

Perspective of Fiqh towards the State Administration System: Review of the Legal Foundation of the Indonesian Democratic Reform Era

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Abstract

The dispute of thought between 'religion state' and 'secular state' should not happen if they are able to taper seated problems in the shari'ah proportionally. Shari'ah is often interpreted according to the interpretation of certain groups that tends to lead to fiqh or particular acts (al-ahkam al-juz'iyah) in the teaching of religion. Thus, the debate between the two sides are mostly on the implementation of shari'ah in every country. Yet the real substance of the shari'ah is a living organism that is able to loose any debatable issues in the religion for the benefit of ummah. In the context of our country in reform era, the substance of shari'ah had been manifested by implementing a democratic system based on a strong legal foundation for the benefit and welfare of the people. Therefore, some law institutions like Constitutional Court (MK) and super agency called KPK are established to guard the constitution and state budget.

Key words: shari'ah, state, democracy, constitution, politic.

1. Introduction

The discourse of the relationship between law and governmental authority often affect to the problem of sacred religion on the hand and the facts of the irreligious on the other hand. These discussions often arose since the early periods of the birth of Islam itself till now. It is understandable because of al-Qur'an and al-Hadith as the primary source of Islamic teachings have never talked in detail (*juz'i*) concerning the relation of the religion and the state. On the other hand, the text of the revelation often reveals the matter of the state's relations and the religion globally. The macro postulates that only provide global rules can be reflected, for example, in the moral messages about the importance of the enforcement of justice (*al-'adalah*), the equality principle before the law (*al-musawah*), democratization (*al-syura*), the enforcement of human rights and the freedom (*al-hurriyyah*), etc. In this situation, explanation of the text in accordance with the context of the continuous changes has the very strategic meaning that resulted on the implementation of the social welfare through the instrument of refined politics.

The dominance of macro propositions about the relationship between the state and the religion implies the elasticity of Islam in appreciating the development of the society that has continued to happen throughout history. The role of the rational became very central in connecting the religious texts with the contexts of the social reality that tends to be changeable. This reality shows the existence of an appropriateness that the problem of the religious relations and the state is always up-to-date-ly discussed by many people, especially in our age now that is marked by the development of knowledge of the government administration that is fast enough and dynamic. The key word is how the relationship between religion and state could show the values of justice, prosperity, welfare, and peace, in accordance with the destiny of the religious teaching (*maqashid al-shari'ah*) that is to spread the goodness and prevent the damage. In Islam, the issues of politics are in the domain of *fiqh mu'amalah* (the social law). In the catalog of *fiqh* (islamic law) got the maxim (the rules) saying that in principle the law of *mu'amalah* was *ibahah* (neutral). It means that the origin law from *fiqh mu'amalah* was to be able to be carried out (except for being gotten by the proposition that banned it).

The other rules that has the same meaning also mentioned that *fiqh mu'amalah* was basically free to be carried out until being known by the existence of the ban. By referring to the two rules of *fiqh* above the provisions concerning politics and the system of the government do not need the text proposition of the religion in details. The essential of the formation of a government in Islam is the goodness (*mashlahah*) that was presented verbally in the form of the general proposition (*kulli*) that is also reflected in the form of general principle in the various moral calls. Whereas in the operational details, Islam is very accommodative and compatible with the development of science, including knowledge of government administration. Basically, the political law needs to be returned in the context of its relevance with the spirit of the change and the development of the law of government administration. Whereas the religious proposition that should become references is the general principles in the religious teaching that the estuary is how the provisions of the political law could reflect the values of ethics and moral in the middle of the life of humankind.

