

**POLITICAL RIGHT FOR ADDITIONAL VOTERS AT GENERAL
ELECTION IN PROGRESSIVE LAW AND *MASHLAHAH MURSALAH*
PERSPECTIVE**

THESIS

BY:

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NIM 16230010



CONSTITUTIONAL LAW DEPARTMENT

SHARIAH FACULTY

STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM

MALANG

2020

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STATEMENT OF THE AUTHENTICITY

In the name of Allah, with consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

POLITICAL RIGHT FOR ADDITIONAL VOTERS AT GENERAL ELECTION IN PROGRESSIVE LAW AND *MASHLAHAH MURSALAH* PERSPECTIVE

It is truly the writer's original work which can be legally justified. If this thesis is a proven result of duplication or plagiarism from another scientific work, it as the precondition of degree will be stated legally invalid.

Malang, 5 June 2020

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APPROVAL SHEET

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POLITICAL RIGHT FOR ADDITIONAL VOTERS AT GENERAL ELECTION IN PROGRESSIVE LAW AND *MASHLAHAH MURSALAH* PERSPECTIVE

The supervisor states that this thesis has met the scientific requirements to be
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LEGITIMATION SHEET

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**POLITICAL RIGHT FOR ADDITIONAL VOTERS AT GENERAL
ELECTION IN PROGRESSIVE LAW AND MASHLAHAH MURSALAH
PERSPECTIVE**

Has passed and certified with grade : B+

Malang, 16 September 2020



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MOTTO

“As best as humans are the most useful for other humans”

(HR. Ahmad dan Thabrani)



TRANSLITERATION GUIDANCE

A. General

The transliteration guide which is used by the Syariah Faculty of State Islamic University Maulana Malik Ibrahim of Malang is the EYD plus. This is used based on the Consensus Directive from the Religion Ministry, Education and Culture Ministry of The State of Republic Indonesia, dated January 22 1998 No. 158/1987 and 0543.b/U/1987, which is also stated in The Arabic Transliteration Guide Book, INIS Felow 1992.

B. Consonant

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	'
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H
ش	Sy	ء	'
ص	Sh	ي	Y

ض	DI		
---	----	--	--

The Hamzah which is usually represented by an alif, when it is at the beginning of the word, henceforth it is transliterated following its vocal pronouncing and not represented in writing. However, when it is in the middle or end of a word, it is represented by a coma facing upwards (‘), as oppose to a comma (,) which replaces the ‘ain “ع”.

C. Vocal, Long Pronounce, and Diphthong

In every written Arabic text in the Latin form, its vowels fathah is written with “a”, kasrah with “i”, and dlommah with “u”, whereas elongated vowels are written suchas:

Elongated (a) vowel = â for example قال becomes qâla

Elongated (i) vowel = î forexample قيل becomes qîla

Elongated (u) vowel = û for example دون becomes dûna

Especially for the pronouncing of *ya' nisbat* (in association), it cannot be represented by “i”, unless it is written as “iy” to represent the *ya' nisbat* at the end. The same goes for sound of a diphthong, *wawu*, and *ya'* after fathah it is written as “aw” da “ay”. Study the following examples:

Diftong (aw)= و forexample قول becomes

qawlunDiftong(ay)= ي forexample خير becomes khayrun

D. Ta' Marbûthah(ة)

Ta' marbûthah is transliterated as “t” if it is in the middle of the word, but if it is *Ta' marbûthah* at the end of the word, then it is transliterated as “h”. Forexample, المدرسة لرسالة will be al-risalat lial-mudarrisah, or if it happen to be in the

middle of a phrase which constitutes *mudlaf and mudlaf ilayh*, then the transliteration will be using “t” which is joined with the previous word.

E. Auxiliary Verb and Lafadh Al-Jalalah

Auxiliary verb “al” (اَلْ) written with lowercase form, except if it located at the beginning of word, while “al” in lafadh jalalah which located in the middle of two words or being or become *idhafah*, it removes from writing. Study the following:

1. Al-Imâm al-Bukhâriy said...
2. Al-Bukhâriy explains, in the prologue of his book...
3. MasyâAllâhkânawamâ lam yasya” lamyakun.

ACKNOWLEDGMENT

Alhamdulillah bini'matihilatimmushalihat, with all of His Grace, mercy and guidance the thesis entitled **“Political Right For Additional Voters at General Election In Progressive Law and *Maslahah Mursalah* Perspective”**. Peace be Upon into The Rasulullah Prophet Muhammad SAW who has taught us guidance (*uswatunhasanah*) to do activity correctly in our life. By following Him, may we belong to those who believe and fet their intercession on the last day of the end. Amien.

From all the teaching, advice, guidance, and helps of service for us to finish this thesis, then with all humanity the writer will expresses the gratitude which is unequaled to:

1. Prof. Dr. Abdul Haris, M.Ag., as the Rector of The State Islamic University Maulana Malik Ibrahim of Malang.
2. Dr. Saifullah, S.H., M.Hum., as the Dean of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
3. Dr. M. Aunul Hakim, S.Ag., M.H., as The Head of Constitutional Law Department of Syariah of The State Islamic University Maulana Malik Ibrahim of Malang.
4. Dr. M. Aunul Hakim, S.Ag., M.H., as my thesis supervisor. The writer thanks for his spending time to guide, direct, and motivate to finish writing this thesis. The writer hopes that he and his family will be blessed by Allah SWT.
5. All the lecturers at Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang who has provided learning to all of us. With sincere

intentions, may all of their charity be part of worship to get the pleasure of Allah SWT.

6. The staff of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
7. My parents, who always support me in financially, give me strength, motivation, and accompany me with all my struggles.
8. My brothers and my sisters who always pray for me, give me support and motivation to finish this thesis.
9. All of my friends in Constitutional Law 2016, especially in International Class Program (ICP), to my roommate 18 ABA MSAA and my best friend in *Ma'had Al-Hikmah Al-Fathimiyyah*, Thank you for being a good friend while in Malang. Remain family, even though we are back where we came from.
10. All parties that can't be mentioned one by one.

With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of living in the world and the hereafter. As a human who has never escaped fault, the writer is very hopeful for the forgiveness, criticism, and suggestions from all parties for future improvement efforts.

Malang, 5 June 2020

Writer,

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ABSTRAK

Fina Wildaniyah. NIM16230010, 2020. Hak Politik Pemilih Tambahan Pada Pemilihan Umum Serentak Perspektif Hukum Progresif dan Masalah Mursalah. Skripsi. Hukum Tata Negara. Fakultas Syariah. Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing Dr. M. Aunul Hakim, S.Ag., M.H.

Kata kunci : Hak Politik, Pemilih Tambahan, Pemilihan Umum Serentak, Hukum Progresif, *Masalah Mursalah*.

Pemilihan umum merupakan sarana untuk memperkuat negara demokrasi. Regulasi terkait pemilihan umum diatur dalam undang-undang nomor 7 tahun 2017. Aturan tersebut menjadi payung hukum pada pelaksanaan pemilihan umum serentak yang menggabungkan pemilihan umum presiden/wakil presiden dengan anggota legislatif. Regulasi tersebut juga mengatur tentang pemilih tambahan. Pemilih yang tidak dapat memilih di tempat asalnya karena keadaan tertentu. Pasal 344 ayat (2) nomor 7 tahun 2017 tentang pemilihan umum ternyata dapat berpotensi menghilangkan hak politik pemilih tambahan, sebab ketentuan dalam pasal tersebut belum mengatur secara jelas terkait alokasi surat suara bagi pemilih tambahan.

Adapun rumusan masalah dalam penelitian ini adalah 1). Apa landasan pemikiran mengenai pemenuhan hak politik pemilih tambahan?, 2). Bagaimana konstruksi hukum mengenai hak politik pemilih tambahan perspektif *masalah mursalah*?. Penelitian ini menggunakan jenis penelitian hukum normatif dengan pendekatan perundang-undangan (*statue approach*) dan pendekatan konseptual (*conceptual approach*).

Hasil dari penelitian ini menunjukkan bahwa atas dasar pemikiran hukum progresif yang menyatakan hukum harus berjalan sesuai keadaan manusia maka sebaiknya pemenuhan hak politik pemilih tambahan haruslah diperhatikan dengan menjamin keadilan, kesejahteraan dan kebahagiaan. Pemenuhan hak politik pemilih tambahan merupakan bentuk hak asasi manusia, sehingga diperlukan regulasi baru atau konstruksi hukum untuk menjamin hak politik pemilih tambahan. Adanya TPS khusus bagi pemilih tambahan merupakan bentuk konstruksi hukum. Apabila ditinjau dari perspektif *masalah mursalah*, TPS khusus tidak bertentangan dengan syariat sebab hal tersebut merupakan bentuk kemaslahatan dan bisa menjadi wadah untuk meminimalisir masyarakat khususnya pemilih tambahan agar tidak kehilangan hak memilihnya.

ABSTRACT

Fina Wildaniyah. SIN 16230010, 2020. Political Right For Additional Voters at General Election in Progressive and MaslahahMursalah Perspective. Thesis Department of Constitutional Law, Faculty of Shari'ah, The State Islamic University Maulana Malik Ibrahim Malang. Advisor: Dr. M. Aunul Hakim, S.Ag., M.H.

Keywords : Political Right, Additional Voter, General Election, simultaneous election, Progressive Law, *Maslahah Mursalah*.

Elections is one of effort for the country to strengthen democratic countries. Regulation that is related to general elections are regulated in law number 7 of 2017. These rules become a legal protection for the implementation of simultaneous general elections that combine presidential/vice presidential elections with members of the legislature. The regulation also regulate about additional voters. The voters who cannot vote at their origin place because of certain conditions. Article 344 paragraph (2) number 7 of 2017 concerning general elections has the potential to eliminate the political right of additional voters, because the provisions of this article do not clearly regulate about allocation of ballots for additional voters..

The formulation of the problems in this study are 1). What is the rationale for fulfilling additional voter political rights? 2). How is the legal construction regarding the political rights of additional voters in *maslahah mursalah* perspective?. This research uses normative legal research with a statue approach and conceptual approach.

The results of this study indicate that on the basis of progressive law which states that the law must run according to human conditions, it is better about fulfillment of additional voter political right must be considered by ensuring justice, welfare and happiness. The fulfillment of additional voter political right is a form of human rights, so new regulations or legal construction are needed to guarantee additional voter political right. The existence of a special voting place for additional voters is a form of legal construction. When viewed from the perspective of *maslahah mursalah*, special voting place is not against the *shari'a* because this is a form of benefit and can be a place to minimize the community, especially additional voters, so as not to lose their right to vote.

الملخص

فيما ولدانية، رَقْمُ تَسْجِيلٍ 16230010، 2020. الموضوع حقّ السّياسة المنتخب الرّائد على انتخاب عامّة معاً منظور حكم التّقدّمِي ومصلحة مرسلّة. رسالة الأخرّة. قسّم حكم نظام شرعيّ. كليّة الشّريعة. الجامعة الإسلاميّة مولانا مالك إبراهيم مالانغ. المشرف الدّكتور م. عون الحاكم، الماجستير.

كلمات المفتاح: حقّ السّياسة. المنتخب الرّائد. انتخاب عامّة معاً. حكم التّقدّمِي. ومصلحة مرسلّة.

انتخاب عامّة هو سبيل ليقوّي دولة ديمقراطيّة. التّنظيم معلق انتخاب عامّة مضبوط في قانون رقم 7 عام 2017. ذلك النّظام يكون مظلة الحكم في أداء انتخاب عامّة معاً يجمع انتخاب الرّئيس أو نائب رئيس مع عضو تشريعيّ. ذلك التّنظيم ينظّم أيضاً عن المنتخب الرّائد. المنتخب الذي لا يستطيع أن ينتخب في موطنه لأنّ حالاً معيّناً. فصل 344 آية (2). قانون رقم 7 عام 2017. عن انتخاب عامّة يمكن أن تلغي الحقوق السياسيّة للمنتخب الرّائد لأن أحكام هذه فصل لا تنظم بوضوح تخصيص بطاقة انتخاب للمنتخب.

أما المسألة الرّئيسيّة في هذا البحث هو ١. ما أرض فكرة تحقيق حقّ السّياسة المنتخب الرّائد في انتخاب العامّ معاً؟ ٢. كيف بنية الحكم بشأن تحقيق حقّ السّياسة المنتخب الرّائد منظر المصلحة المرسلّة. يستخدم الباحث البحوث القانونيّة المعياريّة باستخدام النّهج القانوني والنّهج المفاهيمي.

تشير نتائج هذه الدراسة إلى أنه على أساس التفكير القانوني التّقدمي الذي ينص على أن القانون يجب أن يعمل وفقاً للظروف الإنسانيّة ، ينبغي النظر في تحقيق حقوق سياسيّة إضافيّة للناخب من خلال ضمان العدالة والرفاهية والسعادة. إن أعمال الحقوق السياسيّة الإضافيّة للناخبين هو شكل من أشكال حقوق الإنسان ، لذلك هناك حاجة إلى لوائح جديدة أو بناء قانوني لضمان حقوق سياسيّة إضافيّة للناخبين. إن وجود مكان التصويت خاص للناخبين الإضافيين هو شكل من أشكال البناء القانوني. عند النظر إليها من منظور مصلحة مرسلّة ، فإن مكان التصويت خاص لا تتعارض مع الشريعة لأن هذا شكل من أشكال الفائدة ويمكن أن يكون مكاناً لتقليل المجتمع ، وخاصة الناخبين الإضافيين ، حتى لا يفقدوا حقهم في التصويت.

