

# THE ISLAMIC PERSPECTIVE OF CHANGES IN GOVERNMENT ADMINISTRATION AND LAW

## With Special Reference to the Development of Legal Political System in Post-Reformasi Indonesia

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**Abstract:** The debate surrounding theocracy and secularism among Indonesian Muslims has been recorded since pre-independence period in early part of the 20<sup>th</sup> Century until now. This article is an effort to examine the compatibility of Islam with the idea of democracy and the inclusion of *shari'ah* in it. The focus is on government administration and law. Using the approach of Islamic law perspective, the writer argues that the dichotomy between theocracy and secularism does not apply to Indonesia because he treats *shari'ah* as merely a philosophical reference. *Shari'ah* evolves as a living organism that transcends any debatable issues for benefit of *ummah*. In contemporary Indonesian political context, the substance of *shari'ah* had been manifested by implementing a democratic system based on a legal foundation for the benefit and welfare of *ummah*. Therefore, some political-legal institutions like Constitutional Court and Anti-Corruption Commission are considered as part of *shari'ah* implementation although they are not textually sanctioned by *shari'ah*.

**Keywords:** *shari'ah*, state, government administration, law, *ummah*.

## Introduction

The relationship between religion and state is always a big issue in Islam. It is understandable because of the Qur'an and Hadith as the primary sources of Islamic teachings have never talked in detail (*juz'ī*)

concerning the relationship between religion and the state.<sup>1</sup> On the other hand, the text of the revelation reveals the matter in general statements. As a result, the macro postulates should only produce general principles, namely the enforcement of justice (*al-'adalah*), equality before the law (*al-musawāh*), consultation (*al-shūrā*), the enforcement of human rights, and freedom (*al-hurriyyah*). In this situation, the explanation of religious texts in accordance with the context of the continuous changes is inevitable that results in the implementation of the social welfare through the instrument of refined politics.

These macro propositions about the relationship between the state and religion may imply to the flexibility of Islam in appreciating the development of the Muslim society throughout history. The role of the reason and human intellect becomes very central in connecting the religious texts with the contexts of the ever changing social reality. This paper examines the Islamic perspective of changes in the relationship between religion and the state, especially in accordance with the development of government administration knowledge and law. The key issue is how the relationship between religion and the state could show the values of justice, prosperity, welfare, and peace, in line with the goals of the religious teaching (*maqāṣid al-shari'ah*) that is to spread the goodness and prevent the damage.<sup>2</sup>

In Islam, the issues of politics are in the domain of *fiqh al-mu'amalah* (contract law). There is a maxim in Islamic Jurisprudence concerning the flexibility of contract law in Islam saying that the basic principle of *mu'amalah* is *ibāhah* (neutral). It means that the original law stemming from *fiqh al-mu'amalah* is a possibility for execution (except if specified otherwise). Another rule that has the same meaning is that *fiqh al-mu'amalah* is basically executable until there is a specified prohibition.

These two rules of *fiqh* above are potential foundation of the provisions concerning politics and the system of the government in Islam. The essential of the formation of a government in Islam is the welfare (*maslahah*) that is presented verbally in the form of the general

<sup>1</sup> Abdul Wahhab Khallaf in his book *Ilm Usul al-Fiqh* (Beirut: Dar al-Fikr, 1992) p. 17 only discovers about 15 verses in al-Qur'an on state and government issues.

<sup>2</sup> Al-Shatibi, *al-Muwafaqat fi Usul al-Abkam*, (np: Dar al-Rashad al-hadithah, nd) vol 2, p. 2-3

proposition (*kullī*), and is also reflected in the form of general principle in the various moral calls. In the operational details, Islam is very accommodative and compatible with the development of science, including science on politics and 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. It is in this context that the theory of state, government, and law needs to be discussed as a basic theoretical foundation of this paper.