2. Islamic Political Experience

Political experience of Muslims traveled with full diversity of patterns and forms of government according to the level of society and knowledge of constitutional law. In the *Rasulullah* period (when he is alive), the discourse of the relationship between religion and state did not yet come to the forefront. In fact, he himself handled the problems of the state with the revelation guidance. The *Makkah* phase that was undergone by *Rasulullah PUH* for 13 years did not yet touch the problem of the religious relations and the state because in this period the focus of the religious teaching was focused on the consolidation of the belief and the foundations of the other religious teaching. Just in the *Medina* phase the discourse of the religious relations and the state began to emerge to the surface, especially when the Islam community had contacted with the other community like Jewish and Christian for ten years. This discourse thus could be handled by *Rasulullah PUH* without any debate in Islam community. At that time, the authority of *Rasulullah PUH* could tie all Muslims community as they trusted that apart from becoming their leader he was also as a messenger who was given the revelation to lead them. His position as a Prophet and the messenger gave the authority to him to govern as well as oblige the followers to follow his teachings.

After *Rasulullah PUH* died, the discourse of the country's leadership began to emerge and the dynamics of knowledge of government administration continued to move on to respond to the mutual relationship between the state and the religion with firmly referred to the text of the revelation that partly indeed was still potentially interpreted. Before the *Rasulullah PUH*'s death body was buried the political debate in the *Thaqifah Bani Sa'idah* hall happened. The debate was about who will replace him as a caliph. This dispute then created the monumental decision so-called the principles of *syura* (conference) in the history of Islamic government administration. This was marked with the election of Abu Bakar As-Shiddiq RA as the first caliph. Abu Bakar who was supported by the *Muhajirin* (immigrant) fortification overcame the other candidate from the *Anshar* fortification through the tough debate.¹

In the era of the Friend's (*sahabah*) dignitary the government's system that was agreed is *Khilafah* (caliph) by appointing a leader that afterwards is acknowledged as the Caliph who is assigned to continue the struggle of the Prophet Muhammad. After Abu Bakar RA died, the position of the Caliph was replaced in succession by the Friend (*sahabah*) Umar bin al-Khatthab RA, Uthman bin Affan RA, and Ali bin Abi Thalib RA. In this period of caliph (*khilafah*), the problem of the government, including leadership succession, was decided democratically through the mechanism of the conference. Nevertheless, the atmosphere of democracy in this era started to be questioned since the beginning of the administration of Uthman bin Affan RA and then continued in the period of Ali bin Abi Thalib RA administration. In this period the competition to gain the power began to be proceeding violent and even headed in the interest's conflict and the civil war.

The election of Uthman in fact also through the mechanism of democracy. Umar bin al-Khatthab before passed away appointed six people to hold a meeting to assign his replacement. This was carried out to avoid the occurrence of the chaos and the dispute in the power transition. Then Utsman bin Affan RA was chosen. But the six people who had been appointed were still having the feeling of dissatisfaction that caused sharp frictions amongst the Friend (*sahabah*). After Utsman was killed resulting from the dissatisfaction, the power transition became increasingly bloody. His successor, Ali bin Abi Talib RA was thought increasingly moved further away from the conduct of democracy that had been applied earlier.

¹ Abu Yasid (Editor), *Fiqh Today, Fikih Politik*, p. viii

The atmosphere of democracy was increasingly drop, or even completely disappeared in the era of post *khilafah* (caliph) that practiced the monarchy system (*mamlakah*). The Bani Umayyah kingdom that governed for almost one age (approximately 90 years) began to apply the monarchy system or the hereditary kingdom. Likewise in the following dynasty, Bani Abbasiyah, the rotation of leadership was carried out for generations. The administration of Abbasiyah dynasty took place for quite a long time in time extension around five centuries (750 - 1258). In the following periods the monarchy system was still continuing to colour the Islamic government till the 19th century. That was marked with the fall of the Islamic kingdom called *Turkey Uthmani*.²

Since this age the imperialism and west colonialism began to enter the territory and the centre of Islam authority. The rumours of *nation state* began to be rolled by several thinkers and the leaders of the religion. This situation demanded the thinkers of Islam to reformulate the system of government administration in accordance with the challenge that will deal with. A democratic system that once existed in the period of *khilafah rasyidah* (caliph) was reviewed again and then transformed in the form of the fiqh books.

