled people in the general election.<sup>2</sup>

The government which is elected (either directly or chosen by the representatives who are in the government) are usually applied by countries which are democratic. Democracy and the human rights are two main principles which cannot be ignored when a country has claimed itself to be a democratic state.<sup>5</sup>

Democracy can also be said as a form of government which gives the highest power to the hands of the people, where every citizen has the same rights and responsibilities in the law and in the government without exception. The people have the highest power in the state. Because of that, the democracy which is implemented by the Indonesian government is a form of democratization in establishing the state's power which is applied through the general election. Article 22E paragraph (1) of Republic of Indonesia's 1945 Constitution regulates that the general election must

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be established directly, publicly, freely, confidentially, honestly and justly.

With the establishment of a general election which is free, honest and just, it is an indication that there exists a democratic political life. So, the establishment of the general election should give a chance to all members of the society to express their opinions constitutionally in the political system which apply.<sup>4</sup>

Theoretically, the general election is thought to be the most basic stage within the sequence of the democratic governmental life. It is the engine which activates the democratic political mechanism system.<sup>3</sup>In expressing their opinions, the people may do so through the general election, thus the election is a sign of the people's aspirations in a democracy. Without the general election, a country cannot be claimed as a democratic country in its real definition. This means that the basic of a democratic state life is that the citizens have the right to actively participate in the political process, including in general elections.<sup>8</sup>

Every citizen, without exception, have the same rights and are guaranteed to be able to actively participate in politics. In the constitutional rights and in the human rights' point of view, the protection of the people's rights in the political sector, which are juridical-constitutionally regulated in the 1945. The state also guarantees that every citizen has the right to elect and to be elected without exception.

The thing which becomes an interesting problem is regarding the controversy of the people with mental health issues' capability in voting in the general election. This is related to the Decree of the Constitutional Court 135/PUU-XIII/2015, thus there are no discriminations for the citizens who have the right as voters. Because of that this research regarding the controversy of the capability of voters with mental health issues must be done. Thus, here we describe the general election, the concept of participation and the criteria of people with mental health disorder as voters.

In this paper, we analyze whether or not the people with mental health disorders have the capability of becoming electors in a general election. Thus, this paper uses a Sociological approach with a post-positivism paradigm, that the participation of the people with mental health disorders as voters in an election is a reality which occurs in the governmental life of the Indonesians.

## Method

This Research is **sociological juridical normative** research<sup>9</sup>, or what Wignjosoebroto mentioned as **anon doctrinal** research, which is a research which uses the practice of law, it is said that the law is identical with the not only the written norms which are made and constitutionalized by the institutions but also the living law. Satjipto Rahardjo mentions that this research views the law as progressive law, this method is called a **sociological analysis**<sup>10</sup>.

## Discussion

Article 24 paragraph (2) of Republic of Indonesia's 1945 Constitution and Article 2 of the Constitution No. 24 year 2003 regarding the Constitutional Court (Fascicle of the Republic of Indonesia year 2003 No. 98, Additional Fascicle of the Republic of Indonesia No. 4316, further written as UU MK), determines that the Constitutional Court is a juridical institution apart from the Supreme Court and the juridical institution underneath it which undergo the independent judicial power to establish fairness to enforce the law and justice.

The establishment of the Constitutional Court as a Special Tribunal separately from the Supreme Court, carrying out duties, is a conception which is able to be traced long before the modern nation-state, which basically tests out the harmony of lower legal norms with higher legal norms<sup>7</sup>according Article 1 paragraph (2) of the 1945 State Constitution. This implies that the implementation of popular sovereignty through the constitution needs to be escorted and guarded.