### Theory of the State

At least there are two major theories in looking into the relationship of religion (the law) and state (power), namely theocracy and secularism. Theocracy said that the state in any condition could not be separated from the religion. And the religion could not also be separated from politics. Furthermore, according to this theory, all the efforts of a Muslim's thinking about moral and politics must have religious foundations. In other words, the state is political as well as religious agency.<sup>3</sup> The Jargon that was often raised by this theory was Islam is the religion at the same time the state (*al-islām dīn wa dawlah*).<sup>4</sup> Theocracy was championed by several leading figures like Abul A'la al-Maududi (Pakistan) and Hasan Al-Bannā as well as Sayyid Qutb of *al-Ikhwān al-Muslimūn* (Egypt).<sup>5</sup>

Theocracy as argued by those thinkers tried to maintain and implement *shari'ah* as well as to develop the Islamic system by comparing the current non-Islamic system. Sayyid Qutb, for instance, tried to base the reality on the Islamic foundation and stated that other ideologies were regarded as wrong and decadent. Furthermore, he believed that various problems that emerge today were result of people's reluctance to comprehensively apply Islamic teachings.<sup>6</sup> Supporters of theocracy believed that by applying the *shari'ah* all problems would be solved. In other words, in any condition the development of reality must formally refer to Islamic teachings.

<sup>3</sup> Abd. Salam, *Legitimasi Negara Islam: Problem Otoritas Syari'ah dan Politik Penguasa* (Jogjakarta: Fajar Pustaka Baru, 2003), p. x.

<sup>4</sup> Abdurrahman Wahid, "Indonesia's Mild Secularism." *SAIS Review*, 21:2, (2001), , p. 25

<sup>5</sup> Munawir Sjadjzali, *Islam dan Tata Negara* (Jakarta: UI Press, 1990), pp. 145-178

<sup>6</sup> *Ibid.*, p. 148

Because of its insistence to apply literal teaching of Islam, this movement then was branded as fundamentalism.<sup>7</sup>

Basically, theocracy which was endorsed by those Muslim fundamentalist thinkers was a form of government that was based on the sovereignty of God. Nevertheless, the form of the authority of God as conveyed in the Holy Scripture was far from clear. This fact gives opportunities to humankind to create the system of the government administration that agrees with the Holy Scripture's principles. Therefore, Islamic state is actually not in line with the concept of the theocracy that always exploits the name God yet no implementation. More precisely, an Islamic state should be called theodemocracy that combined the element of the deity (theocentric) and humanity as the caliph of the Lord (anthropocentric). In caliphate system, it is the caliph (humankind) with his rational judgment that interprets and undertakes the government's mission in a way that is in line with Islamic values.

Meanwhile, secularism was often regarded as the opponent of the theory of the religious state because state was to separate from all authorities of the religion. Historically, this theory originated from the experience of Western civilization during renaissance period. At that time, some teachings of Bible was considered contradictory to human intellect.<sup>8</sup>

The idea of the secularization then imported and spread out by several Muslim thinkers as a whole without looking at the history of the philosophical, theological, as well as sociological base of the idea. In Islamic history, Islam had not yet experienced the bitter experience of relations between the religion and the state or the conflict between the religion and science, like what happened in the Christian history. Therefore, it is unwise if the concept and the idea of the secularization were then adopted and applied in the Muslim communities who have had their own philosophy of life.

The idea of the secularism began to be voiced by Muslim thinkers in early 20<sup>th</sup> Century. There were two well-known figures of this idea; 'Alī 'Abd al-Rāziq in Egypt and Mustafa Kemal Attaturk in Turkey. While the former was mainly an intellectual, the latter was a military

<sup>7</sup> Moh. Nurhakim, *Islam, Tradisi, dan Reformasi: Pragmatisme Agama dalam Pemikiran Hasan Hanafi* (Malang: Bayumedia Publishing, 2003), p. 149.

<sup>8</sup> Adnan Armas, *Pengaruh Kristen - Orientalis terhadap Islam Liberal* (Jakarta: Gema Insani, 2003), p. 3.

general and then a political leader in Turkey. In his *Al-Islām wa Uṣūl al-Hukm*, al-Rāziq firmly did not agree that Muslims should establish *khilāfah Islāmiyah* (Islamic caliphate) or *dawlah Islāmiyah* (the Islamic state). Moreover, only a few caliphs were peacefully got the caliph position, whereas many were hereditary or a result of bloody armed campaigns.<sup>9</sup> In a part of his book, he clearly said that any statement from the Prophet relating to *imāmah*, *khilāfah*, or *bay'ah* is considered as the same as what Jesus Christ has said about the problem of Roman Emperor's right and the God's right.<sup>10</sup>