The discourse of state and religion was increasingly fruitful and had its momentum in this era. The state's discourse in the middle of multi-ethnic, multi-race, multicultural, and even the multi-religion society encouraged several group to formulate a new concept of government administration in accordance with the spirit of change. Unexpectedly, many theories relating to the relationship between state and religion were exposed by the experts of religious studies. Among the theories are the theory of the religious state, the theory of the secular state, and the theory of symbiotic that was the combination both of them. The last mentioned theory is thought to be relevant enough to be applied in the context of the nation state that is full of the diversity

The occurrence of the process of the government's system like portrayed above was actually something that certainly and understandable, because, the government's system in Islam is categorized as *wasilah* (the media or the mediator), not *ghayah* (the aim). However *ghayah* was meant as the enforcement of justice for the people evenly so that they could live prosperous and peaceful. Accordingly, it makes sense that in the text of revelation, the government's system was not discussed explicitly and in details, it was discussed in a macro and universal manner instead.

Caused by the absence of explicit concept about political issues and the government in the text of revelation, the technical regulation was handed over to the Muslims *ummah* by referring to the universal propositions or various texts in Al-Quran and Al-Hadith that was *kulli* (macro) or *ijmali* (global). In other words, a set of principle of ethics and moral in displaying the country and the government was sufficient to become theological-philosophical base in the political life. Essentially, the theological-philosophical base was a conviction towards the character of Islam that presented its teaching completely in all aspects of the life. Conceptually Islam did not acknowledge the separation between the religion and the state. In fact, it considered that the state in its essence was the integral part or the expansion of Islam itself. From this point of view, then emerged an idiom, *al-islamu din wa dawlah* (Islam is the religion at the same time the state).

3. Law and Authority of the Government

The spirit of Islamic canon law in carrying out the Lord's laws for the prosperous of humankind is actually more than just the endless discourse of the religious and state country. That most important is how the noble values of the religious teaching could be appreciated maximally in daily life for the sake of the nation and the country. In fact, the instrument of the state was also really needed for these interests to equip the awareness of the people in the religious affairs. In connection with this matter, the Caliph Othman once saying: "Allah used the authority of the government to handle the issues that could not be overcome directly by al-Qur'an".³

From the statement above, it could be highlighted that the formalization and liberalization of the religion could exist hand in hand as long as having a purpose to maintain *maqashid al-shari'ah*, that is to apply the noble aim of the Islamic canon law (shari'ah) in spreading out the people prosperity and eroding the poverty (*jalb al-mashalih wadar'u al-mafasid*).

² Ibid, p. ix

³ Jamal al-Din 'Athiyah, *Nahwa Taf'il Maqashid al-Syari'ah*, p. 50.

The existence of the Islamic canon law (*shari'ah*) like was portrayed above had the meaning 'released from the shackle'. Indeed, the Islamic canon law is a form of mechanism that contains the transcendent faith system. Practically, the Lord has revealed the texts of the holy Quran as the rule equipment. The text of the revelation is believed to be able to overcome all the problems of the life of humankind. Unfortunately, the problem that emerged is that the completed version of the *shari'ah* is not in its detailed form that can handle each case of social life. On the other hand, the text of the revelation is present in a very simple and limited quantity that can not solve the continuous problems that are faced by Muslim community on earth.

The core of the Islamic canon law that implemented the text of the revelation has a purpose to discharge from the bind of the *jahiliyah* culture that tended to deny elements of equality in the social life. Because of this, the provisions of the Islamic canon law in Islam valued the morality and the values of humanity. This is different from the positivism in the west legal philosophy that puts the provisions of the law and morality as two different matters and did not have the connection to one another. In the Islamic canon law, the provisions of the law and morality are two similar matters and could not be separated to one another. An idiom relating to this matter is "law without morality was an offender, while morality without the law was utopia". Anyone who better understood the law but did not study *tashawwuf* (moral) then he is called *fasiq*. On the other hand, anyone studied *tashawwuf* but did not understand the law then he becomes *zindiq*.⁴

As a form of method and the mechanism of the rule, the Islamic canon law (*shari'ah*) was the movement exceeded each text and always compatible with any form of changes. The Islamic canon law is the main motivator in the dynamism of the community that continuously grows fast. The Islamic canon law is the mechanism of the dialogue between the text of the holy teaching and the social development. Therefore, the core of the Islamic canon law always up-to-date every time as *shari'ah* itself has its own way in up dating every single change happened in the community

