

# The Comparative Study of Fiqh Siyasah with the General Principles of Good Government in Indonesia

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# THE COMPARATIVE STUDY OF FIQH SIYASAH WITH THE GENERAL PRINCIPLES OF GOOD GOVERNMENT IN INDONESIA

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1

## Abstrak

Asas-Asas Umum Pemerintahan yang Baik saat ini menjadi salah satu dasar penilaian bagi hakim di Peradilan Tata Usaha Negara untuk menguji suatu tindak pemerintah tersebut mengandung unsur kerugian bagi masyarakat atau tidak. Adanya UU 30 Tahun 2014 tentang Administrasi Pemerintahan telah memperluas kompetensi Peradilan Tata Usaha negara dimana obyek gugatan dalam PTUN tidak hanya KTUN (beschikking) akan tetapi juga tindakan faktual dari pejabat atau badan tata usaha negara. Dengan adanya perubahan UU No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara yaitu UU No. 9 Tahun 2004 dan UU No. 51 Tahun 2009 mempertegas keberadaan Asas-Asas Umum Pemerintahan yang Baik sebagai alasan menggugat di PTUN. Tidak bisa dipungkiri saat ini konsep hukum Islam banyak dipakai dan diterapkan dalam tindakan-tindakan hukum, baik dalam ranah hukum bisnis atau privat maupun hukum publik. Oleh karena itu maka konsep pemerintahan yang baik menurut Islam perlu dikaji secara mendalam, sering disebut dengan konsep fiqh siyasah. Penelitian ini ditujukan untuk meneliti perbandingan antara konsep Asas-Asas Umum Pemerintahan yang Baik di satu sisi dengan konsep fiqh siyasah di sisi yang lain.

20

Kata kunci: Asas-Asas Umum Pemerintahan yang Baik, Fiqh Siyasah, Peradilan Tata Usaha Negara, Hukum Islam.

1

## Abstract

The General Principles of Good Government are currently one of the assessment bases for the judges in the Administrative Court to examine whether or not actions of the government contains the elements of harm for the community. The existence of Law No.30 of 2014 on Government Administration has expanded the competence of The Administrative Court (PTUN) in which the object of lawsuit in the Administrative Court is not only the Decisions of Administrative (beschikking) but also factual action from official or administrative institutions. With the amendment of Law No.5 of 1986 on the Administrative Court namely Law No. 9 of 2004 and Law No.51 of 2009 affirms the existence of The General Principles of Good Government as one of reasons to sue in the Administrative Court. It is inevitable today that the concept of Islamic law is widely used and applied in legal actions, whether in the realm of business law, private law or public law. Therefore, the concept of good government according to Islam needs to be studied further, often referred to as the concept of fiqh siyasah. This study is aimed to examine the comparison between the concept of The General Principles of Good Government with the concept of fiqh siyasah.

Key words: General Principles of Good Government, Fiqh Siyasah, Administrative Court, Islamic Law.

25

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## Introduction

The general principles of good government are referred to as the basis comparison or examining in the Netherlands (article 8 paragraph (1) Wet AROB). It is gradually accepted as a law that the AUPB in the Netherlands known as the *algemene beginselen van behoorlijk bestuur* (ABBB) should be viewed as unwritten legal norms, which always have to be obeyed by the government even though AUPB must be translated and interpreted constextually. Moreover, it can be said that The general principles of good government is unwritten legal principles that can be constextually applied.<sup>1</sup> In the practice of law in the Netherlands, The General Principles of Good Government has got a clear place, which consists of: a. Principle of equation; b. Principle of trust; c. Principle of legal certainty; d. Principle of precision; e. Principle of reasoning (motivation); f. Prohibition of detournement de pover (abuse of authority); and g. Prohibition of acting arbitrarily.

Principles f and g in the law concerning administrative justice are always called separately (eg article 8 paragraph (1) letter b Wet AROB).<sup>2</sup> According to Kuntjoro Purbopranoto, AUPB is an important part for the realization of state government in a broad sense.<sup>3</sup>

As seen from the history, The general principles of good government became a principal problem since 1950 that is with the report from the Commission De Monchy which contains the subjects about "verhoogde Rechtscherming" (increased legal protection for the people). The report used the term "Algemene Beginselen Van Behoorlijk Bestuur" (General Principles of Good Government). Although the proposals and opinions of the De Monchy Commission are not entirely accepted, the term has earned a proper place in Dutch legislation and jurisprudence.<sup>4</sup>

In the Netherlands, The general principles of good government is in practice used by appeals agencies, even though this principle is not expressly mentioned in the legislation. These general principles can be categorized in 13 principles: 1. Principle of legal security; 2. Principle of proportionality; 3. Principle of equality; 4. Principle of carefulness; 5. Principle of motivation; 6. Principle of misuse of competence; 7. Principle of fairplay; 8. Principle of reasonableness or prohibition of arbitrariness; 9. principle of meeting raised expectation; 10. Principle of undoing the consequences of an annulled decision; 11. Principles of protection of the personal way of life; 12. Principle of wisdom (sapientia); and 13. Principle of public service.<sup>5</sup>

<sup>1</sup> See Philipus Hadjon, et al. *Pengantar Hukum Administrasi Indonesia*, (Yogyakarta: Gadjah Mada University Press, 1997), p. 270.

<sup>2</sup> *Ibid.* p. 270.

<sup>3</sup> Kuntjoro Purbopranoto, *Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara*, (Bandung: Alumni, 1978), p. 28.

<sup>4</sup> *Ibid.*, p. 28.

<sup>5</sup> *Ibid.*, p. 30.