In line with al-Rāziq, Attaturk launched secularization campaign in Turkey. According to him, if religion was utilized to govern the community then it will always be utilized by a dictator as a tool to exploit or prosecute his people. Secularism would rescue the nation from the misfortune. As a president of Turkey after abolishing Ottoman caliphate Attaturk began to secularize Turkey in 1928 by removing the article 2 of Turkish constitutions that stated Islam as official religion in Turkey. Before, in 1924, *Shaykh al-Islam* position and Sharī'ah Ministry as well as the court of Islamic canon law were abolished. This process was aimed at removing the authority of *sharī'ah* and replaced it with the absolute sovereignty of the people. In 1937, the principle of the secularism was put into the Turkish constitution, since then officially Turkey became a secular country.<sup>11</sup>

Recently, the idea of the secularism has often been exploited to respond the fundamentalism which has aim to establish Islamic state. Supporters of secularism tend to use the European concepts that firmly stated the separation of religion from public sphere. However, secularism is opposed by many Muslim thinkers as it disregards the nature of Muslims countries. Muslims intellectuals with this inclination are now called liberal Muslims.<sup>12</sup> They certainly oppose the claim of fundamentalists that was firm with their stand to build an Islamic state. They left the religious tradition that was well-institutionalized and

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<sup>9</sup> Sjadzali, *Islam dan Tata Negara*, pp. 140-141

<sup>10</sup> Ali Abd al-Raziq, *Khilafah dan Pemerintahan dalam Islam* (Bandung: Pustaka, 1985), pp. 38-29.

<sup>11</sup> Adian Husaini and Nuim Hidayat, *Islam Liberal* (Jakarta: Gema Insani, 2004), p. 36.

<sup>12</sup> C. Kurzman, ed, 'Liberal Islam and its Islamic context'. *Liberal Islam: A source book*, (New York: Oxford University Press, 1998), pp. 3-28

embraced the foundations of secularism philosophy that flourished in European countries.

The debate between supporters of theocracy and secular state among Muslims fiercely happened in the issue of the application of *shari'ah*. While both agree that essentially the aim of *shari'ah* is to achieve social welfares it has been referred to the Holy Qur'an (34:15) by "a prosperous country with the blessings of God", the two camps have separate ways in getting into that goal. Therefore, Muslims' debate surrounding theocracy and secularism is more about formal issues instead of substantial one. The followers of theocracy believed that *shari'ah* must be applied literally in the framework of an Islamic state.<sup>13</sup> Meanwhile, the followers of secular theory regarded that while the principle of *shari'ah* must be upheld, it should not be literally interpreted and applied, but must be translated into its social context.<sup>14</sup>

### Law and Authority of the Government

The spirit of *shari'ah* with its ultimate goals to achieve prosperity for humankind is actually more than just the issue of Islam and politics. The most important is how the noble values of the religious teaching could be appreciated maximally in daily life in a given country. Surely, the goals of *shari'ah* are also goals of any given countries. Therefore, to achieve welfare and prosperity for people is not a profane issue, but also sacred one. In connection with this matter, the Caliph Uthman ibn Affan once said: "God used the authority of the government to handle the issues that could not be overcome directly by the Qur'an".<sup>15</sup> Consequently, the formalization or liberalization of the religion in this matter is not a big issue as long as the purpose is to achieve the ultimate goals of *shari'ah*.

The employment of principle of *shari'ah*, rather than detailed rules of *shari'ah* is understandable. The assumption that the revealed texts deals with all as aspects of human lives throughout history is simple

<sup>13</sup> Muhammad Ismail Yusanto, "Selamatkan Indonesia dengan Syariat Islam," in *Syariat Islam dalam Pandangan Muslim Liberal*, (Jakarta: Jaringan Islam Liberal and The Asia Foundation, 2003), pp. 139-172

<sup>14</sup> Muhammad Said al-Asy'mawi, 'Jalan Menuju Tuhan', in *Syariat Islam dalam Pandangan Muslim Liberal*, (Jakarta: Jaringan Islam Liberal and The Asia Foundation, 2003), pp. 1-17.