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CHAPTER I

INTRODUCTION

A. Background

Indonesia is a country that implements a democratic system. The concept of democracy is a manifestation of the principle of popular sovereignty that is contained in Article 1 paragraph (2) of the Constitution of the Republic Indonesia year 1945 which reads "Sovereignty is in the hands of the people and is carried out according to the Basic Law".¹ Based on this article, it can be interpreted that the sovereignty of the people as the highest source of power that is or comes from the people.

The term people's sovereignty is a combination of two words, namely "sovereignty" and "people" which both have different meanings. Sovereignty has a meaning supremacy or in the other sense it is above and in control of everything. Etymologically, sovereignty means superiority, but when applied to a country, the word means "superiority in a special meaning", namely superiority that implies the power to make law. Simply, sovereignty is refer to a "supreme authority".² When associated with the word "people" then, the people are the places that give a supreme power. Thus, the sovereignty of the people can be defined as the supreme power in the country that is located in the hands of the people.³

¹ The Constitution of the Republic of Indonesi of 1945

² Hendra Nurtjahjo, *Filsafat Demokrasi*, (Jakarta : Bumi Aksara, 2006), 31

³ Khairul Fahmi, *Pemilihan Umum & Kedaulatan Rakyat*, (Jakarta : PT. RajaGrafindo Persada, 2012), 19.

The principle of popular sovereignty has been carried out since the proclamation of Indonesian independence. The principle originates from the 4th (four) precept of the Pancasila, "People who are led by wisdom in consultation / representation". One form of the principle of popular sovereignty is the existence of direct elections in Indonesia.

The general election in Indonesia was originally intended to elect legislative members, namely the People's Representative Council (DPR), provincial regional legislative assembly (DPRD Provinsi) and district / city regional representative council (DPRD kab/kota). After the amendment of Constitution 1945 in 2002, then the president and vice president, originally conducted by the MPR, agreed to be carried out directly by people and from people so that the presidential and vice presidential elections were included in the series of elections. In 2004, presidential and vice presidential elections are evidence that the elections are more transparent and dynamic.

Along with article 28 letter D of the Constitution of the Republic of Indonesia of 1945 state that "each citizen has the right to equal opportunity in government", we can know together that in holding election which essentially prioritize the political rights of citizens namely the right to vote and be elected as human rights guaranteed in the Indonesian constitution.

The right to vote is a constitutional right of citizens that have been set out in the constitution which is also affirmed in Court Decision Number 011-017/PUU-I/2003 which says: "that the constitutional right of citizens to vote and be

elected (right to vote and right to be candidate) is a right guaranteed by the constitution, laws and international conventions, the limitation of deviation, negation and elimination of said rights is a violation of the human rights of citizens ". Court Decision Number 102/PUU-VII/2009 also states that the right to vote as a constitutional right that must be protected must not be obstructed, or complicated by the provisions of any administrative procedure.

In April 2019, Indonesia had a big political performance. Because the 2019 general election was held differently from 2014, which was held simultaneously or better known as the election of five ballot boxes. The merger of the election between the president and vice president and legislative bodies from the central to the regions is based on the decision of the Constitutional Court Number 14/PUU-XI/2013 which states that the implementation of elections in 2019 and thereafter will be held simultaneously. Based on the decision of the constitutional court, a law number 7 of 2017 regarding general elections was born, which discussed in detail and combined the presidential and vice presidential election rules and legislative bodies. In addition, the Election Law also discusses the overall electoral management institutions and mechanisms related to voter lists and additional voter lists.

Additional voter lists in the Election Law are voter data that have been registered in the permanent voter list at a polling station, which due to certain conditions the voter cannot exercise his right to vote at the relevant polling

station.⁴ Furthermore, the Election Law regulates that to be included in that category, a person must show proof of electronic identity cards and proof that the person concerned has been registered as a voter in the permanent voter list at the original polling station.

Apparently the regulation in the law has the potential to obstruct the right to vote in the 2019 election. Particularly article 344 paragraph (2) of Law No. 7 of 2017 which states that *“the number of ballots printed is equal to the number of permanent voters plus 2% (two percent) of the number of voters remaining as reserves, determined by the General Election Commission's decision.”*⁵ As stated by Commissioner of General Election Commission Viryan Azis, that the 2% (two percent) reserve ballots are backup ballots if there are ballots that are wrongly punched, or damaged.⁶ Looking at the statement of the General Election Commission commissioner stated that the ballots will be printed in accordance with the final voter list. While voters who have moved to polling stations (DPTb) have not been given certainty regarding the availability of ballots. If the reserve ballots of 2% (two percent) are intended for additional voters, this will not be sufficient, because the amount will not be proportional to the availability of ballots and additional voters are not spread evenly.

Article 344 paragraph (2) was examined material before a constitutional judge. The petition was made by two students named Joni Iskandar and Roni Alfiansyah Ritonga who because of that article the petitioner felt that his right to

⁴ Article 210 paragraph (2) of Law Number 7 Tahun 2017, Concerning General Election.

⁵ Article 344 paragraph (2) of Law Number 7 of 2017 concerning General Elections

⁶<https://nasional.kompas.com/read/2019/02/22/16412691/undang-undang-pemilu-belum-mengatur-surat-suara-pemilih-tambahan>

vote had been blocked in the 2019 election. The petitioner felt that the article could potentially eliminate the right to elect additional voters because there was no clear statement stating that voters who are included in the additional voter list also have the certainty of getting ballots. Decision of the Constitutional Court set forth in decision number 19/PUU-X/2019 states that the petition of the applicant is groundless according to law. The Constitutional Court ruled that if the applicant was concerned that the number of votes was insufficient, then this could be overcome by using excess ballots that were not used from the nearest polling station.

Ballots are paper used to vote in elections. The availability of ballots is important for the implementation of general elections as a form of people's participation and aspirations. Lack of ballots is still frequently occur in many areas, this should be anticipated in order to avoid unwanted things, and that the elections run smoothly.

Lack of ballots have occurred at TPS 21 Banjar Pering, Kuta, Bali. Additional voters complained about not being able to use their voting rights, claiming they were disabled because they used Form A5. Dozens of residents have complained about queuing for a long time but it is not certain. They protested the KPPS and PPK officers and asked about their voting rights. The officer was also confused about this and said that his party did not know anything about the ballot because he only received. *“kan (tambahan surat suara) 2 persen dari 187 (DPT) sisa 4. Ini yang membuat kita kesulitan, saya harus bilang apa. Kalau dari regulasi semuanya dapat memilih mulai dari jam 07.00 WITA antara*

DPT dan DPTb sama”. Said the PPK Kuta sub-district officer, Mangku Nguja. Mangku also mentioned that there were 57 voters who brought A5. While the number of ballots available is only 201, so there are still a shortage of around 53 ballots.⁷

The same thing also happened in Sleman regency, Central Java, where additional voters were threatened not to vote. As happened to Umi students from South Sumatra and Enggar students from Lampung. They cannot vote because the available ballot papers are used up. They also moved to another polling station but in another polling station the same thing happened. So that both of them were disappointed because until 13:00 WIB the officer could not provide ballots. While one polling station official said *“yang jadi prioritas adalah pemilih DPT, kami tidak menyangka pemilih A5 sebanyak ini.”*⁸

Citizens who own the A5 form in Sleman regency had asked for clarification of the suffrage from General Election Commissions in Sleman. However, commissioners who have authority are not in the office so they try to contact via telephone to ask for clarity by meeting directly to discuss the fate of additional voting rights. One of the commissioners asked for a short time to coordinate with other commissioners and promised that another 10 minutes would come from commissioners who were close to the office. It turned out that the commissioner could not be contacted. Residents decided to give an ultimatum to

⁷<https://news.detik.com/berita/d-4514038/surat-suara-habis-pemilik-a5-di-tps-kuta-bali-protes-surat-suara-habis-pemilik-a5-di-tps-bali-protes> : Aditya Mardiasuti-detik news

⁸<https://news.detik.com/berita-jawa-tengah/d-4514603/di-sleman-pemilih-a5-tak-bisa-nyoblos-karena-surat-suara-habis> Di Sleman, Pemilih A5 Tak Bisa Nyoblos Karena Surat Suara Habis : Ristu Hanafi-detiknews.

General Election Commissions in Sleman that if until 19:00 there was no clarity and answers from them, it would report to Bawaslu as a legal step. Until 20.10 it turned out there was no clarity from the commissioners. Until 21:30, finally the residents could meet with commissioner asking to ask those who had not voted to be facilitated, but the commissioners could not facilitate it because it was not in accordance with applicable regulations.⁹

Legislation is an important element in a rule of law to achieve legal objectives. In its development, there are several legal objectives, namely:

- a. Ethical flow, the principle in this school is that law is merely to achieve justice.
- b. Utilization flow, this flow assumes that in principle the purpose of the law is only to create benefits and happiness in society.
- c. Juridical normative flow, which considers that the principle of the goal of law is to create legal certainty.¹⁰

The purpose of the law as explained earlier, has similarities with the progressive law put by Prof. Satjipto Raharjo. That the presence of progressive law is intended to protect the people towards the ideal of law and does not want to make the law as an instrument that has no conscience, but instead makes a moral institution. The concept of thought was later stated that “the law is an institution that aims to bring people to a life that is fair, prosperous, and makes people

⁹<https://alinea.mmtc.ac.id/kendala-pengguna-a5-sleman-dan-nasib-hak-pilihnya/>Kendala Pengguna A5 Sleman dan Nasib Hak Pilihnya : Tassamu Akhsan-alinea.

¹⁰ Achmad Rifa'I, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*, (Jakarta : Kreasindo Mediacita, 2010), 130.

happy.”¹¹ The statement is the essence of progressive law. It is at once a legal ideal that demands to be realized. Therefore, law is a process that continuously builds itself towards that ideal. The dynamics of law will not stop, therefore, the law must continue to exist to build themselves and build social change (social engineering by law), which will then realize the legal goals for human welfare and happiness.

Progressive law is a part of searching for the truth that never stops. The initiator of progressive law, Satjipto Rahardjo said that rule breaking is very important in the law enforcement system. That is, that law enforcement, judges or police and other law enforcers must be brave to get out and free themselves from the use of standardized patterns.¹² Thus, it can be seen that progressive law is an idea that prioritizes human welfare as the object of law itself. Changes in the legal system, including laws and regulations, are very necessary. So, it can make the law more developed and in accordance with the principle objectives of its formation, especially in ensuring human happiness and welfare.

Apparently the purpose of the law as explained earlier has similarities in Islam. Islam has many methods in determining a law. The main sources in determining Islamic law are the Qur'an and Sunnah. However, there are also other methods that can be used for a *mujtahid* if a text is not found in solving the

¹¹ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 2.

¹² Satjipto Rahardjo said “There are three ways to do rule breaking. First, by using spiritual intelligence to wake up from the plight of the law and not allow yourself to be restrained by the old way; Second, searching for deeper meaning should be a new measure in carrying out the law and having a legal status; Third, the law should be carried out not according to logical principles alone, but with feelings, concerns and involvement with weak groups.” Suteki, *Masa Depan Hukum Progresif*, (Yogyakarta : Thafa Media, 2015), 38.

problem, one of which is the *mashlahah mursalah* which has the aim of creating benefit and preventing damage to the Ummah. *Mashlahah mursalah* is something that is good in the sense. With consideration can realize a benefit and avoid a badness. Something that is good according to common sense not contradict the aims of *syara* ' in general.¹³

Al-Ghazali in the book *Al-Musytasyfa* gives an understanding of *maslahah mursalah*:

مَا لَمْ يَشْهَدْ لَهُ مِنَ الشَّرْعِ بِالْبُطْلَانِ وَلَا بِالِاعْتِبَارِ نَصٌّ مُعَيَّنٌ.¹⁴

“Anything (*maslahah*) for which there is no evidence from *syara* ' in a particular text (*nash*)”

Maslahah Mursalah method can be used to anticipate any developments that occur according to the environment, situation and conditions in society with limitations that must not conflict with the Al-Qur'an and As-Sunnah.

The fulfillment of political rights for additional voters as described above is not explained directly in the *Qur'an* and *Sunnah*. However, the *Qur'an* commands to continue to doing *ma'ruf* and prevent them from the bad things (*amr ma'ruf nahi munkar*).

يُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَ يُؤْمِرُونَ بِالْمَعْرُوفِ وَ يَنْهَوْنَ عَنِ الْمُنْكَرِ وَ يُسَارِعُونَ فِي الْخَيْرَاتِ

وَ أُوتُواكَ مِنَ الصَّالِحِينَ

¹³ Sapiudin Shidiq, *Ushul Fiqh*, (Jakarta: Kencana Prenada Media Group, 2014), 89.

¹⁴ Al-Ghazali, Tahqiq : Hamzah bin Zahir hafidz, *Al-Mustasyfa Fi 'Ilm Al-Ushul*, (Madinah, 2008), 481.

“They believe in Allah and the last day, order to do what is right, and prevent those who deny and act immediately (do) various virtues. They include godly people.”