Along with time and the political change in Indonesia, these principles later emerged and published in a law that is Law No. 28/1999 on a Clean State organizing and Free from Corruption, Collusion and Nepotism. With a different format from the Netherlands AUPB, in article 3 of Law no. 28 / 1999 mentioned some principles of state administration are:<sup>4</sup>

1. Principle of Legal Certainty;
2. Orderly Principle of State Administration;
3. Public Interest Principles;
4. Principle of Openness;
5. Principle of proportionality;
6. Principle of Professionalism;
- and 7. Principles of Accountability.

The principles contained in Law No. 28/1999 is intended for the overall state administration, while the principles in The general principles of good government are basically directed only to the government in a narrow sense, rather than *regering* or *overheid*, which means the government in a broad sense. Therefore, in relation to the judicial process, the principles contained in Law No. 28/1999 does not have the same legal consequences as AUPL, which has actually been used as one of the assesment of the judges. In other words, the principles contained in Law No. 28/1999 is more ethics in the administration of the state not as a rule of law. As time goes by, then with the amendment of Law No. 5/1986 on the Administrative Court is by the enactment of Law No. 9/2004 on Amendment to Law No. 5/1986 article 53 paragraph (2) stating that

the reasons that can be used in the lawsuit as referred to in paragraph (1) are:

- a. The Decision of the Administration being contested is in contrary with the prevailing laws and regulations;
- b. The Decision of the Administration being contested is in contrary with the general principles of good government.<sup>10</sup>

The explanation of Law no. 9/2004 state that what is meant by "general principles of good government" is to cover the principles of: legal certainty; orderly state administration; transparency; proportionality; professionalism; and accountability.<sup>28</sup>

Thus, the current The general principles of good government between Administrative Courts Law and the Clean and Corrupt Implementation Act of the State has been aligned. However, it is undeniable that it has developed in the business world and the government of the Islamic concept which emphasizes good government as well as AUPB in the Netherlands and has been used in Indonesia with some changes.

One of Islam's doctrines is that the Islam that Allah revealed through the Prophet Muhammad has asserted itself as a perfect religion and Prophet Muhammad was appointed as the closing Prophet. Meanwhile, the revelation is limited by time and space and the Prophet Muhammad lived and died in a single phase of a certain period, while the ages are constantly changing and evolving.<sup>6</sup> Could

6 Prawitra Thalib, "Appliation ofQowaid Fiqhiyyah in Contemporary Islamic Law", *Jurnal Yuridika Volume 31 No 1*, (Januari 2016): 110, doi: 10.20473/ydk.v31i1.1958

it be that a limited teaching with space and time can answer the needs of human life throughout the ages. For this, the scholars gave an answer. The perfection of Islam includes two related meanings, universal and comprehensiveness. The universality of Islam requires that Islam is compatible for every age and place, while Islamic comprehensiveness necessitates Islam to answer and be the solution to every problem arising from all aspects of life. Simply, *siyasah syar'iyah* is interpreted as the provisions of the policy of governing the problems of state based on the Shari'a.

Khallaf formulates *siyasah syar'iyah* with: the Management of general problems for the Islamic government that ensures the creation of the goodness and avoid badness of Islamic society, not in contradiction with the provisions of Islamic law and general principles, although not in line with the opinions of mujtahid scholars.<sup>7</sup> This definition is further by Abdurrahman Taj who formulated *Siyasah syar'iyah* as the laws that regulate the interests of the State, organize the problems of the people in accordance with the spirit (spirit) of Shari'a and the basic of the universal root for the creation of community goals, although the arrangement is not affirmed either by the Qur'an and al-Sunah. In line with this background, this study is intended to examine further to the extent to which the understanding and the implementation of AUPB and Fiqh *Siyasah* in the implementing the government in Indonesia that the majority of the population

are Moslem. From the background above, the authors formulate the formulation of the problem as follows:

1. What are the similarities and the differences concepts between the AUPB concept and the concept of Fiqh *Siyasah*?
2. Is the concept of fiqh *siyasah* applicable in Indonesia as well as the concept of AUPB?

The study focused on the discussion of the concept of The general principles of good government comprehensively compared with the concept of fiqh *siyasah*. The source of the writing is taken from primary and secondary legal materials. The primary legal material consists of legislation, official records, or treatises in the making of legislation and judgment. While the secondary legal materials in the form of all publications about the law that is not an official documents. Secondary legal materials in the form of texts concerning legal scholarship and opinions of jurists as well as legal scholars derived from the relevant literature with the subject of this paper are contained and taken from books, journals, papers, and electronic data sources.

## Discussion

### A. The General Principles of Good Government in Indonesia

Based on the provisions of Article 1 Sub-Article 2 of Law No. 30/2014 on Government Administration, it is mentioned

<sup>7</sup> *Jbid.*, p.117.

that the function of government is a function in implementing the Government Administration which includes the functions of regulation, service, development, empowerment, and protection. The modern legal states that began to develop sometime in the late nineteenth and twentieth centuries, the task of the government is vast, that is to hold general welfare and security in a broad sense. Thus the modern state can also be called the welfare state, because in the modern countries prioritize the fulfillment of public interest, and for that then many of the tasks previously held by private (private, personal) is now taken over by the government, because these tasks have now become a duty to conduct general welfare, thereby increasing the government's task.<sup>8</sup>

According to Lemaire, in the modern state the government task is *bestuurzorg* (the implementation of public welfare conducted by the government) and is a hallmark of welfare state.<sup>9</sup> In carrying out the functions or tasks of the *bestuurzorg*, the government requires a freedom of action. The freedom here is not interpreted as fully free, but freedom of action by the government must be interpreted that in certain things for the sake of running the *bestuurzorg* function, the government can do on its own initiative and on its own policy in terms of resolving the emergency issues that arise and the settlement rules not available

With the freedom of action that can be performed by the government and the tools of completeness, it is not uncommon the actions or actions of the government deviate from the rule of law applicable, causing harm to society. Therefore, increased legal protection (*verhoogde rechtsbescherming*) needs to be done by applying the general principles of good government. According to Hadjon, with the acts of government as a central point associated with the protection of the law for the people, the protection of the law can be divided into two kinds, namely the first preventive legal protection and the second repressive legal protection. Preventive legal protection is an opportunity given to the people (*inspraak*) to be consulted before the government's decision gets a definitive form. The purpose of preventive legal protection is to prevent the occurrence of disputes arising on the day after the publication of the government's decision.<sup>10</sup> Preventive legal protection greatly influences governmental acts based on freedom of action because with government preventive legal protections it is encouraged to be thorough and careful in making decisions based on discretion.<sup>11</sup> The means of preventive legal protection is an objection (*inspraak*). Repressive legal protection here is intended as a form of legal protection by suing or disputing or prosecuting

<sup>8</sup> See Soehino, *Asas-Asas Hukum Tata Pemerintahan*, (Yogyakarta: Liberty, 1984), p. 22.