Some characteristics of the foundation of Islamic canon law (*shari'ah*) are:

1. Islamic canon law is a method that aims to the progress and always creates laws without freezing the law itself. The Islamic canon law is a spirit to create new rules, carries out reforms and accurate interpretations.⁵
2. Islamic canon law is dynamic steps that always guide humankind to the true aims and the noble orientations so that they are not trapped in the misleading textual.⁶
3. The valid view in the application of the Islamic canon law is the exact understanding towards the Islamic canon law itself. It is a method as well as a motivator. Therefore, the function of the Islamic canon law is to implement the method, to protect the spirit, and to enforce the motive motor for the sake of the human prosperity. In other words, methodology is used in deciding the law; spirit of the teaching might not be ignored in appreciating the provisions of the text; and in applying the teaching, the aspect of the motivator might not be set aside.⁷

The application of the Islamic canon law (*shari'ah*) at its substantive meaning is the dispersion of the Lord's blessing to all humankind. The meanings of the blessing are an effort to ease humankind, to protect the interests of the public, to give the balance between rights and the obligation, to do manifestation to observe the current issues and not to give *burden* to humankind.

Another meaning of the blessing (*rahmat*) is an effort to form each individual in order to be able to lead himself, strengthen his way of life and bring about the shape of the identity without making the life more complicated. Furthermore, the blessing has a meaning the shape of the life of harmony where the majority respects and protects the minority, in fact, both of them are able to develop the full of the understanding life as well as develop the conducive co-operation so that the individual and collective prosperity can be applied together.⁸

In the political point of view, the Islamic canon law (*shari'ah*) has a pretension to releasing the country's shackle. Meaning that evil, hasty, and misconduct must be eradicated in the context of life as a country.

⁴ Abu Yasid (Editor), *Fiqh Today, Fiqh Tasawuf*, p. ix.

⁵ Muhammad Sa'id al-Asymawi, *Ushul al-Syari'ah*, p. 212.

⁶ Ibid

⁷ Ibid

⁸ Ibid, p. 214.

As a method and a mechanism of the rule, the Islamic canon law always gives space to carry out the dialogue between the text of the teaching and the context of the social life. Its main purpose is how an implementation of the government administration could increase the justice and the people prosperity. Paractically, the involvement of the country will facilitate the process of dialogue because of the existence of the representativeness of the leader and the ruler as the representation of the people. Certainly, the principle of the representativeness is carried out in accordance with the fixed legal action that becomes the religious proposition, like the application of the conference (*al-musyawah*), the enforcement of the principle of the equality, justice, human rights, etc.

4. Government for the People

The principle of government from the people and for the people often referred to the term of democracy. In the Islamic history, the democratic term was not well-known widely. They knew better another term like the freedom (*al-hurriyyah*) that was actually the main pillar of democracy that was inherited since the Prophet's Muhammad PUH era. Including in the category of *al-hurriyyah* or freedom is the freedom to choose the leader, to give opinion, to criticize the ruler as well as freedom to manage the country collectively, beside that, Islam is also known by the term of *al-syura* (the conference). The understanding of *al-syura* is not only hold a meeting, but shows opinions from various expertises in their own field. Ask for the opinion or look for the truth collectively is one of the principles in democracy that has been practiced by most nations in the world recently. In Islam, conducting meeting to achieve the truth and to reach the collective deal is highly recommended.

Therefore, the essential of democracy had actually been practiced by Islam since long time ago by using another terminology called *al-syura*. Apart from the authority of piety that becomes the main task, Rasulullah PUH has been the leading figure who is democratic in various matters. Moreover, when he came up with a case that did not have the revelation support he remained in the democratic stand by adopting the opinion of his friends (*sahabah*) until receiving the directive stipulation from Allah PUH. This could be the first democratic practice that happened in the Arabia Peninsula right in the middle of the paternalistic desert community who still valued the social status, and non-egalitarian.