It is also in line with the principles of *fiqh* that can be used as a pattern in determining political policies such as:

تَصَرَّفُ الْإِمَامُ عَلَى الرَّعِيَّةِ مَنْوُطٌ بِالْمَصْلَحَةِ

“The policy of a leader over the people must be based on benefit”.¹⁵

Leaders, public servants, civil servants or military officers, judges, community leaders or so on are essentially the representation of the voice of the people they lead, so that in dedicating their leadership all policies that will be decided must provide benefits (*maslahah*) for the people.

Seeing from the explanation that has been described above, the writer wants to study and examine by raising the title **“Political Right For Additional Voters at General Election In Progressive Law And *Maslahah Mursalah* Perspective”**

B. Statement of The Problem

1. What is the rationale to fulfillment the political right for additional voters ?
2. How is the legal construction regarding the political right for additional voters based on *maslahah mursalah* perspective ?

C. Objective of Research

¹⁵ Kaki Lima Lirboyoy, *Formulasi Nalar Fiqh (Telaah Kaidah Fiqh Konseptual)*, (Surabaya : Khalista, 2017), 76.

1. To explain the rationale to fulfillment of the political rights of additional voters.
2. To find out the legal construction regarding the political rights for additional voters based on *maslahah mursalah* perspective.

D. Research Benefits

1. Theoretical benefits

Theoretically, this research can provide insight and benefits for the development of legal science, especially party law and elections which are integrated with Islamic scholarship, and can be useful for students of UIN Maulana Malik Ibrahim Malang, in particular the Department of Constitutional Law and also the Indonesian Community who are entitled to choose every holding general elections.

2. Practical Benefits

In addition to theoretical benefits, this research is expected to provide benefits to those directly related to the results of this study, such as Indonesian Legislative Assembly and the Election Commission. It is expected to be a consideration for designing policies related to Additional Voters' List in the next General Election.

E. Research Methods

1. Types of research

The type of research used in this research is normative legal research, which is legal research done by researching the library material or secondary data, can also be called Literature Law research.¹⁶

2. Research approaches

The research approach used is a statue approach and a conceptual approach. The statue approach conducted by the researcher was to study Law number 7 year 2017 about the elections. In addition, it also studies all regulations or legislation relating to legal issues to be researched. The conceptual approach is derived from the views and doctrines that can build an argument in solving the legal issues studied. An understanding of these views and doctrines is the basis for researchers in building a legal argumentation in solving the issues.¹⁷

3. Data Source

Data sources are used to support researchers in solving legal issues. The research sources include primary legal materials, secondary legal materials, and tertiary legal materials.

a. Primary legal material

Primary legal material is legal material that has the most primary authority. Primary legal materials include statutory regulations, official records or minutes of making a statutory regulation, and judges'

¹⁶ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif*, (Jakarta: PT Raja Grafindo Persada, 2006), 14.

¹⁷ Peter Mahmud marzuki, *Penelitian Hukum*, (Jakarta : kencana, 2005), 135-136.

decisions.¹⁸ Primary legal materials include regulations and decisions. The primary legal materials in this study are:

1. 1945 Constitution;
2. Law number 7 of 2017 concerning General Elections;
3. Election Commission Regulation Number 11 Year 2018 Concerning Compilation of Domestic Voter Lists in Organizing General Elections;
4. Decision of the Constitutional Court number 19 / PUU-XI / 2019.

b. Secondary legal material

Secondary legal materials are all publications on legal materials which are unofficial documents. These publications consist of (a) text books that discuss a legal issue and / or several, including legal theses, theses and dissertations, (b) legal dictionaries, (c) legal journals, and (d) comments on the judge's decision.¹⁹ This research uses the concept of progressive law and *mashlahah mursalah*, so that researchers use books, journals and research results on progressive law and *mashlahah mursalah*.

4. Methods of collecting legal materials

Primary legal materials were obtained through investigations conducted by researchers related to the laws and regulations concerned with the issues at hand. In this study, the legal issue examined is the legal

¹⁸ Zainuddinn Ali, *Metode Penelitian Hukum*, (Jakarta : Sinar Grafika, 2017), 47.

¹⁹ Zainuddinn Ali, *Metode Penelitian Hukum*, (Jakarta : Sinar Grafika, 2017), 54.

uncertainty contained in article 344 paragraph (2) of Law number 7 of 2017 concerning General Elections of additional voters on the provision of ballots. Then the researcher also examined the Constitutional Court's decision number 19 / PUU-XI / 2019 relating to the judicial review article *a quo*. In addition, researchers also examined the general election commission regulations relating to legal issues to be studied.

Secondary legal materials are obtained from the literature relating to the object of research studies, such as books, papers, theses, desertation, scientific journals and research reports. Tertiary legal materials are obtained through a legal dictionary related to the research object to be researched.

5. Methods of processing legal materials

The processing of legal materials in this research is through the analysis of legal materials, then data checking (editing), classification (classifying), verification (verifying), analysis (analyzing) and making conclusions (concluding). The researcher traced the regulatory laws relating to legal issues, namely regulations on general elections, Law Number 7 of 2017 concerning Elections, Election Commission Regulation Number 11 of 2018, Human Rights Law and Constitutional Court Ruling Number 19/PUU-IX/2019. Then the researcher conducts an examination and mapping in accordance with the subject matter analyzed using the method of interpretation and legal construction. Interpretation is defined as the process of changing something or a situation of ignorance into

understanding. While the legal construction is a solution or elaborate the double meaning, obscurity, legal uncertainty in a regulation.

The available legal materials are then described and linked to one legal material with another legal material, mainly related elements that cover the research problem. So, the explanation can be answer the problem in this study.

F. Review of Realated Literature

Review of realated literature is necessary to assert, clarify, and look at the advantages and weaknesses of the various theories used by other authors in a study or discussion with the same problem. Researchers in this regard found some previous research results on the same topic but there were differences in the objects researched or viewpoints in the research. Some of the results of the study are as follows :

1. Additional voter list problems and efforts to safeguard voting rights in the Special Region of Yogyakarta.²⁰

This research based on the demographic conditions of the Special Region of Yogyakarta (DIY) with a sizeable population from outside the area. In the 2019 general election, the potential problems appear to be greater when viewed from the number of active students in tertiary institutions, students and students in secondary schools

²⁰ M. Amir Nashiruddin, *Problematika Daftar Pemilih Tambahan (DPTb) dan Upaya Menjaga Hak Pilih di Daerah Istimewa Yogyakarta*, dimuat dalam *Serial Evaluasi Penyelenggaraan Pemilu Serentak 2019 Perihal Pemungutan dan Penghitungan Suara*, (Bawaslu, 2019).

spread across the DIY area. The law regulates 3 categories of voters namely, permanent voter lists (DPT), additional voter lists (DPTb) and special voter lists (DPK). The problem with the voter list is directly proportional to the need for election ballots. The more DPTb in a TPS, the more ballots are needed. While the election law only regulates the addition of ballots as much as 2% of the total of permanent voter.

The conclusion in this study states that the problem of voter registration in the field is caused by the inaccurate data synchronization results from DP4 and the presence of some inaccurate officers. The categorization of DPT, DPTb and DPK with variants of the right to vote is also a significant contributor to the problem in the voting ballot process.

The equation with the thesis studied is related to the additional voting rights (DPTb). The difference is that this research belongs to empirical / field research while this thesis uses a type of normative legal research by analyzing law number 7 of 2017 related to additional voter lists.

2. Review of Fiqh Siyasah on the decision of the Constitutional Court No. 20/PUU-XVII/2019 on the Additional electorate list (DPTB) in the 2019 elections.²¹

This thesis is the result of normative research. Thesis written by Basuki Rohmat, students of Sunan Ampel State Islamic University.

²¹ Basuki Rohmat, *Tinjauan Fiqh Siyasah Terhadap Putusan Mahkamah Konstitusi Nomor 20/PUU-XVII/2019 Tentang Daftar Pemilih Tambahan dalam Pemilu 2019*, (Surabaya : Uin Surabaya, 2019)

The research data is compiled using a library research technique and a statue approach. Data analysis techniques using qualitative techniques that are subsequently compiled systematically so that it becomes a concrete data on the verdict of the most constitutional Decree No. 20/PUU-XVII/2019 on the list of additional voters (DPTb) in the elections of 2019, then the data is processed and analyzed using the theory of Islamic law namely Fiqh Siyasah in the scope *Ahlu halli wa al-a'qdi*.

The results of this study concluded that in the decision of the Constitutional Court No. 20/PUU-XVII2019 on the additional list of voters (DPTb) is a phrase no later than 30 days in article 210 paragraph (1) of the 2017 Law on general elections contrary to the Constitution of the Republic of Indonesia Indonesiatahun 1945 and has no conditional binding force as long as it is not interpreted “at least 30 days before the day of voting except for voters due to unexpected conditions outside The ability and willpower of voters due to illness, devastated natural disasters, to be resistant, and because of carrying out duties at the time of voting is determined at least 7 days before the vote”.

The equation in the study is equally concerned about the political rights of additional voters and also using normative research methods. The difference is that the object of study in the thesis is the

ruling of the Constitutional Court, while the object of research studies is article 344 paragraph (2) of Law No. 7 of 2017 on elections.

3. Strengthening constitutional rights of Indonesian citizens after the verdict No. 20/PUU-XVII/2019.²²

A journal written by Aprista Ristyawati, Faculty of Law, Diponegoro University. The study analyzed the positive impact and negative impact of the post-Decision No. 20/PUU-XVII/2019, and how the efforts for the negative impact of the number 20/PUU-XVII/2019 could be minimized. The method of approach used in this research is normative and analytical descriptive, which describes the object that is the subject of the problem, from the depiction taken an analysis adapted to the existing legal theories and put the law as a building of the norm system.

The results of the study showed that there is a decision of the Constitutional Court No. 20/PUU-XVII/2019 There are some positive impacts of which are for voters listed in additional voters (DPTb) do not feel harmed because to manage the administration of the move choose can be done ahead of the 7 (seven) days of voting. In addition to positive impacts also have a negative impact, among others, with the looseness of additional voters registration period up to seven days ahead of the vote counting is certainly a load of heavy work for PPS and General Election Commision Regency/city.

²² Aprista Ristyawati, Penguatan Hak Konstitusional Warga Negara Indonesia Pasca Putusan Nomor 20/PUU-XVII/2019, Administrative Law & Governance Journal. Vol 2, Juni 2019, Universitas Diponegoro.

Regarding their incentives if they are not thought about and there are adjustments to their welfare, they will have an impact on the loyalty and quality of work of the KPPS and PTPS officers. The addition of voting time will result in a number of new insecurity. The suggestion of this research is that the government can anticipate the negative impact of the COURT decision by doing some alternatives that have been answered in the results of this research.

The equation in the study with research to be discussed by researchers is in discussing the constitutional rights of Indonesian citizens in the elections. While Distinguishing in this study, researchers focus on the protection of the rights to select the list of additional voters found in article 344 paragraph (2) of the Election Act.

Table 1. Review of realated literature

No.	Name/college/ year	Research title	Types of research	Equation	Difference
1.	M. Amir Nashiruddin	Additional Voter List (DPTb) Problems and Efforts to Safeguard Voting Rights in the Special Region of Yogyakarta	Empirical research	Discussing the right to vote for the voter list, specifically the additional voter list	Research to be investigated by researchers is researchers analyzing article 344 paragraph (2) using the concept of progressive

		a			law and <i>masalah mursalah</i>
2.	Basuki Rohmat/ Sunan Ampel State Islamic University students/2019	Review of Fiqh Siyasa on the decision of the Constitutional Court No. 20/PUU-XVII/2019 on the additional list of voters (DPTB) in the 2019 elections	Types of normative research with a statue approach	The same discusses is the associated list of additional voters and also uses the normative research method.	The object of study in the thesis is the ruling of the Constitutional Court, while the object of in this research studies is article 344 paragraph (2) of Law No. 7 of 2017 on general elections
3.	Aprista Ristyawati/ Faculty of Law, Diponegoro University /2019	Strengthening the constitutional rights of Indonesian citizens after the Decree No. 20/PUU-XVII/2019	Types of normative and descriptive analytical juridical research	Equally discussing the constitutional rights of Indonesian citizens in the general elections	Researchers focus on the right to choose the list of additional voters listed in article 344 paragraph (2) of the Election Act.

G. Writing systematics

To facilitate the reader the author will outline the writing systematics beginning from Chapter I to chapter IV with the following discussion:

CHAPTER I: INTRODUCTION

This chapter outlines the introduction that contains an overview that serves as an introduction in understanding the discussion of the next chapter. This chapter contains discussion systematics which include: background problems, problem constraints, problem formulation, research benefits, research objectives, operational definitions and discussion systematics

CHAPTER II: LIBRARY OVERVIEW

This chapter describes the definition of the right and then illustrates the concept of progressive law and the basic concept of *mashlahah mursalah*. An overview of the underlying concepts and theories in this chapter is aimed at answering the problem formulation and analyzing the problems formulated by researchers.

CHAPTER III: DISCUSSION

Chapter III contains the results of the research and the discussion in this chapter explains in detail the results of analysis and discussion of research conducted by researchers.

CHAPTER IV: CLOSING

The final chapter is the conclusion of the research results and suggestions from the results.