<sup>9</sup> *Ibid.*, p. 22.

<sup>10</sup> See Philipus M. Hadjon, *Perlindungan Hukum bagi Rakyat...*, *Opcit.*, hlm. 2.

<sup>11</sup> *Ibid.*, p. 2 as cited from F.H van der Burg, *Rechtsbescherming tegen de Overheid*, p. 187 said that "... vooral wanneer er sprake is van een discretionaire bevoegdheid van het bestuur laat zich een dergelijk overleg goed indenken. Omgekeert: in geval van strikt gebonden bestuursbevoegdheid heeft inspraak vooraf weinig zin: de te nemen beslissing kan er immers toch niet door beïnvloed worden".

the government to court (as part of the judicial /judicial power).<sup>12</sup> It means that repressive legal protection always relates to the judiciary.

The existence of legal protection mentioned above is characteristic of the rule of law, according to Satjipto Raharjo, law states in the world have different historical and thought backgrounds. In Germany, *Rechtstaat* is a pure legal building unrelated to politics. Hans Kelsen's theory known as "*Reine Rechtslehre*" (Teachings of Pure Law<sup>13</sup>), provides the theoretical foundation for the concept. Kelsen says that the state is nothing but a legal building. this doctrine, the theory of the state of the law contains none other than the theory of positive law. The pure legal doctrine does not speak of a specific legal order (*speziellen Rechtsordnung*), but an *allgemeine Rechtslehre* (general law teaching), he simply wants to answer the question "what and how the law is" and not how the law should be made (*nicht aber die Frage, wie es sein oder gemacht werden soll*). More firmly Kelsen says, the pure legal teaching is the science of law and not the politics of law ( "*Sie ist Rechtswissenschaft, nicht aber Rechtspolitik*"). Based on the ideology, the main and sole target is directed to knowledge or find out about "what is the law" (*auf das Rechtgerichtete Erkenntnis sicherstellen* ). Then all things unrelated to the

law must be issued (*alles ausscheiden mochte, was nicht zu dem exakt als Recht bestimmten Gegenstande gehort*). The Doctrine of Pure Law wishes to purify the science of law by removing all the so-called foreign elements (*van allen ihrfremden Elementen befreien*).<sup>14</sup> In addition to "*Rechtstaat*", Germany also knows, "*Gestzestaa* ". Distinguished between *Recht* (*droit*, French; *recht*, Dutch; *pravo*, Russian; *drecho*, Spanish) and *Gesetze* (*loi*, French; *wet*, Dutch; *zakon*, Russian; *ley*, Spanish). Each of these words is a different sign or word, which distinguishes between law in the ordinary sense (law) and law in a more meaningful sense (Law). In the context of this distinction, in Indonesia the term "law" is used for *Gesetz*, law and law for *Recht*, Law.<sup>15</sup>

The emergence of these terms apparently due to the separation between the rule of law as a political structure and as a legal organization can not be maintained longer. The state of law that is only constructed as a legal building needs to be more complete, in this case by making it have a political structure as well. In *Recht's* words, the political structure becomes accommodated into the rule of law. The state of law with such political structure ultimately makes politics an important determinant that determines how the content of a particular state of law. It makes the concept of a common law

12 Hari Sugiharto and Bagus Oktafian Abrianto. "Perlindungan hukum Non Yudisial terhadap Perbuatan Hukum Publik oleh Pemerintah". *Jurnal Yuridika* Vol. 33, No. 1 (Januari 2018): 4. doi: 10.20473/ydk.v33i1.7280

13 we prefer to use term "*pure theory of law*"

14 Satjipto Rahardjo, *Negara Hukum yang Membahagiakan Rakyatnya*, (Yogyakarta: Genta Publishing, 2009), p.6

15 *Ibid.*p. 7

state (*Allgemein*), into a distinctive or special order (*speziellen Rechtsordnung*).<sup>16</sup>

One of features in other legal states other than the existence of legal protection is the supervision. Such supervision is a means of limiting state power. According to S. Marbun, since the introduction of the concept of social interaction in the history of human life in order to achieve the goal of meeting various needs, the subject of power continues to develop into a complex and dilemmatic controversial issue.<sup>17</sup> This condition is reflected in at least from its multi-shape form,<sup>18</sup> as well as from the "existential duality" of power itself.<sup>19</sup> The point is that power, on the one hand, is something "dazzling", and on the other is a "scary" thing.

As a fascinating thing for its multi-functions. By having power, then practically will be able to get everything desired by the holder. Frightening, for the exercise of power in the pursuit of a particular purpose and purpose often violates and suppresses the most essential life rights of the ruled parties. This fact is understood as a result of the very dominant aspect of violence and the aspect of power-two inseparable aspects (in essence) within each power to realize what is desired by the holder of power.