<sup>15</sup> Jamāl al-Dīn 'Afiyyah, *Nahwā Taf'īl Maqāṣid al-Shari'ah* (Damaskus: Dār al-Fikr, 2001), p. 50.

not true because 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 cannot solve the continuous problems that are faced by Muslim community on Earth.

The essence of *shari'ah* has a purpose to discharge human being from unjust *Jahiliyah* (ignorance). Because of this, the provisions of *shari'ah* valued the morality and the values of humanity. In *shari'ah*, the provisions of the law and morality are identical 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.”<sup>16</sup> This is different from 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.

Since *shari'ah* simply means just law, it exceeded any text and always compatible with any form of changes. *Shari'ah* is point of reference for ever growing Muslim the community. It is the mechanism of the dialogue between the revealed texts and social change. Therefore, the essence of *shari'ah* is always present and eternal as it always evolves updating every single change happened in the community.

Ashmawi, an Egyptian progressive Muslim states that *shari'ah* has essential characteristics as follows. First, *shari'ah* is a method that aims to progress and always creates laws without freezing the law itself. It is a spirit to create new rules, carries out reforms and accurate interpretations.<sup>17</sup> Second, *shari'ah* 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 interpretation.<sup>18</sup> Third, the valid view in the application of *shari'a* is the exact understanding towards *shari'ah*. It is a method as well as a stimulus. Therefore, the function of *shari'ah* 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 finding the law; spirit of the teaching might not be ignored in appreciating the provisions of the

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<sup>16</sup> Yasid, *Fiqh Today*, p. ix.

<sup>17</sup> Muhammad Sa'id al-Asymawi, *Nalar Kritis Syari'ah* (Yogyakarta: LKiS, 2004), p. 212.

<sup>18</sup> Ibid.

text; and in applying the teaching, the aspect of the motivator might not be set aside.<sup>19</sup>

The application of *shari'ah* at its substantive meaning is the dispersion of the God's blessing to all humankind. The meanings of the blessing are an effort to facilitate 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. It is also an effort to form each individual in order to be able to lead him/herself, strengthen his/her life and bring about the shape of the identity without making the life more complicated. Furthermore, it has a meaning in shaping 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 achieved.<sup>20</sup>

In the political point of view, *shari'ah* urges that evil, hasty, and misconduct must be eradicated in the context of life as a country. As a method and a mechanism of the rule, *shari'ah* always gives space to carry out the dialogue between revealed religious texts and the context of the social life. Its main purpose is how an implementation of the government administration could uphold the justice and improve people prosperity. Practically, 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 consultation principle (*al-mushararah*), the enforcement of the principle of the equality, justice, and recognition of human rights.

### Government for the People

Admittedly, the term of democracy was not well-known widely in Islamic history. Yet, Muslims knew better another term like freedom (*al-hurriyah*) since the Prophet's era. Including in the category of *al-hurriyah* is the freedom to choose the leader, to give opinion, to criticize the ruler as well as freedom to manage the country collectively, In

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid., p. 214.

addition, the term *al-shūrā* (consultation) is also practiced in early period of Islam. Consultation is not only to hold a meeting, but express personal opinions. Consultation to find solution collectively is one of the principles in democracy that has been practiced by most nations in the world recently. In Islam, conducting consultation to achieve the truth and to reach the collective deal is highly recommended. An institution proposed by al-Māwardī, a medieval Muslim scholar that emphasized the importance of consultation in political issues was *abl ḥall wa al-‘aqd*.<sup>21</sup> Therefore, certain elements of democratic values had actually been practiced by Islam since long time ago by using another terminology called *shūrā*. In addition, the Prophet has been democratic in various worldly affairs. Moreover, when he came up with a case in which the revelation is silent, he remained in the democratic stand by adopting the opinion of his companions until divine directive stipulation stated otherwise.