CHAPTER II

LITERATURE REVIEW

A. Conceptual Definition

1. Political Rights

The state is the bearer of the interests of society. The role of the state as a consensus manager regarding the public interest will be recognized by the community when the state has a “mediation” (communication connection) with the community, namely the nation, the political rights of citizens, and populist groups.²³ State institutions will be recognized as bearers of consensus on the public interest if they identify with the nation, recognize and guarantee the political rights of citizens, and are responsive to the demands of various populist groups.²⁴

Political right is a human right that are upheld and protected by the rule of law, government, and everyone for the sake of honor and protection of human dignity. As stated in the law on human right article 43 paragraph (1) that :

“Every citizen has the right to be elected and to vote in elections based on equal right through direct, general, free, secret, honest, and fair voting”.²⁵

Furthermore, in Article 43 paragraph (2) it is further explained that:

²³ Ramlan Surbakti, *Memahami Ilmu Politik*, (Jakarta : PT Grasindo, 2007), 49.

²⁴ Ramlan Surbakti, *Memahami Ilmu Politik*, (Jakarta : PT Grasindo, 2007), 50.

²⁵ Article 43 paragraph (1) Law No 39 year 1999 about Human Rights.

“Every citizen has the right to participate in government directly or by means of a representative that he chooses freely, according to the manner specified in the laws and regulations.”²⁶

According to Ramlan Surbakti, political rights are an abstract role that manifests as three rights. *First*, the right to vote in general elections thus becomes the justification for the statement that the power exercised by those who hold roles is with the consent of the citizens. *Second*, the right to express opinions and associate. *Third*, the right to obtain legal protection from actions by state institutions deviating from their authority.²⁷

Political rights is a rights that are usually described as the authority to influence the formulation of state objectives, by participating directly or indirectly in the preparation of the legal order.²⁸ Direct state goal setting is a form of direct democracy in which individuals have the right to take part in the parliament, join in discussions, and vote. Meanwhile, indirect people's participation means that this function is carried out by the parliament elected by the people.

Based on explanation above, it can be concluded that political rights are the fundamental rights of individuals in the state to vote and be elected in the elections.

²⁶ Article 43 paragraph (2) Law No 39 year 1999 about Human Rights.

²⁷ Ramlan Surbakti, *Memahami Ilmu Politik*, (Jakarta : PT Grasindo, 2007), 50.

²⁸ Hans Kelsen, *Teori Hukum Murni : Dasar-Dasar Ilmu Hukum Normative (Pure Theory of Law)*, terj. Raisul Muttaqin, Cet. II (Bandung, Nusamedia & Nuansa, 2007), 157.

2. Additional Voters

According to the general election legislation referred to an additional selector is the selector that has been registered in the list of voters fixed in a TPS which because of certain circumstances voters could not use his right to vote in the origin of voting place (TPS).²⁹

As stipulated in article 210 paragraph (3) that in order to be included in additional voters, a person must show proof of an electronic identity card and proof that he has been registered as a voter in the final voter list at the original voting place (TPS).

Voters who are included in the category of Additional Voter lists (DPTb) based on article 36 paragraph (3) of the Regulation of Election Commission Number 11 Year 2018 concerning the Preparation of Domestic Voters Register in the Implementation of General Elections are as follows:

- a. Carrying out government duties elsewhere on Voting Day;
- b. Inpatient in a hospital or health center and accompanying family;
- c. Persons with disabilities who undergo treatment at social institutions / rehabilitation centers;
- d. Undergoing drug rehabilitation;
- e. Being a prisoner in a detention house or prison;
- f. The task of studying / taking secondary or higher education;
Moving domicile; and / or
- g. Hit by natural disasters.³⁰

²⁹ Article 210 paragraph (2), Law Number 7 of 2017 concerning General Elections

³⁰ Article 36 Paragraph (3) Regulation of the General Election Commission Number 11 Year 2018 concerning Preparation of Domestic Voters Register in the Implementation of General Elections

3. General elections

A government can be said to be democratic if the implementation mechanism implements democratic principles.³¹ General election is one of the parameters as a measure of whether a country is democratic or not. Until now, the general election is believed by many to be an important instrument in the process of changing the government. Apart from that, general elections is one of the main indicators to see the extent to which citizens' political rights are exercised.

General elections are a democratic mechanism to decide on a change of government in which the people can channel their political rights freely and safely.³² According to regulation about general election, definition of election is a means of sovereignty of the people to select members of the House of Representatives, members of the House of Representatives, presidents and vice presidents, and to select members of the Regional Representative Council, who Carried out directly, publicly, freely, confidentially, honestly, and fairly in the unitary State of the Republic of Indonesia based on the Pancasila and the Constitution of the Republic of Indonesia year 1945.³³

The general election in Indonesia was originally intended to elect legislative members, namely the People's Representative Council (DPR),

³¹ A. Ubaidillah, dkk., *Pendidikan Kewarganegaraan (Civic Education): Demokrasi, Hak Asasi Manusia dan Masyarakat Madani* (Jakarta: ICCE UIN Syarif Hidayatullah, 2010), 49.

³² A. Ubaidillah, dkk., *Pendidikan Kewarganegaraan (Civic Education): Demokrasi, Hak Asasi Manusia dan Masyarakat Madani* (Jakarta: ICCE UIN Syarif Hidayatullah, 2010), 50.

³³ Article 1 number 1 of Law Number 7 of 2017 concerning General Elections.

provincial regional legislative assembly (DPRD Provinsi) and district / city regional representative council (DPRD kab/kota). After the amendment of Constitution 1945 in 2002, then the president and vice president, originally conducted by the MPR, agreed to be carried out directly by people and from people so that the presidential and vice presidential elections were included in the series of elections. The last general election was a general election in 2019 which was held simultaneously. This general election is different from the previous general election which combines the implementation of presidential/vice presidential elections and the election of legislative members in one regime.

The background of the general election occurred simultaneously due to the ruling of the constitutional court number 14/PUU-XI/2013. Requests for simultaneous general elections were submitted by Effendi Gazali, Ph.D., MPSID, M.Sc, an activist from East Jakarta. Decisions of constitutional court judges there are at least three legal considerations of the constitutional court in the implementation of simultaneous general elections.

First, related to the government system according to the Constitution of the Republic of Indonesia of 1945, namely the presidential system. The agreement that took place during the discussion of the amendment to the Constitution (1999-2002) was to strengthen the presidential system. In realizing *checks and balances*, The position of the President and the Parliament in relation is equal, supervising and compensating. As in the Constitution it is stated that, in certain cases the president's policy must

consider the considerations of the house of representatives of the republic of Indonesia. Kind of, the president in declaring war, the appointment and acceptance of ambassadors, as well as national treaties that have broad impact on people's lives and financial burdens. On the other hand, the House of Representatives must carry out jointly in the formation of laws with the President and be agreed upon. The President also drafted the State Budget (APBN) to be discussed together with the The House of Representatives of The Republic Indonesia and obtain The House of Representatives of The Republic Indonesia approval. Therefore, the effectiveness of government by the President is closely related to two supports, namely popular support and support of political parties as a form of *checks and balances*.

Secondly, the court further saw the original meaning desired by the formulator of the amendment to the Constitution. It can be concluded that the holding of presidential elections was carried out simultaneously with the representative institutions. This was also conveyed by Slamer Effendy Yusuf as an *Ad Hoc* committee I. The MPR Workers' Body which prepared a *draft of the* amendment to the Constitution of the Republic of Indonesia of 1945. He stated that the MPR members in the discussion reached an agreement that the election meant for house of representatives of the republic of Indonesia, Regional Representative Board, president and vice president and DPRD were put in one regime. This is in line with Article 22E paragraph (2) of the 1945 Constitution that general elections are held to elect members of the People's

Legislative Assembly, the Regional Representative Council, the President and Vice President and the Regional People's Representative Council.

Third, the simultaneous general election which combines the presidential election and legislative election in terms of the implementation fund will save the state money from taxpayers and the exploitation of natural resources and other economic resources. In addition, simultaneous elections will reduce time wastage and reduce conflict or horizontal friction in the community. In addition, in practice, the implementation of non-simultaneous general elections in 2004 and 2009 found political facts that in order to gain support for electing as president and DPR support, presidential candidates were forced to negotiate and bargain politics with political parties. This is in fact only tactical, not long-term and not strategic. Thus, according to the Court, it could reduce the position of the President in exercising governmental power according to a presidential government system.

The fundamental difference between the 2019 simultaneous general election and the previous general election is the merger of the general election for members of the legislature with the election for president / vice president. In addition, in the 2014 general election, there were 12 national political parties and 3 local political parties participating in the elections, while in the 2019 general election there were 16 national parties and 4 local parties participating in the election. The presidential threshold uses the results of the 2014 legislative elections and the threshold rises. In 2014 to enter parliament, the threshold that must be achieved is 3.5%, while in 2019 it is 4%. One of

the objectives of using the parliamentary threshold is to create a simple multiparty system. Regarding the method of counting the number of seats in the 2019 election using the Sainte Lague technique, in 2014 using the BPP method (Voters Dividing Number). The addition of 3 constituencies, namely West Kalimantan, North Kalimantan, West Nusa Tenggara so that in 2019 there are 80 electoral districts. And campaign funds also increased by 2.5 billion in 2019.³⁴

B. Framework Theory

1. Progressive Law

a. Background of the progressive Law

Progressive law was conceived by Prof. Satjipto Rahardjo, Professor in law as well as writer and activist in Indonesian law enforcement. The presence of progressive law stems from anxiety about the existing law in Indonesia. The weakness of the law in Indonesia can be seen from the concrete experience when weak people are dealing with the law and then it is the strong people who tend to get away from the law. Trust in the law has declined due to the poor performance of the law itself. Since the 70s the term “court mafia” has become Indonesian vocabulary.

During the New Order, law had increasingly shifted to become a political

³⁴ “7 Perbedaan Pemilu 2014 dan 2019” *Kompas*, 19 November 2018, diakses 4 september 2020, <https://kumparan.com/kumparannews/7-perbedaan-pemilu-2014-dan-2019-1542626775313123571>

tool to maintain power at that time. Thus, it is not the term “law as a tool of social engineering” but has led to “dark engineering”.³⁵

Law that are still in a mess have also occurred when entering the Reformation Era since the fall of the New Order in 1988, the Indonesian people have not succeeded in lifting the law to a near-ideal level, but increasingly causing disappointment, especially those relating to the eradication of corruption, commercialization and commodification of the law. year is booming. The essence of this setback is the erosion of a sense of honesty, empathy and dedication in carrying out the law. More and more days humility is rampant and people are also increasingly unhappy.³⁶

Satjipto Rahadjo also stated that:

“Indonesia cannot be protracted for longer in the way of law enforcement as it has been implemented. Indonesia now needs a type of law enforcement called progressive (progressive law enforcement). Observation so far shows that even though this nation is shouting at the rule of law out loud, the results remain very disappointing. Like for example in dealing with the problem of corruption, almost no results are shown. Much corruption is happening, but the corruptors and the legal fleet are smarter to break the legal moves that they want to impose. We should not simply accept and use the existing legal system without looking at it critically.”³⁷

Seeing the conditions in Indonesian law which are still relatively low, that is why progressive law was born to build and enlighten the nation.

³⁵ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 3.

³⁶ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 4.

³⁷ Satjipto Rahardjo, *Indonesia Ingin Penegakan Hukum Progresif*, (kompas, 15 Juli 2002).

Progressive law is a legal thinking that seeks justice and benefit, rather than legal certainty. Indonesian progressive law consortium on 29-30 November 2013 which was attended by hundreds of academics, practitioners, judges, prosecutors, police and lawyers who agreed that the formation and enforcement of Indonesian law required the development of progressive legal ideas as had been sparked by Prof. Dr. Satjipto Rahardjo, SH.³⁸ In the consortium there are those who approve, criticize, diagnose and narrate it.

Progressive law proposed by Prof. Satjipto Rahardjo aims to make alternative approaches in interpreting the law in Indonesia. Progressive law begins with the assumption that law is for humans, not humans for law. Progressive law does not accept law as an absolute and final institution, but is determined by its ability to serve humans. "Law is an institution that aims to bring people to a just, prosperous life and make people happy."

Progressive law is a correction to the weaknesses of a modern legal system that is full of bureaucracy and procedures, so it has the potential to marginalize truth and justice.

b. The Concept and Characteristic of Progressive Law

Progressive law and progressive law science can not be called a distinct type and a finite scheme, but rather a flowing idea, which does not want to be trapped into the status quo, so that it becomes stagnant

³⁸ Suteki, *Masa Depan Hukum Progresif*, (Yogyakarta : Thafa Media, 2015), vii.

(stagnant). Progressive law always wants to be loyal to the great principle, "the law is for man". Progressive law can be likened to a signpost that always warns, the law must continually break down, replace, free laws that are stagnant, because they are unable to serve a changing environment. That is why the law always flows, because human life is full of dynamics and changes from time to time. A form of solution and theory must also flow to maintain the greatness of human life.³⁹

The basic assumption of progressive law states that the law is not an absolute and final institution, but rather depends on how humans see and use it. Humans are decisive, although sometimes when confronting humans with the law make complex choices. However, legal theories are rooted in two factors, namely law and humans. If the foundation of a theory leads to legal factors, then a theory considers that law is something that is absolute-autonomous and final. However, if it leads to human factors, then the theory will give space to pay attention to humans.⁴⁰ Progressive law emphasizes the human factor, namely the law paradigmatic "law for humans." So whatever he does, the law should not position itself as "law for law", which would give rise to a paradigm of "man for law".⁴¹

³⁹ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 81-82.