One of examples that showed that Rasulullah PUH was a democrat was when he was asked by Arabian ethnic groups to become the civil ruler (non- religion) apart from his status as the holder of the authority of the religion. He took loyal statement to people who wanted to follow his authority as a technique to receive the legitimation. This loyal statement was known in the Islam history as *Bai'ah al-A'qabah*. From this point, Muslim scholars have stressed that the origin of the power is on the hands of the people. Because of that the authority might not be forced without having the willingness from the heart of the people. The willingness statement was stated in the form of the "loyal statement" or *bai'at*.⁹ Based on this principle, the Islamic teaching refused the coup or seized the legitimated power unconstitutionally, because the coup was the form of the unilateral action. Whereas the legitimating of the power must be achieved from the people willingly without any force. After Rasulullah PUH migrated to Medina, he appointed the Ethiopian black slave named Bilal to declaim *adzan* or the call for performing prayers. This was a prestigious position for a black slave in the honorable Arabian community.

When he formed the first state in Islam, namely the multi-Medina state religion, he does not use the holy quran as the constitution of Medina, because the Qur'an is only applicable for those who believed in, namely Muslims. He set the Charter of Medina by agreement with the Jewish people as the state constitution of Medina. At this Medina states period he introduced the concept of the nation (*al-ummah*) as a single unit Medina citizens regardless of ethnic origin. Prophet Muhammad established this Medina state was based on a social contract (*al 'aqd al ijtima'i*) between the Muslims and the Jews, Christians, and the Arabian from the Pagan tribe who resided in Medina. Medina Charter contained principles of good interaction amongst the religion devotees, helping each other against an enemy that attacked the Medina state, upheld justice and defended the persecuted, and advised each other and respected for religious freedom. During the Battle of Badr, the first war in the history of Islam between the Muslims and the Arabians from the Pagan tribe, the Prophet Muhammad took his Friends' (*Sahabah*) opinion in formulating the accurate war strategy.¹⁰ These were concrete evidence that the Prophet Muhammad applied democracy in implementing democracy and the establishment of state governance.

⁹ Munawir Syadzali, *Islam dan Tata Negara*, p. 9

¹⁰ Ibid, p. 17

The long journey of democracy since the early Islamic period until now has been incised internal and external dynamics according to the level of community development and knowledge of government administration. In response to the wave of democratic discourse that continued to roll, the view of the Islamic Ummah in general split into three schools of thought, namely:

a. Islamic Traditionalism

This school generally rejects the democratic system because it contains the sovereignty of people (*siyadah al-umma*) and negate the sovereignty of God. This school is initiated by Sayyid Qutb, the Egyptian thinker, by developing the concept of *Tawheed "Hakimiyyah"* which means that acceptance is only God's laws are to be applied in the life of the society, nation and state.¹¹

While al-Mawdudi from Pakistan tried to offer the term "theo-democracy", according to him, in countries that have implemented the Islamic Shari'ah received the sovereignty of the Lord and the sovereignty of the people, though the sovereignty of people was limited only in the context of state administration and administrative affairs and other matters that are not found in the Islamic canon law (Shari'ah).¹² In line with Al-Mawdudi, Dhiyauddin Rais believed that in Islam got the sovereignty of the people and the sovereignty of the Islamic canon law (*shari'ah*) as well. In other words, the government system in Islam can be said as humunis democratic system, universal, religious, moral, material and spiritual.¹³

Muslim clerics and muslim intellectuals who reject the notion that democracy is not the same as *al-shura* in Islam distinguished between consultation (*musyawarah*) and democracy. Although denotative meaning of *al-shura* and democracy were the same, but the meaning of both was Different connotations. Both of them have the meaning of denotation of the public's participation in resolving problems of politics. While in the meaning of connotation, democracy has the meaning that the last sovereignty is on the hands of the people, whereas in *al-syura* the last sovereignty is on the hands of the Lord who is united in the authority of the holy text that is revealed.