An example showing that the Prophet was a democrat was *Bay’at al-‘Aqabah*. It was when he was asked by Arabian ethnic groups to become the leader apart from his status as the Prophet and messenger of God. He took *bay’ah* from people who wanted to follow his authority as a technique to receive the legitimization.<sup>22</sup> From this point, some Muslim scholars have stressed that the origin of the power is from the people. Because of that the authority might not be forced without having the agreement from the people. The willingness statement was stated in the form of *bay’ah*.<sup>23</sup>

When he migrated to Medina as civil leader (*hakam*) in 622 AD, the Prophet tried to unite pluralistic Medina by devising a charter that was to be agreed by people of Medina; Arabs, Jews and Christians. This charter later is known as Medina Charter. In this Medina period he introduced the concept of the nation (*al-ummah*) as a single unit of Medina citizens regardless of ethnic and religious origin. This Medina state was based on a social contract (*al-‘aqd al-ijtima‘ī*) between Muslims, Jews, Christians, pagan Arabs who resided in Medina. Medina Charter contained principles that unified all Medina people. It required acting as unity and helping each other against enemies,

<sup>21</sup> Syadjali, *Islam dan Tata Negara*, p. 64

<sup>22</sup> Ira. M. Lapidus, *A History of Muslim Societies*, (Cambridge: Cambridge University Press, 2002), p. 23

<sup>23</sup> Syadjali, *Islam dan Tata Negara*, p. 9.

upholding justice and respecting religious freedom.<sup>24</sup> During the Battle of Badr, the first war in the history of Islam between the Muslims and the pagan Arabs from Mecca, the Prophet took his companions' opinion in formulating the accurate war strategy.<sup>25</sup> These were concrete evidence that the Prophet Muhammad applied principles of democracy in his lifetime as political leader in Medina.

In response to the continuous wave of democratization, the view of the Islamic *ummah* in general divided into at least three schools of thought, namely:

### ***Islamic Traditionalism***

This school generally rejects the democratic system because it negates the sovereignty of God. This school is initiated by Sayyid Qutb, the Egyptian thinker, by developing the concept of *Tamḥīd* 'Hakimiyah' which means that acceptance is only God's laws are to be applied in the life of the society, nation and state.<sup>26</sup>

While al-Mawdūdī from Pakistan offered the term "theodemocracy", according to him, in countries that have implemented the *shari'ah* received the sovereignty of God and the sovereignty of the people, though the sovereignty of people was limited only in the context of state administration and administrative affairs and matters which are not found in *shari'ah*.<sup>27</sup> In line with Al-Mawdūdī, Dhiyauddin Rais believed in the sovereignty of the people and the sovereignty of *shari'ah* as well. In other words, Islamic political system is humanistic, democratic, universal, religious, moral, material and spiritual.<sup>28</sup>

This school rejects the notion that democracy is identical with *shūra* (consultation). Although literal meaning of *shūra* and democracy were the same, but they are used in different usage. Both of them have the meaning of denotation of the public's participation in resolving problems of politics. While democracy means that sovereignty is on

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<sup>24</sup> Ibid., p. 10-15

<sup>25</sup> Ibid., p. 17.

<sup>26</sup> Ahmad Mouṣallī, *Al-Uṣūlīyah Al-Islāmiyah: Dirāsah fī al-Khiṭāb al-Aydlīyyī wa al-Siyāsī 'ind Sayyid Qutb* (Beirut: Dār al-Fikr, 1993), pp. 146-148.

<sup>27</sup> Abu al-'Alā al-Maudūdī, *Islamic Law and Constitution* (Lahore: Islamic Publication Ltd., 1960), pp. 147-148.

<sup>28</sup> Muhammad Dhiyauddin Rais, *Teori Politik Islam* (Jakarta: Gema Insani Press, 2001), p. 312.

the hands of the people, whereas *shūrā* means the sovereignty of God.<sup>29</sup>

This conservative school has an assumption that democracy is defective because of the limitations of the human mind, while *shūrā* always tries to address constitutional issues, legal, social and economics, as was established in the *shari'ah*.<sup>30</sup>

### ***Islamic Modernism***

This school generally accepts democratic system but with some adjustments. According to this group, philosophical foundation of democracy still leaves a number of unresolved issues. It said that the problem remains because the democratic system is based on secularism, while Islam is a religion based on divine values.<sup>31</sup> Muslim intellectuals who support the idea of democracy assume that 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 *shūrā*, which is found in the Qur'an (42: 38 and 3:159) 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 hall meeting immediately after the prophet died which ended with the appointment of Abū Bakr as the first caliph. After his appointment, Abū Bakr delivered his inaugural speech emphasizing that his mandate from Muslim people should carry out the teachings of the Qur'an and the Sunnah. If he found to have deviated from this mandate, he was gladly resigned from the position.<sup>32</sup>

Yūsūf al-Qaradāwī is another thinker who accepts the democratic system because he thought that the substance of democracy is in line with Islamic principles. Al-Qaradāwī's opinion is based on an general features of democracy, namely the election process to elect leader and handle their affairs. In addition, democracy also affirms the decision of the majority, protects minority rights, guarantees freedom of the press

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<sup>29</sup> 'Adnān 'Alī Rīdā al-Nahwī, *al-Shūrā la al-dīmūqrātiyah*, (Cairo: Dār al-Qalam, 2001).