In accordance with one of the authorities of the Constitutional Court in terms of judicial review of The Constitution (judicial review), on the petition submitted by: (1) The Healthy Soul Association; (2) The Election Center for the Access of People with Disabilities/PPUA PENCA; (3) Associations for Elections and Democracy/Perludem; and (4) Khorunnisa Nur Agustyati, which is decided by the Constitutional Court Decision Number 135/PUU-XIII/2015, on October 13<sup>th</sup> 2016 against provisions of the sound of Article 57 paragraph (3) letter a of Law Number 8 of 2015 concerning Amendments to Law Number 1 Year 2015 concerning the Establishment of Government Regulations

In the verdict, the Petitioners considered that with the provisions of the sound of Article 57 paragraph (3) letter a of constitution 8/2015, it was considered

detrimental to the constitutional rights of people with mental health as they lost their right to be registered as voters in the election. In the conduct of elections, it is regulated that all citizens who have met the criteria as voters have the right to vote.

Many assumptions mind on how can such people take account on their actions when they hardly able to take care of themselves. Article 29 Numbers (ii) UU 19/2011 and Article 13 letter c, letter f and letter g, Article 77 of Act Number 8 of 2016 concerning People with Disabilities (Fascicle of the Republic of Indonesia year 2016 No. 69, Additional Fascicle of the Republic of Indonesia No. 5871, hereinafter referred to as Law on Persons with Disabilities), that the guaranteed protection is required for people with mental/memory disorders, including in an election democratic party.

According to the Law on People with Disabilities, the definition of a person with disabilities is a person who suffers physical, mental, intellectual and/or sensory limitations for a long period of time and experience difficulties in interacting with their surroundings and difficulties in fully and effectively participate with other citizens with the same rights. Bawaslu (General Election Watch Body) through its members, Mochammad Afifuddin, emphasized that people with disabilities must be facilitated in realizing their right to vote and be elected in the conduct of elections.

In the aforementioned Court Decision, the Court reckon that mental disorders and memory disorders are two things with different characteristics. Mental disorders and memory disorders are two categories which intersect but cannot always solely equated that way. Memory disorders (memory) are problems caused by deterioration or decrease in physical quality—brain as a vehicle for storing and processing memory, whereas mental disorders are not always caused by problems of mere physical quality degradation. Each type of disorder, both mental disorders and memory disorders, have various derivatives.

The Court also opines that generally, mental disorders and/or memory disorders, from medical perspective, have several more specific types. From the duration/the time of the said disorders, principally they can be divided into two categories, a) relatively permanent/chronic mental and/or memory disorders; and b) temporary mental and/or memory disorders, neither permanent nor episodic.

The Court understand that in everyday societal interactions, the term mental and/or memory disorders are being referred to something as a “crazy” condition, which is medically referred to as psychosis. In fact, “crazy” is only one condition amongst mental abnormalities.

The other types of mental abnormalities include mental disorders (neurosis), which has a very wide range of categories. The range of mental and/or memory disorders categories, in casual conversation, fell into various terms, which includes “stress”, “anxiety”, “paranoid”, “*latah*” (a condition where a person subconsciously and spontaneously repeat a particular word under mild surprise), “phobia” and “bad thoughts”.

After careful examination from the Court according on Article 73 *juncto* Article 150 of the Mental Health Law stipulates that mental health checks for legal purposes must be conducted by psychiatrist specialists and even involve other specialist doctors and/or clinical psychologists. Election organizers are certainly not the right institution to carry out such tasks because the organizing institution general elections are not designed to make mental and/or memory health diagnoses.

In the KPU Regulation No. 4 of 2015 concerning Updating of Data and List of Voters in the Election of Governors and Deputy Governors, Regents and Deputy Regents and/or Mayors and Deputy Mayors, it has been stipulated that residents whose memory/mental is challenged must be proven with doctor’s note. So that people whose memory/mental is challenged, to be able to be included as voters in the election needs to provide doctor’s note which states they are able to be included as a voter.

The Court opines in its consideration that with regard to the testing of Article 57 paragraph (3) letter of a Law 8/2015 on the 1945 State Constitution, the Court suggests: (1) mental and memory disorders are two different conditions despite being categorically intersected, (2) not all people who are experience mental/memory disorders will lose the ability to become voters in general elections; (3) the absence of guidelines/criteria and the absence of appropriate institutions/professions to conduct psychiatric analysis of prospective voters, resulting in the *a quo* potentially causing violations of constitutional rights.