Although every time can cause a frightening phenomenon, but power is absolutely necessary in the survival of intercultural life, or also to achieve the goals of the establishment of a country. In other words, that power is functional for the sake of or for the welfare of the individual and the state itself.<sup>20</sup> That is, that power is necessary as far as human - as a social being - requires a unity of leaders in order to realize the fullness of human dignity. At the same time, the central issues that often disturb our reasoning minds are; what is the right way to monitor and limit the use of power (state)? From the literature is known a variety of ways and means that can be used to supervise and limit power. Overall it can be summarized in three aspects: (a) morality or religion,<sup>21</sup> (b) ethics,<sup>22</sup> and (c) law. From these three aspects, the law is the aspect that is considered the most concrete and effective to oversee and to restrict the power of state organizers. Because, it seems that only through law is it possible to apply (imposition of sanctions concretely, that is against the rulers (government) whose actions cause harm to society.

According to some experts of political science and law science state, that the state is actually an integration of power. The state

<sup>16</sup> *Ibid.*, p. 8

<sup>17</sup> SF. Marbun, *etal. Dimensi-Dimensi Hukum Administrasi Negara*, (Yogyakarta: UII Press, 2001), p. 37

<sup>18</sup> Mc. Iver, *Jaring-Jaring Pemerintahan*, (Jakarta: Aksara Bam, 1985), p. 98.

<sup>19</sup> Franz Magnis Suseno, *Kuasa dan Moral*, (Jakarta: Gramedia, 1988), p 1.

<sup>20</sup> *Ibid.*, p. 6.

<sup>21</sup> See Sjachran Basah, *Perlindungan Terhadap Sikap-Tindak Administrasi Negara*, (Bandung: Alumni, 1986.), p. 3.

<sup>22</sup> See Franz Magnis-Suseno, *Etika Politik*, (Jakarta: Gramedia, 1988), p. 60-66.



is the agency (tool) of society that has the power to regulate the relationships between people in society.<sup>23</sup> But that does not mean absolute. Country of Indonesia, for example. The limitations of state power are firmly and clearly known from the 1945 Constitution of the Republic of Indonesia, which implicitly states that Indonesia is a State based on the Law (*Rechtsstaat*). The state of Indonesia is based on the Law (*Rechtsstaat*), not on the basis of mere power (*Machtsstaat*).<sup>24</sup>

State power owned by the government as a state organs, is limited by the laws and the general principles of good government. The limitation of power by laws and regulations implies that all actions taken by the government must be in accordance with the provisions of written rules that have been established, in other words can be mentioned that all government actions must have a legal basis, the law here is defined as a written legislation. On the other hand, the government in doing all its actions should not be against the unwritten rule, in this context it is called the general principles of good government.

The article 53 paragraph (2) of Law 5/1986 does not explicitly mention the AUPB as the basis for filing a lawsuit against the Decision of State administrative. The AUPB is regulated in Article 53 Paragraphs (1) and (2), as well as in the explanation of Article 53 Paragraphs (1) and (2), 2004 Law of State administrative Court. Article 53 Paragraph (1) essentially

emphasizes the legal rights of individuals and legal entities through the State administrative Court, if his rights are impaired by the State administrator. While Article 53 paragraph (2) stressed that in addition to violations of written law, violations of the AUPB can also be used as a basis for filing a lawsuit to the State administrator. The term used by the legislators is not only the AUPB but the General Principles of State Administration (*Asas-Asas Umum Penyelenggaraan Negara/AUPN*) and the General Principle of Good State Administration (*Asas Umum Penyelenggaraan Negara yang Baik/AUPNB*) to follow up the Decree of MPR RI Number XII / MPR / 1998 on the Implementation of a Clean and Free State of Corruption, Collusion and Nepotism. And also the principles of Management and Policy of the civil official.

## B. The Concept of State by Fiqh Siyasah.

On August 12, 2007 HizbutTahrir Indonesia (HTI) organized an International Khilafah conference in Jakarta attended by around 100,000. people consisting of representatives from different countries, although there are some who feel there is something inappropriate about it but the conference is going well. The view that the concept of khilafah considered less permanent because of Indonesia with its Muslim population has that the concept of Indonesia as a State based

23 Miriam Budiadjo, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia, 1982), p. 38.

24 See SF Marbun, *Op.Cit.* p. 39

Pancasila already in line with Islamic law, in connection with the conference held on August 12<sup>th</sup> 2007 it can not be avoided because it is also part of democracy, even though the event that campaigns for the establishment of the international Khilafah clearly and refused the democracy as the foundation of a State on the basis that democracy is not in line with Islamic teachings, since democracy places sovereignty on the people while according to Islamic sovereignty lies in the hands of Allah SWT.<sup>25</sup> This claim is rightly to be regarded as a misconception, this is because as if accusing people who accept the concept of democracy is a wrong Islam, this is not right and must be straightened out considering Islam in the source of the primary law does not regulate exactly the system ketata state or political system.

It is interesting to note that through his spokesman, Muhammad Ismail Yusanto said that Hizbut Tahrir is a political party but the party that has not participated in the election, it is something *contradictio interminis* or contrary to its own term considering the political party accept the concept of democracy and democracy itself which indirectly gave birth to a political party, therefore the concept of international Khilafah and the concept of political party according to Hizbut-Tahrir is an idealism and romanticism from a small part of Muslims which is also unanimously rejected in the Middle East country.<sup>26</sup>

In relation to the above opinions, it raises a question whether there is an obligation for Muslims to formally declare Islamic law by establishing a State based on the Islamic Khilafah. It can be asserted that there is no necessity to establish an Islamic State. It is expressly as set forth in Q.S. A Maidah: 44, Islam has obliged every followers to follow and run the Islamic Shari' a, but it is not implemented in the form of establishing Islamic State or in the formal Islamic. This is because Islamic Shari' ah is generally believed, but in particular Islamic law embodied in fiqh that can be applied differently according to place, time and situation, therefore fiqh may change according to the condition where fiqh it will be applied, it can be proved in the history of Islam can be found the fact that fiqh can vary between one place with another place or between one time to another.<sup>27</sup> For example, during the reign of the first Caliph of Abu Bakr As-shiddiq and Umar bin Khatthab as the second Caliph, during the reign of Umar many ijthahs were made as a renewal of Islamic law itself, such as the dismissal of the giving of alms to the convert, the possible division of inheritance the same part between men and women and even the prohibition against marriage between Muslims and scribes. This means that at a certain level of law in social life there is the possibility of an Islamic law which is made specifically according to the demands of time, precise,