⁴⁰ Satjipto Rahardjo, *Hukum Progresif : Sebuah Sintesa Hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 5.

⁴¹ Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban*, (Jakarta : UKI Press, 2006), 154.

. Progressive law is a part of “searching for the truth” that never stops. The initiator of progressive law, Satjipto Rahardjo said that rule breaking is very important in the law enforcement system. That is, that law enforcement, judges or police and other law enforcers must be brave to get out and free themselves from the use of standardized patterns. According to Satjipto Rahardjo, there are three ways to do rule breaking. *First*, by using spiritual intelligence to wake up from the plight of the law. *Second*, searching for deeper meaning should become a new measure in carrying out the law and the state. *Third*, the law should be carried out not according to logical principles alone, but with feelings, concerns and involvement with weak groups.⁴²

The concept of progressive law is law for man, not man for law. So that when there are problems regarding the law, then the law needs to be fixed, not humans. Because the progressive legal paradigm is about how the law processes following the behavior of human life. Satjipto Raharjo stated that law must always flow, because human life is full of dynamics and changes from time to time.⁴³

Changes in the legal system, including laws and regulations, are very necessary. So that the law is more developed and in accordance with the principle objectives of its formation, especially in ensuring human happiness and welfare. In that context, law is always in a process to continue to be dynamic and always processes for the welfare of human

⁴² Suteki, *Masa depan hukum progresif*, (Yogyakarta : Thafa Media, 2015), 38.

⁴³ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), viii.

justice as well. Law is an institution that continuously delivers people to a just, prosperous life and makes people happy.⁴⁴

That is what is meant by law that is always in the process of becoming (law as a process, law in the making). Therefore, it would seem that the law always changes with the flow of human life. Thus it will be seen that the implementation of law is not only about "legal certainty", but a legal life that will continue to run dynamically following changes and human development either through legislation or legal culture.

The progressive legal perspective directs that law must not be trapped in legal formalism which in practice shows many contradictions and impasse in the search for substantial truth and justice.⁴⁵ Therefore, progressive law is intended to understand the legal system so that it is not considered too rigid, so that in this case, social behavior needs to be considered in order to see the humanitarian problem as a whole and can lead to substantive justice. Progressive thinking means to be able to get out of the habit of thinking of the law which is absolute which only meets the people in power. Thus, the law must also involve humanity issues.

Prof. Suteki stated that progressive law is a law that has never ending. The choice of these two words is the right word to state that progressive law is said to be a law that is undergoing a process of becoming and will end until the process ends. Until now, no scientist has ever dared to claim that progressive law has a certain form, whether as a

⁴⁴ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 2.

⁴⁵ Suteki, *Masa depan hukum progresif*, (Yogyakarta : Thafa Media, 2015), 38-39.

movement, stream, paradigm, theory, concept or approach or interpretation. Because, if it is done then progressive law will lose its progressiveness.⁴⁶

Progressivism starts from a human perspective, humans are basically good, have the qualities of compassion and care for others. This is an important asset to build a legal life in society. Thus, law becomes a tool to describe the basis of humanity. Progressive law has a very strong moral content. Progressivism does not want to make law a technology that has no conscience, but rather a moral institution.⁴⁷

In the concept of progressive law, law does not exist for its own sake, but for a purpose that is outside of itself. Progressive law wants to consciously place its presence in close relations with humans and society. Progressive law has a responsive type. As Nonet & Selznick⁴⁸ said that in the responsive type, law will always be associated with objectives outside the textual narrative of the law itself.

According to Sidharta, the characteristics of progressive law can be described as follows:

1. Progressive law is an assumption that law is for humans, not humans for laws. Law is not everything, but is a tool for humans to give mercy to the world and humanity. Law does not

⁴⁶ Suteki, *Masa Depan Hukum Progresif*, (Yogyakarta : Thafa Media, 2015), viii.

⁴⁷ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 17.

⁴⁸ Nonet & Selznick said as “The Sovereignty of purpose”. And then, said “ thus a distinctive feature of responsive law is the search of implicit values in rules and politic ... a more ‘flexible’ interpretation that sees rules as bound to specific problem and contexts, and undertakes to identify the values at stake in procedural protection. In Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 6.

exist for itself but for something that is broader and bigger, so if problems occur within and with the law, it is the law that is reviewed and corrected, not humans who are forced to be included in the legal scheme.

2. Progressive law must be pro people and pro justice. The law must be on the side of the people and justice must be placed above the rules. Law enforcers must have the courage to break through the strength of the regulatory text.
3. Progressive law aims to bring people to prosperity and happiness.
4. Progressive laws are always in the process of becoming. Law is not a final institution, but is determined by its ability to serve humans.
5. Progressive law emphasizes the good life as the basis of good law. The legal basis lies in the behavior of the nation itself because the behavior of the nation determines the quality of the nation's law.
6. Progressive law has a responsive type. In the responsive type, the law will always be linked to goals outside the textual narrative of the law itself. Responsive type rejects legal autonomy which is final and cannot be challenged.
7. Progressive law promotes a public role. Given that the law has limited capabilities, entrusting everything to the power of law is unrealistic and wrong. For this reason, progressive law agrees to mobilize the autonomous power of society (encouraging public roles).
8. Progressive law builds a rule of law with a conscience that promotes culture. The culture in question is the happiness of the people.
9. Progressive law is carried out with a spiritual intelligence that does not want to be limited by standards, is also not contextual in nature, but wants to get out of the existing situation in an attempt to find the truth of deeper meaning or value.
10. The progressive law breaks down, replaces and sets free. Progressive law is not status quo and submissive. The status quo attitude discourages changes and views doctrine as something that is absolutely necessary.⁴⁹

⁴⁹ Tulisan Sidharta "Posisi Pemikiran Hukum Progresif Dalam Konfigurasi Aliran-Aliran Filsafat Hukum: Sebuah Diagnosis Awal. Dikutip dari buku Saifullah, *Dinamika Teori Hukum (Sebuah Pembacaan Kritis Paradigmatik)*, (Yogyakarta : Pustaka Pelajar , 2018), 9.

With this explanation, the purpose of progressive law is that law should be more sensitive to changes in society, whether local, national or global. Faced with these changes, the presence of progressive law is to protect the people towards the ideal of law.

2. *Maslahah Mursalah*

a. Understanding and definition of *Maslahah Mursalah*

Maslahah derived from the word *Shalah* with additional alif at first which means “good”. It is a mashdar with the meaning of the word *Shalah*, “benefits” or “no damage”.⁵⁰ The word *al-Mashlahah* is the singular form of the word *al-Mashalih* which means to bring good. The meaning of *Mashlahah* in Arabic means “deeds that encourage the goodness of man”. The point is that everything that is beneficial to man, either in the sense of pulling or yielding such as generating profit or pleasure; Or in the sense of refusing or avoiding such rejecting harm or destruction.⁵¹ Thus, any containing benefits should be called *Mashlahah*. So, *mashlahah* contain interesting meaning or bring a *mashlahat* and refuse or avoid any harm.

Al-Qur'an does not mention directly, but *Al-Qu'ran* uses the words *zhalama* and *fasada* which contain maxims as opposed to the word

⁵⁰ Amir Syarifuddin, *Ushul Fiqh 2* (Jakarta : Kencana Prenada Media Group, 2014), 367.

⁵¹ Amir Syarifuddin, *Ushul Fiqh 2* (Jakarta : Kencana Prenada Media Group, 2014), 368.

shalaha. Verses of the *Qur'an* which contain the value that every what is done must provide benefits is contained in the letter Ali Imran verse 114:

يُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَ يُؤْمِرُونَ بِالْمَعْرُوفِ وَ يَنْهَوْنَ عَنِ الْمُنْكَرِ وَ يُسَارِعُونَ

فِي الْخَيْرَاتِ وَ أُولَئِكَ مِنَ الصَّالِحِينَ

“They believe in Allah and the Last Day, order to do what is ma'ruf, and prevent what is wrong and hasten (work on) various virtues. They include pious people.”

While *al-mursalah* has a meaning regardless, that is, regardless of the evidence that considers it or the evidence that ignores it.

Some opinions among the scholars related to the definition of *maslahah mursalah*, including the following:

a. Al-Ghazali

Al-Ghazali formulated the problem of *mursalah* as follows:

مَا لَمْ يَشْهَدْ لَهُ مِنَ الشَّرْعِ بِالْبُطْلَانِ وَ لَا بِالِإِعْتِبَارِ نَصٌّ مُعَيَّنٌ⁵².

“Anything (*maslahah*) for which there is no evidence for him from shara 'in the form of a certain text that cancels it and no one is paying attention to it.”

b. Muhammad Abu Zahrah

The meaning of *maslahah mursalah* according to Abu Zahrah :

المصالح الملازمة لمقاصد الشارعية الإسلامية ولا يشهد لها أصل خاص بلا اعتبار

⁵² Al-Ghazali, Tahqiq : Hamzah bin Zahir hafidz, *Al-Mustasyfa Fi 'Ilm Al-Ushul*, (Madinah, 2008), 481.

او الإلغاء⁵³.

“Maslahat who has conformity with Islamic law and there is no clear instructions about his confession and his refusal”.

c. Abd Wahab Khallaf

Definition of *maslahah mursalah* according to Abdul Wahab Khallaf:

المصلحة المرسلة هي المصلحة التي لم يشرع الشارع حكماً لتحقيقها ولم يدل دليل شرعي على اعتبارها⁵⁴.

“*Mashlahah mursalah* is a *mashlahah* that is not prescribed by the Syara ' to manifest and there is no evidence of Syara ' which considers it (to do so) or ignore it (to leave).”

The essence of *maslahah mursalah* can be formulated as follows:

1. Something that is good according to reason with consideration can realize the benefit or avoid bad for humans.
2. What is good according to reason, is in line with the aim of *syara* ' in establishing the law.
3. What is good according to reason and is in line with the aim of the *syara* 'there is no hint of *syara* ' specifically that rejects it, nor is there a hint of *syara* ' that acknowledges it.

⁵³ Muhammad Abu Zahrah, *Ushul Al-Fiqh*, (Darul Fikr Al-'Araby, 2010), 279.

⁵⁴ Abdul Wahab Khallaf, *Ilm Ushul Al-Fiqh*, (Kairo : Maktabah Da'wah Al-Islamiyah,), 84.

In line with fiqhiyyah rules that are relevant to the concept of maslahah mursalah such as:

دَرْءُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

“Rejecting mafsadat (damage) takes precedence over bringing maslahat (goodness).”⁵⁵

تَصَرَّفُ الْإِمَامِ عَلَى الرَّعِيَّةِ مُنَوِّطٌ بِالْمَصْلَحَةِ

“The policy of a leader over the people must be based on the benefit”⁵⁶

Ulama agree and do not deny that among the purposes and objectives of Islamic sharia revealed to humans is to fulfill all forms of human benefit. Thus, the formation of law with mashlahah mursalah is included in establishing laws based on human benefit, which is to bring benefits and reject harm and damage to humans.

b. Types of Mashlahah

Maslahah can be seen in terms of the purpose of Syara ' in establishing the law, with five points for human life, namely: religion, soul, reason, descent, and property. In addition, it can also be seen from the needs and demands of life on the five trees.

⁵⁵ Rosidin, *Modul Kaidah Fikih (5 Kaidah Pokok & 45 Kaidah Cabang)*, (Singosari:2019), 42.

⁵⁶ Kaki Lima Lirboyoy, *Formulasi Nalar Fiqh (Telaah Kaidah Fiqh Konseptual)*, (Surabaya : Khalista, 2017), 76.

When viewed in terms of the strength of benefit, it is divided into three types, namely:

1) Dharuriyah Maslahah

The benefits of existence are much needed by human life; Meaning, human life does not have any meaning if one and the principle of five is not there, all efforts that directly guarantee or to the existence of the five principles are good or maslahah in the level of Dharuri.⁵⁷

2) Maslahah Hajiyyah

Maslahah whose level of human needs is not only at the level of Dharuri. The form of the benefits is not directly for the fulfillment of basic needs of five (Dharuri), but indirectly to the way there as in terms of giving ease to fulfill the needs of human life. Maslahah hajiyyah also if not fulfilled in human needs, not to directly cause damage to the five staples, but indirectly can indeed lead to destruction.⁵⁸

3) Maslahah Tahsiniyah

Maslahah who needs human life to him is not until the level of Dharuri, nor until the level of Hajj; But these needs need to be met

⁵⁷ Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 371.

⁵⁸ Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 372.

in order to give perfection and beauty in human life. *Maslahah* in the form of *Tahsini* is also related to five basic human needs.⁵⁹

In terms of harmony or *munasib* with legal purposes (*syara'*), it is divided into three parts:

1. *Mashlahah Mu'tabarah*

This *mashlahah* is supported by personality. There is a proposition that is justified / shown that became the basis of the form and type of *kemashlahatan* it. *Maslahah* sort of this can be justified to be consideration of the establishment of the laws of Islam and included into the study *qiyas*.⁶⁰

2. *Mashlahah Mulghah*

Kind of this *mashlahah* is rejected by *syara'*. This *mashlahah* is contrary to the provisions of personality. This kind of *mashlahah* can't be considered in the determination of Islamic law.⁶¹

3. *Mashlahah Mursalah*

Mashlahah mursalah is a *maslahah* that the proposition that commands is not found and there is no firmness to reject it. This *mashlahah* is called the *mashlahah mursalah*.⁶²

⁵⁹ Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 372.