This conservative school has an assumption that democracy suffers because of the limitations of the human mind, while *al-shura* is not so because it always tries to address constitutional issues, legal, social and economics, as was established in the *Shari'ah*.¹⁴ In connection with this, Adnan Ali Ridha al-Nahwi wrote a book entitled *al-Syura la al-dhimuqrathiyah* (the conference is not a democracy).

b. Islamic Modernism

This school generally accepts the democratic system but with some adjustments. According to this group, organizational democracy did not have a problem, but philosophically he still leaves a number of wedge issues. It said that the problem remains because the democratic system is based on secularism, while Islam is a religion based on divine values. This school expressed its agreement to the democratic system in response to the western impression, that the Islamic movement as if the anti-democracy and peace.

Muslim clerics and muslim intellectuals who support the idea of democracy assumes that the democratic system is a system of majority rule that applies the method of deliberation in decision making. They equate the concept of democracy with the concept of *al-shura*, which is found in Sura *al-Shura*: 38 and Surah *Ali 'Imran*: 159 and the Prophet Muhammad's own practices in managing the state and the government. Fazlul Rahman added this argument with the process of deliberation that occurs in *Thaqifah* hall meeting in Bani Sa'idah immediately after the prophet died. At that time Abu Bakr who was elected as the first caliph addressed his speech whose contents receive a mandate from the people to carry out *al-Qur'an* and *al-Sunnah*. If during carrying out this mandate met with the hope of the people, he must be maintained. On the other hand, if doing the fatal mistake then he must be dropped off.¹⁵

¹¹ Ahmad Mousalli, *al-Ushuliyah al-Islamiyyah: Dirasah fi al-Khithab al-Aydiyuluji wa al-Siyasi 'Ind Sayyid Quthb*, p. 146 – 148 .

¹² Abu al-A'la al-Maududi, *Islamic Law and Constitution*, p. 147-148.

¹³ Muhammad Dhiyauddin Rais, *al-Nazhariyyat al-Siyasiyyah al-Islamiyyah*, p. 312

¹⁴ Al-Thabari, *Jami' al-Bayan fi Ta'wil Ayi Al-Qur'an*, col. IV, p. 47.

¹⁵ Fazlur Rahman, *Islam and the State*, in *Islam dan Masalah Kenegaraan: Studi tentang Percaturan dalam Konstituante* by Ahmad Syafi'i Ma'arif, p. 50.

Yusuf al-Qardlawi is one of thinkers who accepts the democratic system because he thought the substance of democracy in line with Islamic principles. Al-Qardlawi's opinion is based on an understanding of democracy in general, namely the process of the general election that involves a lot of people to lift someone who has the right to lead and handle their affairs. This system includes a general election, asking the opinion of the people, affirmed the decision of the majority, minority rights, freedom of the press, giving opinion and so forth.¹⁶ According to this school, there are similarities and differences between secular democracy and Islamic political concept of sovereignty issues. This school then agreed the view of Hasan al-Banna that although democracy is not from Islam, but it is a political system that is closer to Islam.

Although this school generally accepts the democratic system, but many of the followers are less critically look at the essence of people sovereignty issues and the relevance of democracy to the values underlying it, namely equality, freedom and pluralism. Indeed, the Islamic teachings are compatible with the universal values.¹⁷ But at the level of implementation, it contains problematic that is not free from the existence of Islam as a religion that has particular and universal teachings. As a religion, Islam would have their own limitations that differ from Western values that are based on the secularism and the liberalism.

c. Islamic Liberalism

This school can accept the presence of democracy without any notes. Yet in both philosophically and institutionally they support supremacy of democracy in the practice of good governance. According to this school, the presence of democracy is a necessity and must be fully accepted. As some religious aspects that are considered incompatible with democracy should be re-interpreted and adapted to the principles of democracy.¹⁸

In conclusion, democracy in Islam has been practiced since the early days. This can be proven that the Prophet Muhammad has been applying the principles of consultation (*al-musyawah*) in the implementation of state and government in the city of Yathrib. This democratic practice was continued by his successor Caliph, including in the process of change of leadership from one caliph to another. However, it is undeniable that the implementation of democracy in the Islamic system had experienced the different levels of intensity from one to another empire, and even experienced the ups and downs from time to time. Democratic discourse has even experienced to drown during an Islamic government run by hereditary monarchy system within a period of centuries.