25 Danang Firmanto, "Hizbut Tahrir Tolak Kedaulatan Rakyat", *Tempo dailynews*, (13 August 2007)

26 "NU Tolak Khilafah", *Kompas dailynews*, (14 August 2007)

27 Trisadini P. Usanti dan Prawitra Thalib, "Asas Ikhtiyati Pada Akad Pembiayaan Mudharabah Di Lingkungan Perbankan Syariah", *Jurnal Yuridika Vol. 31, No. 2*, (Mei 2016): 303, doi: 10.20473/ydk.v31i2.5190.

situation and condition, but the general Islamic values should not be eliminated, the same thing apply in the state system or fiqh siyasah, it does not matter whether the country is a monarchy, a republic as long as Islamic values are generally in the system of the State then it is not a problem, therefore on this issue should be used *ushulfiqh* rules that is *al abrah fil Islaam bi/jawhar laa bi/ madzhar* which means the basic rules to fight for Islam is the substance not its symbol.<sup>28</sup>

For the State of Indonesia, this inclusive view can be important because Indonesia is ideologically established and built as a religious State not as an Islamic State. In this concept, Indonesia is not a religion-free country but it is not based on a particular religion. All religions are protected by rights and obligations by the State without distinguishing the large number of adherents of the religion, so that based on Pancasila the Indonesian Muslims already feel accommodated the rights and his duty and can carry out his religious teachings without any hindrance, so that Muslim Indonesians do not need an Islamic State because Indonesia as a Pancasila State which is a religious state can be accepted as a concept in line with the Fiqh Siyasah that bind Muslims without exception.

Broadly speaking, the history of Islamic government is divided into four major periods

namely the period of Caliph *nubuwwah*, *rasidiyah*, post-khilafah *rasyidiyah* government and government in the modern era. Particularly in the period of the *nubuwwah* caliphate is a sign of the unparalleled success of the Prophet Mohammed's political career in the history of mankind, a period that inspires ideas as well as builds the hope of Muslims to imitate and practice what has been built in that period anytime and anywhere. so it would be appropriate if Ibn Taymiyya declared that the caliph *nubuwwah* had a special nature (*sui generis*) that would never be repeated in history.<sup>29</sup>

Shariah is the way to the source of the springs, which in this case sharia interpreted as the law of Allah SWT which was revealed to the Prophet Muhammad, while that fiqh is the result of thought of *mujtahid* or jurists who interpret the true meaning of the law contained in sharia is the Quran and Sunnah,<sup>30</sup> so it can be interpreted also that fiqh is sharia in a narrow sense.<sup>31</sup> Imam Hanafi interpret fiqh as a knowledge of a person about his rights and obligations that include laws relating to faith, morals and *amaliah*, This significance arises because in the time of Hanafi Imam fiqh life is not a separate branch of science with other shariah sciences, which then when the separation of aspek-aspek of Islamic fiqh

28 Ridwan, *Fiqh Politik, Gagasan, Harapan dan Kenyataan*, first printed, (Yogyakarta: FHUII Press, 2007), p.xiv.

29 *Ibid*, p.xiv.

30 Prawitra Thalib, "Distinction of Charactersitics Sharia and Fiqh on Islamic Law", *Jurnal Yuridika* Vol. 33, No. 3, (September 2018): 440, doi: 10.20473/ydk.v33i3.9459.

31 Abd. Shomad, Trisadini P. Usanti dan Prawitra Thalib, "Financing Risk of Micro, Small and Medium Enterprises (UMKM) with Cooperation Patterns Between Islamic Bank and Baitul Maal Wa Tamwil (BMT)", *Jurnal DinamikaHukum* Vol.17, No.1, (2017): 57, doi: 10.20884/1.jdh.2017. 17.1.808.

teachings into a branch of sharia science along with other branches of science such as tasawuf and ushul fiqh.<sup>32</sup> Therefore, it can be understood that the discussion in the science of fiqh is all matters relating to all aspects of human activity with its creator, human activities with one another or human with the State, while aspects related to moral coaching is studied separately in the science of Sufism as a separate part of the science of fiqh.<sup>33</sup>

Through this separation, the definition of fiqh as a science that discusses sharia has been limited to the knowledge of a law in accordance with sharia on the deed of human deeds based on the arguments contained in the Qur'an and Sunnah as a result istinbat or ijtihad.<sup>34</sup> While the term siyasah comes from the word sasa that has the meaning of driving, controlling, controlling, controlling, regulating, managing and governing, besides siyasah also can mean government, politics and administration. So that based on it siyasah can be interpreted as an attempt to make a political policy or government or attempt to regulate, control or govern a government or carry out administration of a government,<sup>35</sup> the term siyasah is not to be found in the Qur'an but can be found in some Sunnah.<sup>36</sup>

Based on the above description, it can be stated that siyasah can be regarded as an act

of government and state administration, this is because in the implementation of the State there are elements of controlling, organizing and governing, administering, managing, administering and formulating policies related to community life. As for the activities of the administration and the government is generally governed by the arguments contained in the Qur'an and Sunnah and is specifically regulated by the laws that mere results of human interpretation of the general postulates. Siyasah born of human thinking must be based on the aqidah, morals and general principles of Islamic law in regulating the lives of people in society and state, this siyasah which is then called the fiqh siyasah.<sup>37</sup>