The KPU has registered the persons with mental disabilities as voters. And in the 2019 Election, with the

letter number 1401/PL.02.1-SD/01/KPU/XI/2018, KPU registers voters with mental disabilities. Such action by KPU is a real form of a reality that guarantees equal political rights for every citizen in accordance with the provisions in various laws including the Disability Law, Election Law and the United Nations Convention on the Rights of Persons with Disabilities that have been ratified by Indonesia.

Sarah Birch stated that voting right is actually a universal right which cannot be reduced. The universal voting right means that every citizen has the voting right without any discrimination.<sup>1</sup> From Sarah Birch opinion, it can be concluded that the voting right attached to every citizen doesn't see the citizen as individual, regardless their physical and psychological conditions with exception. Fajri Nursyamsi and team stated that they is a "subject" who have the rights and are able to decide freely for their own life based on their own conscience as well as actively become part of the society.<sup>6</sup>

Based on the Explanation of UU 19/2011 Article 1, the purpose of this convention is to promote, to protect and to guarantee full and equal enjoyment of all human rights and fundamental freedom for all disabled people and to increase respect on the dignity attached to them.

To respect and to uphold the Human Rights of disabled people considering every aspects and limitations that can hinder them in using their political right in the general election. The regulation in the Constitution 8/2016 Article 75 paragraph (2) stated also that the government and the local government are obligated to guarantee the rights and chances for disabled people to vote and to be voted. Medically, one's capacity to vote in the general election is not determined by diagnosis or symptoms suffered by patient, but from their cognitive capability (thinking ability). It means that mentally disabled people such as schizophrenia, bipolar, or severe depression are not automatically lost their capacity to decide their choice.<sup>6</sup>

Generally, mental disabilities of people are chronic and episodic (recurrent). If the recurrence period happens in the general election day, especially when voting, surely, we cannot force them to come to the Voting Venue (TPS-) to participate in voting.<sup>6</sup> Historically, the prohibition of the voting rights for disabled people is not in accordance with the Human Rights development internationally.<sup>6</sup>

Then in 2013, the Human Rights Council stated that the state counterpart must review the form of discrimination or prohibition towards political rights for disabled people. Therefore, international Human Rights development tends to guarantee more the political rights for disabled people, including mentally disabled people.<sup>6</sup>

The chief of local psychiatric hospital (RSJD) of Surakarta, Totok Hardiyanto, in one of the explanations regarding whoever has the right to be the owner of the vote in the general election stated that not all patients who are treated have the right to vote for the nation leader candidate. It is caused by the various severeness condition of each treated patient, it explained also by dr. Aliyah Himawati Rizkiyani, SpKJ, a psychiatrist. In her explanation, she stated that patient will be examined to find whether they are worthy or not as a voter.

Aside from these two aspects above, in the general election it needs also an inclusive general election guaranteed by Constitution. Its purpose is that the disabled people needs are protected and respected hence they can act independently and with guarantee. Juridically, the regulation on disabled people based on the Human Rights are as follows.<sup>1</sup>

1. Law 39/1999 Article 42 which regulates the rights of disabled people, namely:
2. Law 8/2016 Article 13

From the Constitutional regulations above, in general the rights whose owned by disabled people in the general election are as follows: (i) the right to obtain information regarding general election; (ii) the right to be registered to vote; (iii) the right on the access to the Voting Place; (iv) the right to vote confidentially; (v) the right on receiving information including general election information; and (vi) the right to participate as general election organizer.<sup>1</sup>

## **Conclusion**

Mentally disabled people have the capability to participate in a general election as a voter with recommendation and approval from psychiatrist. Therefore, Constitution must regulate the guidelines/criteria strictly of mentally disabled people who participate as a voter in the general election so there would not be any discrimination toward all citizens and it needs regulation regarding the proper organisation/profession to conduct mental analysis toward voter candidates.

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