The momentum of democracy re-emerged after the collapse of the last Islamic empire, the Turkish Othman Empire at the 19th century. Since then, the discourse of democracy was re-echoed by the Muslim Ummah in accordance with the growing of the nation states in the fragment of a multicultural population. Many Muslims had reacted with their own different views because Islam was too late in applying the democratic systems. This condition was increased by the diversity of the form of the states resulting from the progress of knowledge of government administration in *fiqh* itself. Therefore, it not surprising that some Muslims thought that democracy is a western product whose the presence should be modified according to Islamic principles. Others take the contrary, democracy is synonymous with *al-shura* principle in the Qur'an that we should follow as it is.

5. Indonesian Democracy in Reform Era

After the fall of the New Order regime in 1998, Indonesia's politic turns to be very democratic and free. Even some political observers identified Indonesia as the most democratic country after the United States and India. Such assessment is indeed true because the faucet of democracy had just widely opened and no longer castrated like in the New Order regime. As we all know that the mass media in the new order regime was under control of the regime and has no freedom to express opinions. The mass media was always suppressed and dictated by the regime.

Such conditions are totally different with the current reform era that promotes transparency and public accountability. Indonesia's democracy reform era is supported by improving both political instruments related to the direct general election system with a multi-party, the formation of ad hoc institution like anti-corruption agency (KPK) and constitutional court (MK).

¹⁶ Dr. Yusuf al-Qardlawi, *Min Fiqh al-Dawlah fi al-Islam*, p. 183 -184.

¹⁷ Masykuri Abdillah, *Responses of Indonesians Muslim Intellectuals to the Concept of Democracy 1966-1993*, p. 79.

¹⁸ Abu Yasid et.al., *Fiqh Politik*, p. 124.

In terms of democracy, Indonesia is no longer adhering to the new order era of the party system which only limited to three political parties, Golkar, PPP and PDIP. The restrictions are intended to control and dictate the existence of the party. In contrast, in this era, a multi-party system is applied to give the public ample opportunity to establish the institution of political parties as the media to hold aspirations. As the result, the first election in the reform era was held in 1999 participated by 44 political parties. The election was affected by the euphoric of freedom atmosphere which was previously silenced and the election results were always engineered by the authorities. After the euphoria, the rule of following election was tightened with the aim that the presence of parties can be more authoritative in accordance with the vote threshold standard.

Democracy in this reform era is built upon foundation of constitutional law. Hence, it is necessary to set the constitutional institutions to implement the intended purpose called the Constitutional Court (MK). Constitutionally, the Constitutional Court is established under the mandate of the Constitution of the Republic of Indonesia Year 1945 which was amended in the reform era.¹⁹ To actualize the Constitution of the Republic of Indonesia Year 1945 then Act No. 24 Year 2003 regarding the Constitutional Court was produced.²⁰ The presence of MK is one of the important parts in the amendments of the Constitution that were previously considered as sacred by the New Order regime. The MK is established as a state institution dealing with certain matters in the state administration. The main purpose is to guard the constitution implemented in a responsible manner in accordance with the will of the people and democratic ideals.

In this regard the MK has the task of guarding the principal Act produced by legislative and executive so as not to conflict with the spirit of the Constitution has been agreed. Therefore, since its establishment eight years ago up until present MK often nullifying the unfair constitutions that are not in harmony with the Constitution of 1945. Apart from constitutional issues, the state men also considered the need of legislation and law enforcement in the real sense. Mega corruption scandal during the administration of the new order is often covered up, but in this era needed to be resolved in accordance with democratic spirit which demands for transparency in the law enforcement. Because of this, an extraordinary institution was established called the Corruption Eradication Commission (KPK). KPK's presence is intended to handle the big cases that were previously difficult to be touched by law enforcement agencies like police and prosecutors.