Fiqh siyasah as something that comes from mujtahid thinking as an interpretation of the Qur'an and the Sunnah should be viewed as one of the branches of science that has the same position as other branches of science, as with other branches of science of certain properties also attached to fiqh siyasah namely, the relative properties, the nature of the elasticity and implementation properties that are tailored to the time and place where the fiqh will be applied. Regarding the object of discussion and the scope of fiqh siyasah is State and government, this is because in the State and government administration there

32 Prawitra Thalib, "Pemahaman Terhadap Pemberlakuan Hukum Islam di Indonesia", *Jurnal Halu Oleo Law Review* Vol 2, No. 1, (Januari 2018): 380, doi: <http://ojs.uho.ac.id/index.php/holrev/article/view/4196/3259>,

33 Wahbah al-Zuhaili .. *al-Fiqh al-Islami wa Adilatuhu* Jilid I, Beirut: Dar al-Fikr, 1993), p.15-16.

34 Prawitra Thalib, *Syariah: Konsep dan Hermeneutika*, (Surabaya: SHAREAT FH UNAIR kerjasama dengan Lutfansah Mediatama, 2013)

35 Prawitra Thalib. "Pemahaman ... "Op.Cit., p.113.

36 Ridwan, *Op.Cit*, p.76.

37 J. Suyuthi Pulungan, *Fiqh Siyasah*, Jakarta: Rajawali, 1994), p.24-25.

are some actions contained in the meaning of siyasah itself, which among others are to control, arrange, govern, manage, administer, administer and make policy. So that the fiqh siyasah is the maintenance of the State and the shari' a-based government, which has the object of study is all that matters with the administration and administration of which is based on Islamic law generally.<sup>38</sup>

In relation to the object of the fiqh siyasah then matters relating to the administration of State and government can be divided into four main categories, among others:<sup>39</sup>

1. Fiqh siyasah dusturiyah

It is siyasah related to the foundations of the State, the government system, the restriction of power, the transition of leadership and the basic rights of citizens, as for this dusturiyah sector is divided into four parts: a. Siyasah tasyi'iyah syar'iyah, is siyasah about the establishment and determination of the law according to the Islamic law; b. Siyasah qadha'iyah syar'iyah, siyasah about the judiciary that is in accordance with Islamic law; c. Siyasah idariyah syar'iyah, siyasah about administration of government in line with Islamic syariah; and d. Siyasah tanfidziyah syar'iyah, siyasah which regulates the administration of government.

2. Fiqh siyasah dauliyah,

It is a siyasah related to the arrangement of inter-state relations which includes diplomatic relations in general.

3. Fiqh siyasah maliyah,

It is a greed of wealth or state finances, which includes the source of state income, taxes, the distribution of state property and other matters relating to the use of state finances.

4. Fiqh siyasah harbiyah,

It is a matter of concern for the warfare and other matters relating to peace, corps, war captive status and so on.

From the four objects of the fiqh siyasah study in its application to the modification and innovation which does not diminish the essence of the fiqh siyasah, it is possible given the nature of the elasticity and flexibility contained in the science of fiqh, this is possible as long as it does not diminish the essence of Islamic law in general, the factors that influence the application of fiqh include:"?

1. The fact that existing countries are being subjected to modernization as well as the situation and the convergence of the country's emergence, in which case the problems faced by each country differ from one to another, this is because of the difference in political orientation, the background, culture, level of education of the people and so on, through the keelatisity and flexibility of fiqh siyasah is expected to accommodate all these differences, so the administration of state and government can bring benefits to all the people.

<sup>38</sup> Ridwan, *OpCit*, p.81.

<sup>39</sup> J. Suyuthi Pulungan, *OpCit*, p.144.

<sup>40</sup> Ridwan, *Op.Cit*, p.83.

2. In the case of the social affairs faced by every government constantly evolving and innovating in line with the development of times and technological innovations, as these two are very influential in the administration of state and government, in the face of it the state does not have to limit the development of society and technological innovation but the state must facilitate these two interests, this is because the state is in the form of accommodating the benefit of its citizens not otherwise to restrain its citizens.

### C. The Principles of State and Government based on Fiqh Siyasah.

The formation of the state is a necessity, as Muslims are required to appoint leaders among them, therefore establishing a state is a condition that must exist in an Islamic life, this is because of the absence of political authority, some of the teachings of Islam (such as freedom of worship) can not be protected and realized optimally, therefore to realize that it is necessary to have power, as well as the understanding that human nature has a physical need besides the existence of spiritual necessity, then Islam will never be content only by describing his ideals, but it must be accompanied by an effort to find the right means to apply the ideals, in this

case power and state are the basic means of realizing such ideals, regardless of any form of the state as long as it does not contradict the general rule of law it is in line with Islamic law."

The concept of organizing modern governments recognizes what is called the general principles of good government or better known by the term The general principles of good government, through compliance with The <sup>4</sup>general principles of good government is expected that the implementation of state and government can accommodate interests while protecting the rights of every citizen. As we have mentioned earlier, the concept of fiqh siyasah depends on the time, place, situation and condition in which <sup>10</sup>the fiqh will be applied. When contemplated with the The general principles of good government then in the fiqh siyasah there are also basic principles of national and government maintenance, which through these basics is expected the maintenance of the state and the rule of law will bring a breakthrough for every citizen regardless of whether he is Islam or not, as for the fundamentals of maintenance countries and governments in the fiqh siyasah include:<sup>42</sup>

#### 1. Principle of Power as Mandate

Islam has regulated that power is absolute belongs to Allah SWT, this is what has been mentioned in Q.S. Al-Hadid:5<sup>43</sup> and Q.S.