<sup>30</sup> Al-Ṭabarī, *Jāmi' al-Bayān Ta'wīl Āyi al-Qur'ān* (Cairo: Muṣṭafā al-Bāb al-Halabī wa Awlādūh, 1968), p. 47.

<sup>31</sup> Fazlur Rahman, *Islam dan Masalah Kenegaraan: Studi tentang Percaturan dalam Konstituante*, trans. Ahmad Syafi'i Ma'arif (Jakarta: LP3ES, 1987), p. 50.

<sup>32</sup> Ibid.

and so forth.<sup>33</sup> Although this school generally accepts democratic system, but there are objections concerning the issue of people sovereignty and the relevance of democracy to the values underlying it, namely equality, freedom and pluralism. Indeed, basically Islamic teachings are compatible with the universal values,<sup>34</sup> but at the level of implementation, it is quite problematic because Islam has particular and universal teachings. Islam would have its own limitations that differ from Western values that are based on the secularism and the liberalism.

### ***Islamic Liberalism***

This school embraces democracy without any notes. The supporters of Islamic liberalism supports democracy in both philosophical foundation and institutional implementation. 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, they should be re-interpreted and adapted to the principles of democracy.<sup>35</sup> They argue that democracy has been practiced since the early days of Islam. This can be proven that the Prophet Muhammad has been applying the principles of consultation (*mushāvarah*) in the implementation of state and government. This democratic practice was continued by his successor Caliphs. However, it is undeniable that the implementation of democratic practices deteriorated after the period of Four Rightly Guided caliphs because Islamic government run by hereditary monarchy system for centuries.<sup>36</sup>

The momentum of democracy re-emerged in the 19<sup>th</sup> Century onwards with the inspiration from the West. Many liberal Muslim thinkers, such as al-Rāziq and Tāhā Husayn were exposed to Western

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<sup>33</sup> Yusuf al-Qardlawi, *Fiqh Daulah dalam Perspektif al-Qur'an dan al-Sunnah* (Jakarta: Pustaka Al-Kautsar, 1999), pp. 183 -184.

<sup>34</sup> Masykuri Abdillah, *Responses of Indonesians Muslim Intellectuals to the Concept of Democracy 1966-1993* (Hamburg: Abera-verlag, 1997), p. 79.

<sup>35</sup> Abu Yasid et.al., *Fiqh Politik: Relasi Agama & Negara Perspektif Islam* (Situbondo: Ibrahimy Press, 2009), p. 124.

<sup>36</sup> Fethullah Gulen, 'A Comparative approach to Islam and Democracy, *SAIS Review*, 21:2, (2001), pp. 134-136.

democratic culture before supporting democracy for Islam and finding justification from history and internal resources.<sup>37</sup>

### **Indonesian Democracy in Reform Era**

After the fall of the New Order regime in 1998, Indonesia's politics turns to be very democratic and liberal. Such assessment is indeed true because the faucet of democracy had just widely opened and no longer castrated like in the New Order regime. One feature of liberal democracy, which is freedom of speech, experiences freedom. Previously, during the New Order period the mass media was under tight control from the regime. 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).<sup>38</sup>

In terms of democracy, Indonesia is no longer adhering to the new order era of the party system which only limited to two political parties, PPP and PDIP as well as Golkar. The restrictions are intended to control and dictate the existence of the party to focus energy mainly on economic development. In contrast, in this era, a multi-party system is applied to give the public ample opportunity to establish political parties as the media to channel their aspirations. As a result, the first election in the reform era was held in 1999 participated by 44 political parties. The election was affected by the atmosphere of euphoric freedom which was previously silenced and the election results were always carefully staged by the regime.