⁶⁰ Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 373.

⁶¹ Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 375-376.

⁶² Amir Syarifuddin, *Ushul Fiqh 2*, (Jakarta : Kencana Prenada Media Group, 2014), 376-377.

Based on the explanation above it, *mashlahah mursalah* that is one of the sources of law of Islam. This method can be used for diligence in establish a law of Islam.

c. Argumentation about *Maslahah Mursalah*

There are some scholars who support the method of *mashlahah mursalah* in establishing Islamic law, some are rejecting it. The Maliki school of thought is a scholar who supports and popularized the term *mashlahah mursalah*, then followed by the hanbali school. The reasons that are used as the basis for supporting this principle are, *first*, all religious orders are to create prosperity (*maslahah*) and prevent harm to humans. *Second*, dynamic and developing social conditions that create various problems whose legal provisions do not exist in *nash*, *ijma'* or *qiyas*.⁶³

Al-Ghazali also support the *maslahah mursalah* method, according to Al-Ghazali *maslahah mursalah* is a *maslahah* whose arguments are not found in *shara'* (Islamic law), does not materialize, which therefore, cannot be said to be accepted or rejected. Meanwhile *maslahah* which is in line and relevant to the stipulation of Islamic law and does not contradict the Qur'an, *sunnah*, or *ijma'* is acceptable. As stated by Al-Ghazali:

وكل مصلحة رجعت الى حفظ مقصود شرعي علم كونه مقصودا بالكتاب والسنة

⁶³ Mukhsin Nyak Umar, *Rekonstruksi Pemikiran Hukum Islam Di Indonesia (Pendekatan Al-Maslahah Al-Mursalah)*, (Banda Aceh: Yayasan PeNa Banda Aceh, 2006), 39

والإجماع فليس خارجا من هذه اللأصول لكنه لا يسمى قياسا بل مصلحة مرسله⁶⁴.

“Every *maslahat* that has an impact on maintaining the purpose of *syara*’ which can be known from the Al-Qur'an, sunnah / hadith or *ijma*’, and the *maslahat* does not come out of these arguments is called *maslahah mursalah*.”

Based on Al-Ghazali’s opinion, it can be interpreted that the *maslahah mursalah* can be applied if the *maslahah* can maintain *syara*’ goals, namely, to maintain religion, soul, reason, property and descent. Apart from that, the *maslahah* does not contradict Al-Qur'an, As-Sunnah or *Ijma*’.

Meanwhile, according to abu zahrah and abdul wahab khallaf, the *maslahah mursalah* requirements are:

1. *Maslahah mursalah* must not contradict the *Maqashid Al-Syari'ah*, *kulli* arguments, Islamic teachings and the arguments of *Juz'i* which are *qath'i wurudl* and *dalalah*.
2. The benefit must be convincing in the sense that there must be rational and in-depth discussion and research so that we are sure that it is beneficial and rejects fade.
3. The benefit is general.
4. Its implementation did not cause reasonable difficulties.⁶⁵

The scholars who reject this method is *ibn hazm*, which states that *ibn hazm* rejects legal decisions based on (*ra'yu*) or reason. In this view, *ibn hazm* revealed with several hadiths who ruled to obey Allah, Rasul and *ulil amri*. If there is a difference of opinion, it should be returned to Allah (Al-

⁶⁴ Al-Ghazali, Tahqiq : Hamzah bin Zahir hafidz, *Al-Mustasyfa Fi 'Ilm Al-Ushul*, (Madinah, 2008), 503.

⁶⁵ A. Djazuli, *Ilmu Fiqh (penggalan, perkembangan, dan penerapan Hukum Islam)*, (Jakarta: Kencana Prenada Media Grup, 2005), 87.

Qur'an) and Rasul (hadith). In this case it can be seen that the Al-Qur'an, Hadith and ijma 'are legitimate sources of law in every problem of human life.⁶⁶

Ulama who support and use *maslahah mursalah* do not use it unconditionally. In that sense, several conditions must be fulfilled. What is common is that *maslahah mursalah* is only used when no text (*nash*) is found as a reference material. Thus, the legitimacy of *maslahah* is still strong enough to be a method in the formulation or regulation of a law by fulfilling the requirements that have been stated. *Maslahah mursalah* can still be used to see the current social conditions that will grow and the problems are increasingly complex.

⁶⁶ Mukhsin Nyak Umar, *Rekonstruksi Pemikiran Hukum Islam Di Indonesia (Pendekatan Al-Maslahah Al-Mursalah)*, (Banda Aceh: Yayasan PeNa Banda Aceh, 2006), 48.

CHAPTER III

RESEARCH RESULTS AND DISCUSSION

A. The Rationale to Fulfillment The Political Right for Additional Voters

Election is a form of popular sovereignty as a form of democratic state. The development of democracy in Indonesia has gone through ups and downs. After Indonesian independence, the main problem faced was how, in societies of diverse cultural patterns, heightening the level of economic life in addition to fostering a democratic social and political life. Basically the problem revolves around the preparation of a political system in which leadership is strong enough to carry out economic development and nation building with people's participation while avoiding the emergence of dictators, whether individual, party or military.

The development of democracy in Indonesian history can be divided into four period, that are :

1. The period of the Republic of Indonesia I (1945-1959), which is a period of democracy (constitutional) that emphasizes the role of parliament and parties and which can therefore be called Parliamentary Democracy.
2. During the Republic of Indonesia II (1959-1965), the Guided Democracy period which in many aspects deviated from constitutional democracy which was formally the foundation and showed several aspects of people's democracy.

3. The Period of the Republic of Indonesia III (1965-1998), namely the era of producing democracy which was constitutional democracy by highlighting the presidential system.
4. The Period of the Republic of Indonesia IV (1998-present), the Reformation period that wanted the establishment of democracy in Indonesia as a correction to political practices that occurred during the Republic of Indonesia III.⁶⁷

The fall of the New Order opened opportunities for political reform and democratization in Indonesia. The breakthrough made by the Indonesian people in strengthening democracy was with the amendments to the 1945 Constitution carried out by the MPR resulting from the 1999 elections in four stages over four years (1999-2002). Some important changes were made to create a democratic government. The role of the DPR as a legislative body is strengthened, all members of the DPR are elected in elections, oversight of the president is tightened, and human rights are getting stronger guarantees. The 1945 Amendment also introduces general elections to elect the president and vice president directly. In 2004 for the first time the presidential election was directly elected by the people conducted after the legislative elections.

Begins from the history about general election and the development of thought and evaluations of the general election being applied, in 2013 an activist submitted an application for judicial review of the presidential and

⁶⁷ Miriam budiardjo, *Dasar-dasar Ilmu Politik* (Jakarta : PT.Gramedia Pustaka Utama,2008), 127-128.

vice presidential elections. In essence, the petition states that presidential elections conducted after the legislative elections are ineffective so, should the presidential and legislative elections be held at one time (simultaneously). Starting with this decision, a new regulation was born, namely Law No. 7 of 2017 concerning general elections, which combines presidential and legislative elections at one time (simultaneously).

There are several technicalities in the simultaneous general elections that have changed although not significantly. One of them is the rules regarding additional voters. The rules about additional voters have been regulated in law number 7 of 2017 which is more fully explained than the previous law. Article 210 paragraph (2) states that additional voters are voters registered in the final voter list at a voting place who, due to certain circumstances, cannot exercise their right to vote at the voting place where they are registered. The requirements related to the condition of additional voters who cannot vote at the original voting place. It was explained in article 36 paragraph (3) of the General Election Commission Regulation Number 11 of 2018 concerning Compilation of Domestic Voters List in Organizing General Elections, are as follows :

- a. Carrying out government duties elsewhere on Voting Day;
- b. Inpatient in a hospital or health center and accompanying family;
- c. Persons with disabilities who undergo treatment at social institutions / rehabilitation centers;
- d. Undergoing drug rehabilitation;
- e. Being a prisoner in a detention house or prison;
- f. The task of studying / taking secondary or higher education; Moving domicile; and / or

g. Hit by natural disasters.

Ballot paper is a paper used to vote in general elections. The availability of ballots is important for the implementation of general elections as a form of people's participation and aspirations. Lack of ballots still often occurs in various regions, this should be anticipated in advance in order to avoid things that are not desirable, and so that the election runs smoothly.

The rules about ballot papers, has been regulated in chapter VIII of the Election Law. However, in this chapter there is an article, namely article 344 paragraph (2) which has not provided legal certainty regarding ballots for additional voters. Whereas the provision in the article reads "The number of ballot papers printed is the same as the number of permanent voters plus 2% (two percent) of the number of permanent voters as reserves, which is determined by a General Election Commission decision." Seeing the provisions in this article, ballot papers will only be given to voters who are registered as permanent voters.

With the simultaneous general elections, voters who are registered in additional voters who in fact are concentrated in large numbers in certain locations, can prevent additional voters from channeling their voting rights due to the limited availability of ballots at TPS if they are only intended for permanent voters. For example, the assisted residents in prisons, residents of social institutions, patients and medical personnel in hospitals, students in Islamic boarding schools, labor in plantations and mining. Based on this

article, the petitioner feels that his rights are being hindered because of the fear of running out of ballots for applicants who are included in the additional voter (DPTb) category due to the unallocated procurement of ballots for the additional voter category.

Article 344 paragraph (2) has been carried out by a Judicial Review to the Constitutional Court as stated in decision number 19 / PUU / XII / 2019. In essence, the petition stated that the article could potentially eliminate the right to vote for additional voters because it did not include provisions or legal certainty regarding additional voter ballots. In addition, it turns out that Article 350 paragraph (3) states that *“The number of ballots at each TPS is the same as the number of voters listed in the final voter list and additional voter lists are added by 2% (two percent) of the final voter list as reserves”*. Between the two articles, there is an inconsistency between one article and another in a law, so in this case, legal interpretation is needed to interpret and provide legal interpretation whether ballot allocation can be given to additional voters or only permanent voters.

The Chairperson of the General Election Commission RI stated in the petition that if there was a shortage of ballots, the General Election Commission determined the number of ballots printed after a recommendation from the election supervisory body was in accordance with the level and / or after the Constitutional Court decision was issued. In connection with Article 350 paragraph (2) of the Election Law, PKPU Number 3 of 2019 regulates,

"The number of voters for each TPS is at most 300 people or 300 voters by taking into account not joining villages / sub-districts, the ease of voting to TPS, does not separate voters in one family, matters relating to geographical aspects, and the distance, and travel time to the polling station with due observance of the voting grace period. " (2) The adjustment of the number of voters for each TPS as referred to in paragraph (1) is intended so that voting and counting of votes at the TPS can be carried out on the same day.

And with regard to the needs which the Petitioners think are necessary in the event of an extension of the meaning of the TPS formation process which is not only based on permanent voter lists (DPT), but also based or based on additional voter lists (DPTb). In fact, the General Election Commision has regulated the possibility in Article 38 paragraph (10) PKPU mutarlih (updating voter data) which reads in Article 38 paragraph (10), "In the event that the number of additional voters (DPTb) at a place exceeds the maximum number of voters at TPS, TPS can be formed based on additional voters (DPTb)." However, of course this is still done by considering the availability of the General Election Commision's budget and the ability to provide ballot papers and other equipment, and it can be done as long as there is a recommendation from the Regency / City Election Supervisory Board.

The General Election Commision still needs to formulate appropriate services in order to protect the voting rights of additional voters which in fact have the potential to hinder the right to elect additional voters on voting day

due to the availability of ballots and TPS services which may not be served. The policy formulation that will be taken by the General Election Commission will of course take into account the budget availability and the General Election Commission's ability to procure and distribute ballot papers and other equipment at the time of voting. Specifically with regard to this Article, the General Election Commission hopes that the decision to be issued will still provide sufficient space for the General Election Commission not only to fulfill logistical needs, but also to recruit personnel at the polling stations to be established, including providing training and giving announcements to the public.⁶⁸

Regarding the review of Article 344 paragraph (2) of the Election Law which states that the number of ballots is the same as the number of permanent voters plus 2% of the total number of permanent voters as reserves, which is determined by a General Election Commission decision. Bawaslu has received reports that potential voters who will move and / or use their voting rights 23 in other places are still not commensurate with the number of ballots as much as 2% of the total number of permanent voters as reserves, so it is potentially unacceptable for residents who move to vote with Form A5 to be eligible. use their voting rights due to the limited number of ballot reserves at each polling station.⁶⁹

⁶⁸ Risalah sidang 19/PUU/XII/2019 Pernyataan Komisi Pemilihan Umum Republik Indonesia.

⁶⁹ Risalah Sidang 19/PUU/XII/2019 pernyataan Badan Pengawas Pemilu Republik Indonesia.

The judge's consideration in the decision was that if the phrase "from the number of permanent voters" was omitted, legal uncertainty would occur because it was not known with certainty which data or list of voters was used as the basis for determining the number of ballots. If the percentage of the number of ballots is not limited, there is a concern that it will be misused. This means that determining the percentage of the number of reserve ballots is one way to control so that the ballots are not misused. However, the court is of the opinion that if the number of backup ballots of 2% of the total permanent voters is not sufficient for voters in a TPS, this can be resolved by using the excess unused ballots from the nearest TPS. Seeing the Court's decision, ballots can be issued for additional voters without eliminating permanent voters.