41 Prawitra Thalib, *et al* "Hisbah (Supervision) Application in Determining of Standardized Standard Akad Modes on Islamic Financial Institution in Indonesia", *Revista Publicando* Vol. 5, No. 18, (December 2018) 191, <https://mlconsultores.com/revista/index.php/crv/article/view/1943>

42 Ridwan, *Op.Cit.*, p.15-63.

43 The verse governs "His is the kingdom of the heavens and the earth. To Allah everything is returned

Al-Mulk: 144, based on the verse it can be understood that the belief in Allah SWT as the supreme powerholder is the foundation for the establishment of state and government. The power and sovereignty of Allah SWT can be known through His attributes and His wills conveyed through the revelation to Prophet Muhammad, which is expected through this revelation will shape the inner attitude and pattern of human perceptions to lead a life in this world. The meaning of man as the caliph of God on earth is interpreted that in fact the nature of man is the substitute of God on earth to regulate, cultivate and prosper the earth for the sake of man itself, but because of the unchangeable nature of man then man replacing God to regulate and cultivate the earth is merely as a mere metaphor because the meaning of the substitute is not an absolute substitute but is a mandate to replace some of the tasks of God on earth, whose mandate is mandated to be entrusted to the trustee who in this case is Allah SWT. When it comes to the concept of state sovereignty then man in this case is the recipient of trust from Allah SWT to manage, govern and prosper his people, which in this case of course the trust will be held accountable in the latter day. Since the authority to regulate the state is mandatory it is mandatory that each leader entrusted to act

in accordance with the wishes of the trustee, if the leader as the trustee deviates what has been entrusted can be said the leader has betrayed his leadership, so that the leader no longer has the highest authority in leading the people and indirectly this condition creates an obligation for the people to reprimand and straighten the leader so as not to break the trust that has been given to him.

## 2. Principle of Deliberation

This principle basically aims to accommodate the various interests and desires that arise in a society, it is very important considering the differences in interests and desires is a potential conflict, conflict and division, in Q.S. Ali Imran: 159<sup>45</sup> has been stipulated that in deliberations there are some guidelines to be followed, which among others is a gentle and forgiving attitude, which in this case is besikap gentle and forgiving in addressing the differences that arise in a deliberation. Consequently, deliberation can be interpreted as an act to signal the truth and goodness, but the main essence of deliberation according to fiqh siyasah is the provision of opportunity to every member of the community who has the ability and right to participate in the administration of the state and government.<sup>46</sup>

44 The verse governs "Glory to God in Whose hands is the kingdom, and He is Able to do all things"

45 In the verse it has been determined that "It is by grace from Allah that you act tenderly against them. If you are being hard-hearted, they would have kept away from you. So forgive them, beg forgiveness for them, and talk with them in the affair. Then when you have made a determination, put your trust in God. Lo! Allah love those who put their trust in Him"

46 Abdul Muin Salim, *Konsep Kekuasaan Politik Dalam Al-Quran*, (Jakarta: RajaGra:findo Persada, 1994), p.259.

### 3. Principle of protection of human rights

The glory of human beings as Allah's creatures can be seen in Q.S. Al-Isro: 70<sup>47</sup>, because of the glory of the human being has the right that is essentially attached to him since he was born, this right should be protected by Islamic Shari'a as the goal of the derived Islamic Law, that is to maintain and protect the interests of human life which The outline covers five main aspects which include: a. Protection of religion; b. Protection of the soul; c. Protection of the intellectual; d. Protection of offspring; and e. Protection of property.

### 4. The principle of freedom

Islam has decreed that there is no compulsion in Islam, every human being is free to decide whether he will embrace Islam or vice versa, therefore Islam in principle respects the freedom of every individual, but freedom is not free freedom, but freedom is limited by the freedom of others and the prevailing norms, freedom is something that must be protected but in general the freedom that must be protected includes three main parts which are among others:

#### a. Freedom of religion

The human nature is to worship its creator even in Q.S. Al-Baqoroh verse 256 explained that there is no compulsion in Islam, so that every human being is free to choose

whether or not to believe in Islam without any compulsion or pressure from any party, this freedom of religion also has implications for other religious people, in which case every religious people of both Islam and non-Muslims are free to practice their worship without any barriers from any party, this is what the state must fulfill.

#### b. Freedom of thought and opinion

The basic foundation of the establishment of neegara according to Islam is the fulfillment of the benefit for mankind, the fulfillment of this benefit is also applied through freedom of thought and opinion based on charity makruf and nahi mungkar, this is as regulated in Q.S. Ali Imran: 104, this freedom of thought and opinion is used to help remind the government of its mandate in order not to be misused, as for acts to criticize the government as the mu'aradhah, so it is worth remembering that this freedom of thought and opinion should always be on frames of truth and should not be used as a tool for causing slander, conflict and division

#### c. Freedom of association and assembly

This freedom of association and assembly can take place in all aspects, political, economic, socio-cultural, in the field of political freedom of association and assembly is an integral instrument, it then spawned political parties that would later represent the interests of the people in governing the state, in politics must be institutionalized because if

<sup>47</sup> The verse has stated that "We have indeed honored the sons of Adam, We have transported them to the land and the sea, We bestowed on them the good things, and We bestowed on them the superiority of most of the creatures that We created"



it is not institutionalized it will be a hollow ideal that is difficult to materialize, which is where political institutionalization can be done through political parties as a result of freedom of association and opinion.<sup>48</sup>

### 5. Principle of people's obedience

Government in a country must be obeyed by its people, as this regulated in Q.S. Al-Maidah:59, besides that it is also the disfellowship of khalifatullah fil ardh, where man as the successor or representative of Allah SWT in ruling the earth, as meant by amr according to Q.S. Al-Maidah: 59 can be interpreted as a leader, regional chief, judge and scholar, all of which are synergistic in the life of society. Islam sets out that God Almighty is the ultimate supreme powerholder, while the government is the holder of authority in a relative country, when referring to Q.S. Al-Maidah: 59 can be understood that the command to obedience to the amr ulil is placed after the command to obey Allah and the Apostle, this also implies that the obedience of the people to his government is obligatory if the government obeys Allah and the Messenger, in this case always carries out charity and misleading charities and does not contradict the values of Islamic law in general, which in general contain the following elements, firstly, the government runs the Islamic law either directly or indirectly, second, the government establishes the law fairly to the whole his people without

exception and the last, the government did not order his people to commit immorality.