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. This institution is 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

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<sup>37</sup> Munawir Sjadjali, *Islam dan Tata Negara*, pp. 138-139

<sup>38</sup> KPK is established under Law No. 30/2002 whereas MK is established under Law No. 24/2003

amended in the reform era.<sup>39</sup> To actualize the Constitution of the Republic of Indonesia Year 1945 then Law No. 24 Year 2003 regarding the Constitutional Court was produced.<sup>40</sup> 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. MK is established as a state institution dealing with certain matters in the state administration. The main purpose is to safeguard the constitution implemented in a responsible manner in accordance with the will of the people and democratic ideals.<sup>41</sup> All legal products of legislative body are potential to be reviewed by MK so as not to conflict with the amended Constitution. Therefore, since its establishment eight years ago up until present MK has nullified several laws which are considered contradictory to Constitution of 1945.

Apart from constitutional issues, eradicating corruption is an important national agenda. It is corruption that forced Soeharto stepping down, therefore, corruption eradication is imminent priority. Because of this, an extraordinary institution was established called the Corruption Eradication Commission (KPK).<sup>42</sup> Admittedly, justice is an important element of democracy for a country in transition like Indonesia.<sup>43</sup>

So far, KPK is considered effective to handle corruption cases in Indonesia. As stated in the Article 3 Act No. 30 year 2002, KPK is a state agency that is free and independent from any intervention.<sup>44</sup> 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 supervising the implementation of governance of the state.<sup>45</sup>

The establishment of MK and KPK is among a lot of efforts undertaken in the current *Reformasi* era. It has changed the face of the state system in the republic. Democratic system which previously was

<sup>39</sup> See National Constitution 1945, especially articles 7A, 7B, 20, 21, 24, 24C, and 25.

<sup>40</sup> See Law No. 24, 2003 on Constitutional Court.

<sup>41</sup> Ibid.

<sup>42</sup> Law No. 30, 2002 on Commission of Corruption Eradication

<sup>43</sup> Matthew Draper, 'Justice as Building Block of Democracy in Transitional Societies: the case of Indonesia', *Columbia Journal of Transnational Law*, 40, (2001).

<sup>44</sup> Ibid. I/3.

<sup>45</sup> Law No. 30, 2002 on Comission for corruption eradication, II/6.

coopted to legitimize autocratic system of the New Order regime, now is really a representation of the people according to the principles of democracy. It is undeniable that in the real practice there are deviations in the field of democracy like money politics in elections. 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 firm instruments of democracy. This is a right path to prosperity. 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.

In the view of Islamic jurisprudence, a well-applied instrument of state is a requirement. The spirit of *shari'ah* is the application of divine law for the realization of welfare of mankind. Such purposes may exceed the actual partition of the state of religious discourse vis-à-vis the secular state. The most important principle in Islamic legal philosophy is how the Islamic noble values can be appreciated fully in the life of the nation. In this context, Islam deliberately sets the issue of state and political system not in detail. In contrast, the Qur'an simply raises general principles in the form of general propositions (*al-hukm al-kullī*) so the virtuous values can be applied by mankind in every period corresponding to the level of the development of society and constitutional law.

In the term of Islamic jurisprudence, the concept of people's representation in decision-making is required. Indeed, the ins and outs of democracy have been widely practiced since the early period of Islam, although the terminology used is not democracy, but *shūra* and *hurriyah*. Likewise, the Prophet Muḥammad is a democratic figure in many ways. When there are some cases have no revelation basis, he consulted his companions until revelation stated otherwise. The long journey of principles of democracy in Islam since the early Islamic period to the present has chalked many internal and external dynamics along with the people development. The dynamics increasingly finds its momentum in the era of nation-states with diverse segments of the population.

## Conclusion

In the context of post New Order Indonesia, a democratic system is rapidly developing in a positive direction. Indonesia's democracy reform era is framed by improving political instruments in form of election system and other related institutions. However, it is realized that democracy must be built on a strong legal foundation. It is necessary to guard the constitutional institutions to implement the intended goals. In this context, Constitutional Court (MK) was established in 2002 after the amendment to national constitution. In addition, the democratic process must go hand in hand with clean governance. Therefore, another law institution is established called the Corruption Eradication Commission (KPK) to deal with corruption which is a serious and massive problem in Indonesia. []

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