However, it seems that the decisions of the constitutional court still cannot be applied maximally. As happened at the class IIB prison prison in Banda Aceh. About 200 prisoners had to lose their right to vote due to insufficient ballot papers.⁷⁰ In addition, a shortage of ballots has occurred at TPS 21 Banjar Pering, Kuta, Bali. Additional voters complained that they could not use their voting rights and they admitted that they were left behind because they used the A5 form. Dozens of residents complained that they had been queuing for a long time but were not certain. They protested to the KPPS and PPK officers and asked about their voting rights. The officer was

⁷⁰ Hasil penelitian Ikmal Fatra Maula dan Ubaidullah, berjudul "Hak Politik Narapidana Rumah Tahanan Negara Kelas IIB Banda Aceh Pada Pemilu Tahun 2019," *Jurnal Ilmiah Mahasiswa FISIP Unsyiah*, no.1(2020): 7.

also confused about this and said that his party did not know anything about the ballot because he only received it. " *kan (tambahan surat suara) 2 persen dari 187 (DPT) sisa 4. Ini yang membuat kita kesulitan, saya harus bilang apa. Kalau dari regulasi semuanya dapat memilih mulai dari jam 07.00 WITA antara DPT dan DPTb sama* ". Said the PPK officer of Kuta sub-district, Mangku Nguja. He also said that the number of voters who brought A5 was 57 people. While the number of ballots available is only 201, so there is still a shortage of around 53 ballots.⁷¹

Election issues are closely related to human rights issues, because humans have the right to freedom or independence. Changes in the legal system, including statutory regulations, are very necessary. So that law is more developed and in accordance with the principles of its purpose, especially in guaranteeing human happiness and welfare. As the concept of progressive law which emphasizes that law must run on human behavior.

Progressive law is an institution that aims to bring people to a just, prosperous life and make people happy. Progressive law came from basic assumptions, law is for humans and not for human to law.⁷² To find out whether or not a law is progressive, then the law needs to be reviewed from the aspect of justice, welfare and usefulness.

⁷¹ <https://news.detik.com/berita/d-4514038/surat-suara-habis-pemilik-a5-di-tps-kuta-bali-protes-surat-suara-habis-pemilik-a5-di-tps-bali-protes> : Aditya Mardiasuti-detik news

⁷² Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 2.

The concept of progressive law is law for man, not man for law. So that when there are problems regarding the law, then the law needs to be fixed, not humans. Because the progressive legal paradigm is about how the law processes following the behavior of human life. Satjipto Raharjo stated that law must always flow, because human life is full of dynamics and changes from time to time.⁷³

The law can not be separated from human life. Law is like air for humans to be able to live. However, legal thinkers and observers differ in view of the reasons for the emergence of law. The idealists formulated that the purpose of law was present to bring about justice, while positivists stated that law was merely a tool to create order, stability and certainty. Marxists also have a different statement that the law is as an instrument to secure and maintain the economic power of the bourgeoisie or those who have power.⁷⁴

The law is expected to be an instrument of justice and at the same time to overcome the weaknesses contained in the legislation. This justice institution enforcer also has a very big role in deciding a law to solve all dynamic and complex cases with conscience and justice. This is in accordance with the function of judges as regulated in Law number 48 of 2009 concerning judicial power which states that “judges as law enforcement

⁷³ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), viii.

⁷⁴ Sirajuddin, Fatkhurohman, dan Zulkarnain, *Legislative Drafting : Pelembagaan Metode Partisipatif dalam Pembentukan Peraturan Perundang-Undangan* (Malang: Setara Press, 2016), 1.

and justice are required to explore, follow and understand the value of the law that lives in society.”

The organizer of the election, the General Election Commission which is also contained in the electoral regulation has given the opportunity for voters who due to certain circumstances to move the location of the election. Voters who are included in the category of moving to vote will get a letter type A5. Based on the data recorded by the Election Supervisory Agency (BAWASLU), there were 174,429 additional voters who came in to manage from the area of origin and 105,819 additional voters who came to process in the destination area. Likewise, there were 231,744 additional exit voters who took care of the original regions and 439,196 additional go-out administers in the destination areas.⁷⁵ Bawaslu also conducts mapping of additional voters and the results are that there are still areas that are concentrated with the potential for additional voters in educational institutions, namely high school / equivalent, tertiary institutions and Islamic boarding schools.

Justice is one of the principles in elections. So as much as possible the rules and organization of elections are carried out in accordance with these principles. The holding of fair and integrity elections is a first step towards creating a democratic state that upholds human rights values, including in fulfilling every citizens' rights in the electoral process, as well as guaranteeing

⁷⁵ Decision of the Constitutional Court Number 19/PUU-XVII/2019

the right to elect every citizen without being hindered by administrative processes or providing inadequate logistics.

Article 344 paragraph (2) which states “*the number of ballots printed is equal to the number of permanent voters plus 2% (two percent) of the total number of permanent voters in reserve, which is determined by the General Election Commission 's decision.*” (“*jumlah surat suara yang dicetak sama dengan jumlah Pemilih tetap ditambah dengan 2% (dua persen) dari jumlah Pemilih tetap sebagai cadangan, yang ditetapkan dengan keputusan KPU.*”). That article was not declared a ballot for additional voters. In fact, the number of additional voters in the general election is quite large, and the numbers are not evenly distributed between regions. This is not in accordance with the constitution, article 28D paragraph (1) which states that “each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law.” and article 28D paragraph (3) which states that “each citizen has the right to equal opportunity in government.”

Electoral justice is a variety of ways and mechanisms to ensure that any actions, procedures, and decisions related to the electoral process in accordance with the law (constitution, laws, rules or international agreements, and other provisions in force in a country), and ways and mechanisms to guarantee or restore suffrage. Through electoral justice, parties who believe that their suffrage has been violated is possible to submit complaints, take

part in trials, and accept decisions.⁷⁶ Electoral justice system is an important instrument to uphold the law and fully guarantee the application of democratic principles through the implementation of free, fair and honest elections.⁷⁷

Regulation of General Election Commission Number 15/2018 article 10 paragraph (1) states that the number of ballot papers supplied in each polling station is equal to the number of voters listed in the final voters list, plus 2% (two percent) of the permanent voters list in each polling station as a reserve for each of the Presidential and Vice President Elections, members of the DPR, DPD, Provincial DPRD, and Regency / City DPRD with a maximum quota of 300 people per polling station. From this it was concluded that the maximum number of additional voters in every polling station could only be 6 (six) people, while the number of registered fostered residents was 210 people. This means that there are around 200 people who lost their right to vote, whose ballots were inadequate. In fact, voting in elections is a form of political participation.

According to Ramlan Surbakti, participation is one of the important aspects of democracy, the assumption that underlies democracy and the participation of a person who knows best about what is good for him is the person himself. This is because political decisions made and implemented by the government concern and influence the lives of citizens. So the community

⁷⁶ International IDEA, *Keadilan Pemilu : Ringkasan Buku Acuan International IDEA*, (Jakarta : Indonesia Printer, t.t.), 36.

⁷⁷ International IDEA, *Keadilan Pemilu*, 5.

has the right to participate in determining the content of political decisions.⁷⁸

In general, political participation is the activity of a person or group to actively participate in political life, among others by electing the leadership of the state directly or indirectly, influencing government policy (public policy). These activities include voting in general elections, attending general meetings, holding relationships or lobbying with government officials or members of parliament, becoming a party member or becoming a social movement.

Beside justice, the characteristic of progressive law is to prioritize welfare. General elections are a means of democracy to elect leaders or representatives of the people in accordance with the expectations of society. The expected leader or representative of the people must be a leader who is able to bring goodness and lead the country to become a developed, prosperous and prosperous country. As stated by Asep Hidayat in the journal entitled "Benefits of Election Implementation for Community Welfare". The results of the study state that elections are useful as a tool for democracy, a means of community participation, a solution to changing leadership, legitimizing elected leaders, a place for people to raise their aspirations, socialize and establish relationships.⁷⁹

General election activities are also a means of channeling the principal rights of citizens. Therefore, in the context of implementing the human rights

⁷⁸ Ramlan surbakti, *Memahami Ilmu Politik* (Jakarta : PT Grasindo), 140.

⁷⁹ Asep hidayat, Manfaat Pelaksanaan Pemilu Untuk Kesejahteraan Masyarakat, Benefits Of Election Implementation For Community Welfare. *Jurnal Ilmu Politik*, Vol. 2, No.1 (2020) : 61.

of citizens, it is imperative for the government to ensure the implementation of general elections in accordance with the stipulated constitutional schedule. In accordance with the principle of people's sovereignty where the people are sovereign, all aspects of holding the general election itself must be returned to the people to determine them.⁸⁰

Based on this, if the political rights of the community are impeded by a shortage of ballots, it will hinder the process of public participation in the general election as a place to submit aspirations. With the success of the general elections being held, the people's welfare will also be more secure because the leaders or representatives of the people who will be elected are a common desire and that trust can be felt by the community. It is a violation of human rights if the government does not guarantee the rights of the people to vote in general elections.

Seeing the facts in the field that a number of voters who are included in the additional voters if they run out of ballots will be transferred to another TPS. This states that the regulations contained in article 344 paragraph (2) of the Election Law have not provided legal certainty that can guarantee the right to vote to the public without differentiating from one another and without being hindered by the provision of insufficient ballots. Then the voters have to move to choose the TPS in order to channel their voting rights. In addition, it is not certain that the polling stations visited are easy to reach

⁸⁰ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, (Jakarta : PT RajaGrafindo Persada, 2010), 416.

or not. In fact, Article 350 paragraph (2) states that the TPS established must be easily accessible to its location, not combine villages, pay attention to geographical aspects and ensure that every voter can cast their votes directly, freely and confidentially.

If we look the conditions of laborers, prisoners, and hospital patients where they are concentrated in certain areas. So if there is a shortage of ballots, they will find it difficult to change TPS. Therefore, with a large number of additional voters, a regulation should be able to provide more progressive regulations to fulfill people's suffrage rights and of course by applying justice and equality in government in accordance with the mandate of the 1945 Constitution. a form of political participation that can represent and fulfill the people's desire for the government and people's representatives as a form of people's representation.

In addition, the purpose of the law is to give the greatest possible happiness to the greatest possible number. Thus, it means that in determining a legal policy, the orientation and priorities that are used as goals are in the interests of the public at large. Jeremy Bentham said that achieving happiness in law does not only discuss justice and legal certainty, but also benefits.

Jeremy Bentham argues about the utility or expediency of stating that:

“By utility is meant that property in any object, whereby it tends to produce benefits, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be

the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.”⁸¹

That the intended usefulness is something that tends to produce benefits, benefits, pleasure, goodness, or happiness. Good for a group or individual. Then came the greatest happiness theory which means that everyone's highest goal in this life is to get happiness.

Based on that explanation, the laws and regulations or the judge's decision should be able to bring happiness to additional voters. People who are enthusiastic enough to participate in elections should be accompanied by regulations that can provide legal certainty. The problem of ballot papers which is quite complex makes the public not happy enough, because, by running out of ballots there will be a feeling of dissatisfaction with the services provided by the election organizers, as if the election organizer is wrong and looks disorderly. Even though the related regulations have not provided legal certainty.

Prof. Dr. Sudjito, SH, MSI, professor of Legal Studies and Head of the Pancasila Study Center at University of Gadjah Mada, once said that,⁸² to achieve happiness in the state, a law must be able to achieve the state's objectives as stipulated in the opening of the Constitution.

“ Pursuant to which, in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the

⁸¹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (Batoche Books : Kitchener, 2000), 14-15.

⁸² Sudjito, “Hukum Untuk Kebahagiaan” Sindo News, 8 Mei 2014, diakses 30 Mei 2020 <https://nasional.sindonews.com>.

entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice, Indonesia's National Independence shall be laid down in a Constitution of the State of Indonesia, which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in the One and Only God, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, so as to realize social justice for all the people of Indonesia.”⁸³

This means that the legal products that will be made must reflect the nature contained in the opening of the Constitution to achieve the integrity of life starting from the general welfare, efforts to educate the nation, maintaining freedom and peace, the realization of order, and social justice. Therefore, the articles contained in the election law should also be able to provide and realize happiness by achieving justice and order.

Thus, progressive law states that a law is created to what extent the law can give happiness or not. If viewed from the aspect of benefit or happiness, the provisions in Article 344 paragraph (2) do not fully guarantee the additional political rights of voters. The provisions contained in Article 344 paragraph (2) have the potential to eliminate the right to vote for the public, especially those registered in the additional voters.

Progressive law and progressive law science can not be called a distinct type and a finite scheme, but rather a flowing idea, which does not want to be trapped into the status quo, so that it becomes stagnant (stagnant).

⁸³ Preamble paragraph 4th The constitution of the republic of Indonesia of 1945

Progressive law always wants to be loyal to the great principle, "the law is for man". Progressive law can be likened to a signpost that always warns, the law must continually tear down, replace, and release laws that are stagnant, because they are unable to serve a changing environment. That is why the law always flows, because human life is full of dynamics and changes from time to time. A form of solution and theory must also flow to maintain the greatness of human life.⁸⁴

Political right based on article 344 paragraph (2) have not provided a fair effect for additional voters, because this article could potentially eliminate the right to vote for additional voters, which then is not in line with the statement that general elections are a means for the welfare of the community, because they are obstructed by regulations that have not provide legal certainty. If people's rights are injured due to uncertain regulations, happiness will also not come to society. On the basis of progressive legal thinking which states that the law must work in accordance with human conditions, it is better if the fulfillment of additional voter political rights must be considered. The fulfillment of additional voter political rights is a form of human rights, so that a regulation or legal construction is needed that can guarantee the justice, welfare and political happiness of additional voters in simultaneous general elections.