### 6. Principle of equality

Human beings have the same position in the eyes of the law, this must be guaranteed by the state, thus in practice the state should not discriminate between people with one another, because according to Q.S. Al-Hujurat: 13 is indeed the one who distinguishes one another from the other is the piety of the creator and who deserves to judge it in a prerogative is Allah SWT, not the government, the country or the clergy. To achieve this, the state should always create a non-discriminatory policy, all citizens have the same rights in the eyes of the law without exception.

### 7. Principle of justice

Justice is the ultimate principle in Islam and is one of the attributes of Allah SWT, therefore in faith in Allah should also adhere to the principle of this justice, in regard to that justice in its application the state must ensure several things which are:<sup>49</sup> a. States must ensure that every individual living within that country has the same rights and obligations without exception; b. Justice is to rule out any differences that exist from status, race, property and rank, so that every individual in a country has the same status before the law; and c. The State is said to have complied with the principle of fairness if it has ensured the fulfillment of the rights of the individual entitled to the right and ensuring the fulfillment

48 Kuntowijoyo, *Identitas Politik Umat Islam*, (Bandung Mizan, 1997), hlm. 74.

49 Compare with, Murtadha Muthahhari, *Keadilan Illahi*, (Bandung: Mizan, 1992), p.54-58.

of the individual obligations obliged to carry out such obligations.

### **8. The principle of independent judiciary**

The judiciary is part of the duty of the government in order to impose law in its territory, while the free judiciary is a separate judicial body of other institutions, independent judiciary means independent, independent judiciary which carries out its duties without any pressure from other institutions. This principle is emphasized to the independence of judges in carrying out their duties, which is based on Hadith Rasullullah to Muadz bin Jabal allowing qadi to berijtihad in solving problems that are not regulated in detail in the Qur'an and Sunnah.

### **9. The principle of peace**

Islam is a religion that is a mercy to all the worlds, this is as regulated in QS. Al-Anbiya: 107, peace is one application of the grace of the universe, it is explained rinci in Q.S. Al-Hujurat: 10, based on the verse can be understood that the harmonious relationship between people will create blessings of mercy for all mankind and vice versa also without a harmonious relationship among people will lead to divisions and conflicts that will destroy the atmosphere of peace. untk realize peace it is expected the state can regulate mengnei ethical interactions of each individual who take shelter in the country in order to realize peace for all mankind.

### **10. Principle of Welfare**

The state is the main catalyst for the fulfillment of material and spiritual needs for all of its people, through the fulfillment of this welfare principle is expected to remove the gap between rich and poor or in other words the equality of prosperity among all the people, this is what the real state must be realized, the government has the right to be actively involved in the community economy as one of its obligations to realize social welfare.

The concept of statehood in Islam is not specifically specified in the Qur'an and Sunnah, in this case Allah SWT and Prophet Muhammad SAW did not give specific instructions about the establishment of an Islamic state, Allah SWT through his word has ordered to do charity makruf and nahi mungkar, namely doing good deeds and avoiding evil deeds, as well as the Prophet Muhammad SAW who did not provide specific guidance to establish an Islamic state, but in general Allah SWT and Prophet Muhammad SAW has determined the guidelines to be obeyed when will do all the actions that including the establishment and regulation of the state. Regarding the ordinance of the relationship between man and his creator in detail has been set in the Qur'an and Sunnah so that gave birth to fiqh rule, everything in worship is prohibited as long as there is no proposition that allow it. But in contrast to the ordinance of relations between people with each other or the relationship between humans

and the state, in bermuamalah has given birth to the rule of fiqh everything in muamalah is permissible as long as there is no prohibition that forbid it, even Prophet Muhammad SAW also said "*antum a 'lamu bi umuri dunyakum*" which means you all know more about the affairs of each world.

State is the relationship between human beings with the government as the bearer of mandate that has been given by Allah SWT, not the relationship between human beings with the creator because the concept of khilafah itself is a mandate to humans to regulate the world in accordance with what has been determined by Allah SWT through revelation that has been revealed to the Prophet Muhammad. Therefore, it can be concluded that there is no definite provision about the concept of the Islamic state, so that whatever form of state as long as guarantee the rights and obligations of Muslims to worship Allah Almighty, then the country has in accordance with Islamic Shari'ah, without having labeled with Islamic symbols, because the state is the affairs of the world that has been safeguarded to mankind by Allah SWT, then on the affairs of the state is actually human affairs in the country where he lived, as long as not eliminating the Islamic values in general then the concept of any state is allowed and not in contrary with sharia.

## Conclusion

The values contained in the AAUPB have similarities with the values contained in siyasah fiqh, this is based on the correspondence between the rules of fiqh and AAUPB, this is due to the siyasah fiqh and the philosophical basis of the birth of the AAUPB are the same name to ensure the government runs perfectly for benefit of the state and people. This then indirectly makes the concept of siyasah fiqh acceptable to AAUPB in Indonesia, siyasah fiqh does not try to make the state must be in the form of khilafah or sultanate, but more emphasized on the outline that must be owned by the state in running the government, a guarantee that must be given to the state in guaranteeing and protecting human rights both derogable and non-derogable, siyasah fiqh and AAUPB are not in the domain to be contested, because the values contained in siyasah fiqh have been contained in the AAUPB, or in other words AAUPB has reflected values value in siyasah fiqh. Therefore, it can also be understood that the adoption of the values contained in the Islamic law through normalization has been carried out through the establishment of Law No. 28/1999 on Clean State Organizing and Free from Corruption, Collusion, and Nepotism.

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