Likewise MK, the existence of KPK is independent enough compared with the other law enforcement agencies that are already exist. In the Article 3 Act No. 30 year 2002 stated that the KPK is a state agency that is free and independent from any authority in performing its duties.²¹ However, the difference with the MK is that, the KPK is not expected as a permanent form of law enforcement agencies. Instead, the Commission established under certain conditions in which law enforcement agencies have so far not been able to overcome the major legal cases. Once police and prosecutors are able to be independent and the rule of law is no longer messy as current situations the existence of KPK institutions no need to be extended. KPK has a quite extensive duty and authority. Besides having enforcement and prevention of corruption, the Commission also supervise and coordinate with other law enforcement agencies as well as monitoring of the implementation of state government.²² The purpose of supervision and monitoring is to encouraging law enforcement agencies that have been permanently established like prosecutors and police in order to be independent institutions.

A lot of state efforts undertaken together with people in the current reform era has changed the face of the state system in the republic. Democratic system which had been the ruler tool to legitimize its political will, it is really a representation of the people according to the substance of democracy itself. It is undeniable that in the real practice there are deviations in the field of democracy like money politics in the event of regional elections, legislative elections and the Election of President and Vice President. However, the people of Indonesia considered such conditions as a transition en route to the real democracy. Looking ahead, with the existing democratic order, Indonesia is expected to become the prominent legal state with the firm instruments of democracy so as to prosper the people. Therefore, legal basis that can display the implementation of a healthy democracy is absolutely needed so that the constitutional system of this republic is able to appreciate the implications of community development in almost all aspects of life and national as well as state lines.

¹⁹ See *Undang-undang Dasar Negara Republik Indonesia Tahun 1945*, pasal 7A, 7B, 20, 21, 24, 24C, dan 25.

²⁰ See *Undang-Undang Republik Indonesia Nomor 24 Tahun 2003*, tentang Mahkamah Konstitusi.

²¹ *Undang-Undang Republik Indonesia Nomor 30 Tahun 2002*, tentang Komisi Pemberantasan Tindak Pidana Korupsi, bab I, pasal 3.

²² *Undang-Undang Republik Indonesia Nomor 30 Tahun 2002* tentang Komisi Pemberantasan Tindak Pidana Korupsi, bab II, pasal 6.

6. Conclusion

In the view of fiqh, the instrument of state is needed for the benefit of the teachings of the Shari'ah into daily life. The spirit of shariah is the application of devine law for the realization of welfare of mankind in their everyday lives. Such purposes may exceed the actual partition of the state of religious discourse vis-à-vis the secular state. The most important principle in Islam according to *maqashid al-Shari'ah* is how the noble values of religious teachings can be appreciated fully in the life of the nation. In this context, Islam deliberately set the issue of state not in detail in the form of particular law (*al-hukm al-juz'i*). In contrast, the Qur'an simply raises the general principles in the form of propositions (*al-hukm al-kulli*) so the virtuous values can be absorbed by the mankind in every period corresponding to the level of the development of society and constitutional law.

According to fiqh, the concept of people's representation in decision-making is required. Therefore, the ins and outs of democracy have been widely practiced since the early period of Islam, although the terminology used is not democracy, but it resembles to *al-shura* (consultative) and *al-hurriyyah* (freedom). Prophet Muhammad is a democratic figure in many ways. When there are some cases have no revelation basis, he adopted the democratic opinion of his companions until he obtained the decree of Allah SAW. The long journey of democracy since the early Islamic period to the present has chalked many internal and external dynamics in line with the people development and governmental administrative sciences. The dynamics are increasingly finding its momentum in the era of nation-states with diverse segments of the population and multicultural.

In the context of Indonesia, in this reform era a democratic system is rapidly developing in a positive direction after it had been misused by previous regime to silence the people's aspirations. Indonesia's democracy reform era is framed by improving political instrument relating to the direct general election system with the multi-party. However, the leaders of the state realize that democracy must be built on a strong legal foundation as the constitutional basis. It is necessary to guard the constitutional institutions to implement the intended purposes. In this context, a new institution is born called the Constitutional Court (MK). Constitutionally, the Court is established under the mandate of the Constitution of the Republic of Indonesia Year 1945 which had been amended in this reform era. In addition, the democratic process must hand in hand with transparency in the field of law enforcement. Therefore, another law institution is established called the Corruption Eradication Commission (KPK) to handle the big cases that were previously contaminated by the legal mafia practices that also involve the authorities.

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