⁸⁴ Satjipto Rahardjo, *Hukum Progresif : Sebuah sintesa hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), 81-82.

The government and people's representatives who have the authority to formulate laws, should be able to protect and carry the expected welfare. A ruler has an obligation to make the society prosperous, not to suffer the society. Legal norms basically come from a reality and values in society, not the will of the people who have power or what is stated in a law.

Thus, regulators should pay more attention to human rights for the welfare of society, especially those who are included in the supplementary voter list so that they can still channel their aspirations through general elections without being constrained by insufficient ballot availability. Apart from changes in laws and regulations, support from election administrators is also needed to anticipate the shortage of ballots at polling stations during the election process. As well as providing an understanding that voters who fall into the category of additional voters have the same rights as permanent voters, so that in its implementation additional voters do not feel discriminated against because they are not from their area of origin.

B. Legal Construction Regarding The Political Right For Additional Voters Based on *Maslahah Mursalah* Perspective

Establishing a *maslahah* is a good thing for community peace. *Ulama* agree that the purpose of Islamic sharia is revealed to humans is to fulfill the benefit of humans. Therefore, the formation of law with *mashlahah mursalah* is one form of establishing laws based on human benefit, which is to bring benefits and reject harm and damage to humans. *Mashlahah mursalah* is a

method of determining the law to achieve benefit that there is no firmness to use or reject it. Thus, *mashlahah mursalah* is not limited by the argument of recognition or the argument of cancellation.

Realizing benefit is one of the principles contained in the principles of good governance. In fiqh siyasah, it is stated that the principle of good governance must be realized in the state administration system, namely the principle of trust, the principle of responsibility, the principle of benefit, and the principle of supervision.⁸⁵ Same with Al-Mawardi's opinion which states that the goals of leadership or governance in a country include: *first*, the realization of the benefit of the people. *second*, so that people's lives become safe and prosperous.⁸⁶

The formation of laws carried out by the government and the House of Representatives is one form of legal stipulation to regulate the structure of people's lives. In the process of making laws, drafters must consider human rights, such as the right to vote. The right to vote is a political right of the people guaranteed by the constitution. Granting the right to vote to the people who in certain circumstances, is a form of benefit.

The legal issue that will be analyzed using *maslahah mursalah* is about additional voter political rights. In this case, additional voters have been

⁸⁵ Ahmad Sukardja, *Hukum Tata Negara Dan Hukum Administrasi Negara Dalam Perspektif Fiqh Siyasah*, (Jakarta : Sinar Grafika, 2014), 242.

⁸⁶ Imam Al-Mawardi, *Hukum Tata Negara Dan Kepemimpinan Dalam Takaran Islam (Terjemah Bahasa Indonesia Dari Al-Ahkam As-Sulthaniyyah*, (Jakarta: Gema Insani Press, 2000), 14.

guaranteed to vote in the 2019 simultaneous general election. However, there are a few problems in the regulations governing additional voter ballots. Whereas the provision of ballots as referred to in Article 344 paragraph (2) only includes final voter list ballots, with additional 2% reserve ballots. This shows that the regulation could injure additional voters' political rights. Therefore, it is necessary to construct a law to protect the additional political rights of voters so that there are no shortages of ballots.

Ballot papers are not just plain paper. However, paper can lead a country to become a more democratic country. Because the principle of democracy is one person, one votes, one value. Thus, every community needs to get their rights without being hindered by limited ballot papers.

As the petition filed by two students regarding the potential for losing the right to vote for additional voters and stated in decision number 19 / PUU-XII / 2019. Whereas the decision of the constitutional court related to article 344 paragraph (2) which has the potential to eliminate the right to vote for additional voters can be overcome by using excess unused ballots from the nearest polling station.

With regard to the needs required in terms of an extension of the meaning of the TPS formation process which is not only based on permanent voters, but also based on additional voters list. In fact, the General Election Commission has regulated the possibility in Article 38 paragraph (10) PKPU about updating voter data which reads in Article 38 paragraph (10),

“In the event that the number of additional voters (DPTb) at a place exceeds the maximum number of voters at TPS, it can be formed a voting place for additional voters (DPTb).”

As well as in Article 220 and article 223 PKPU Number 3 of 2019, which reads

"In the event that there are new patients or families of patients who are hospitalized as referred to in paragraph (1) exceeding the highest number of voters in the TPS, a voting place for additional voters (DPTb) can be established at the hospital based on the recommendation of Bawaslu in the district / city."

"In the event that there are voters who are currently serving imprisonment in a correctional facility or state detention center as referred to in paragraph (1) exceeding the maximum number of voters in a TPS, a voting place for additional voters (DPTb) can be established in the correctional institution or state detention center based on the recommendation of the Bawaslu regency / city."

So, the General Election Commission in several articles has actually anticipated the formation of a voting place (TPS) based on DPTb. However, even though the General Election Commission has anticipated the establishment of a voting place based additional voters (DPTb), the link or relationship with the previous article relating to the provision of this logistics cannot yet be provided. In addition, in this article, the establishment of a special TPS is only formed for voters who are in hospitals or prisons. Meanwhile, the criteria for additional voters are not only voters who are in hospitals and social institutions, but also voters who are on duty, students,

etc.⁸⁷ and the additional voters are not evenly distributed in one or several specific places.

In establishing a law we can stick to the *maslahah mursalah* method. The existence of a special TPS for additional voters is a form of legal construction to minimize the shortage of ballots for additional voters so that it can be a benefit for additional voters to retain their voting rights.

Ulama agree that if *maslahat* already exists in *i'tibar syar'i* then that *maslahat* can be accepted and can be used as evidence in *berijtihad*. There are two forms referred to by *i'tibar syar'i*, namely *i'tibar* directly which is called *al-mu'tsirr* and *i'tibar* not directly which is called *al-mula'im*.⁸⁸

Al-Ghazali's opinion regarding the conditions that must be met that benefit must be *mula'imah* (in line with the act of *syara'*/ Islamic law), he stated that:

فكل مصلحة لا ترجع الى حفظ مقصود فهم من الكتاب والسنة والإجماع وكانت من المصالح الغريبة التي لا تلائم تصرفات الشرع فهي باطلة مطرحة.⁸⁹

"Every *maslahat* that does not return to maintain the meaning of Islamic law which can be understood from the Qur'an, sunnah and Ijma" is a strange *maslahat* (*gharibah*) which is not in line with the act of *syara* "then the *maslahat* is null and must be discarded."

⁸⁷ See article 36 ayat (3) Peraturan Komisi Pemilihan Umum Nomor 11 Tahun 2018 tentang Penyusunan Daftar Pemilih Di Dalam Negeri Dalam Penyelenggaraan Pemilihan Umum

⁸⁸ Amir Syarifuddin, *Ushul Fiqh* 2, (Jakarta : Kencana Prenada Media Group, 2014), 382.

⁸⁹ Al-Ghazali, Tahqiq : Hamzah bin Zahir hafidz, *Al-Mustasyfa Fi 'Ilm Al-Ushul*, (Madinah, 2008), 502-503.

وكل مصلحة رجعت الى حفظ مقصود شرعي علم كونه مقصودا بالكتاب والسنة والإجماع فليس خارجا من هذه اللأصول لكنه لا يسمى قياسا بل مصلحة مرسله⁹⁰.

"Every maslahat that has an impact on maintaining the purpose of syara which can be known from the Al-Qur'an, sunnah / hadith or ijma' and the maslahat does not come out of these arguments is called *maslahah mursalah*."

Syari'at does not explicitly explain how the technical implementation of the election of leaders. However, the *syari'at* gives implied values in the state or exercise leadership in accordance with *syari'at*. As in the verses of the Qur'an in Surah Ali Imron: 159 and Ash-Shuraa verse 38.

فَبِمَا رَحْمَةٍ مِنَ اللَّهِ لِنْتَ لَهُمْ وَلَوْ كُنْتَ فَظًّا غَلِيظَ الْقَلْبِ لَانْفَضُّوا مِنْ حَوْلِكَ فَاعْفُ عَنْهُمْ وَاسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ إِنَّ اللَّهَ يُحِبُّ الْمُتَوَكِّلِينَ

"It was by the mercy of Allah that thou wast lenient with them (O Muhammad), for if thou hadst been stern and fierce of heart they would have dispersed from round about thee. So pardon them and ask forgiveness for them and consult with them upon the conduct of affairs. And when thou art resolved, then put thy trust in Allah. Lo! Allah loveth those who put their trust (in Him)."

وَالَّذِينَ اسْتَجَابُوا لِرَبِّهِمْ وَأَقَامُوا الصَّلَاةَ وَأَمْْرُهُمْ شُورَى بَيْنَهُمْ وَمِمَّا رَزَقْنَاهُمْ يُنفِقُونَ

"And those who have responded to their Lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend."

⁹⁰ Al-Ghazali, Tahqiq : Hamzah bin Zahir hafidz, *Al-Mustasyfa Fi 'Ilm Al-Ushul*, (Madinah, 2008), 503.

Based on the above paragraph, it can be seen that in completing or deciding something should be done by deliberation. The Indonesian state which implements a democratic system with the existence of general elections is one way to appoint leaders and the people to participate in the process of leadership replacement. This means that the appointment of a leader by using the general election is applied to achieve a benefit by involving the people.

The concept of deliberation in a state is closely related to the concept of democracy. Although the scope of deliberation is broader than democracy, however, in resolving problems in the life of the community, nation and state, deliberation is something that must be enforced, both on matters of life that have no text, such as matters of appointing leaders. Thus, the existence of a special TPS for additional voters is not something against the *Al-Qur'an*, because a special TPS can be a means so that in the implementation of the election of leader voters who are registered in the category of additional voters they do not lose their right to vote. General election is the people's sovereignty as a form of representative democracy. Because the people or the *ummah* cannot fully rule and they feel the need to elect a leader among them together who are then represented to their representatives who will sit in government, both in the legislature and in the executive.

Based on the explanation above, according to the author, the fulfillment of political rights for additional voters can be done by establishing a special voting place for additional voters. This is in accordance with the benefit that concerns the

interests of the people and not personal interests, especially for additional voters. In addition, the urgency of a special voting place for additional voters is a legal construction that can be a place to minimize the community, especially additional voters, so as not to lose their right to vote. The urgency of a special voting place according to *maslahah mursalah* is still relevant and does not contradict the *syara'* (Al-Qur'an and Hadith). Refer to surah Ali Imron: 159 regarding the importance of deliberation. The special voting place can support the fulfillment of additional voters' political rights in the simultaneous general election to maintain democratic values and deliberation in electing leaders in a country.

CHAPTER IV

CLOSING

A. CONCLUSION

Based on the explanation above, the writer tries to conclude that:

1. There is still a need for policy formulations for proper services in order to protect the voting rights of DPTb voters which in fact have the potential to hinder the right to vote for DPTb voters on polling day due to the availability of ballots and TPS services which may not be served by considering the availability of budget and election organizer ability. On the basis of progressive legal thinking which states that the law must work in accordance with human conditions, it is better if the fulfillment of additional voter political rights must be considered. The fulfillment of additional voter political rights is a form of human rights, so new regulations or legal constructs are needed that can guarantee the justice, welfare and happiness of additional voters in simultaneous general elections and can minimize discrimination between additional voters and permanent voters.
2. *Mashlahah mursalah* is a method of determining law in Islam that prioritizes the benefit of the people. Whereas the fulfillment of political rights for additional voters can be done by establishing a

special voting place for additional voters. This is in accordance with the benefit that concerns the interests of the people and not personal interests, especially for additional voters. The existence of a special voting place for additional voters does not contradict the *Shari'a* (Al-Qur'an and Hadith). This can be a legal construction that can serve as a forum to minimize the public, especially additional voters, so as not to lose their right to vote.

B. SUGGESTION

1. There are additional voters with a large number and not evenly spread throughout the region. So it is necessary to make new rules that better guarantee additional voter political rights. The government must consider the urgency of having a special polling station for additional voters so that it can help minimize the loss of voting rights in simultaneous general elections.
2. The author give a suggestion to election organizers from central to village level to better understand how the technical implementation of elections and the new rules that exist in elections. So that it does not cause discrimination for additional voters because of the lack of understanding of the election organizers and can lead to a sense of justice, welfare, usefulness and happiness of the law in accordance with progressive law.

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No.	Day/ Date	Subject of Consultation	Signature
1.	3 th of December 2019	The title's thesis proposal	
2.	23 th of January 2020	Title and Background	
3.	29 th of January 2020	Title and Background	
4.	14 th of February 2020	Proposal	
5.	17 th of May 2020	Revision of Chapter I & II	
6.	19 th of May 2020	Chapter I & II accepted	
7.	26 th of May 2020	Review Chapter III	
8.	30 th of May 2020	Revision Chapter III and accepted	
9.	3 th of June 2020	Review chapter IV and accepted	
10.	4 th of June 2020	Abstract	
11.	5 th of June 2020	All the parts of the Thesis	

Malang, 5 June 2020

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