

Constitutional *Fiqh* in The Framework of The Pancasila State

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Abstract:

This researcher's article discusses constitutional *fiqh* in the framework of the Pancasila state. Constitutional *fiqh* is the study of constitutional law that is based on Islamic principles collected through *ijtihad* from basic sources of Islamic law and supplementary sources. This type of *fiqh* is inextricably linked to parts of the rule of law that embody the values of justice, deliberation, equality, and liberty within the context of moral responsibility. The locus of constitutional *fiqh* in this case is Indonesia, as a democratic Pancasila state; if one examines the Pancasila state thoroughly, it has significance for responding to the issues posed by the transnational Islamic movement advocating for a *Khilafah* state. Islam lacks a standardized and precise understanding of the state and government. However, Islam establishes universal axioms on the relationship between religion and state, allowing for greater flexibility in recognizing the evolution of society throughout history. The function of human reasoning is critical in reconciling religious scriptures with the ever-changing realities of contemporary society. Conditions such as this demonstrate normalcy, and the study of the link between religion and the state is always fascinating. The field of constitutional jurisprudence, particularly in Indonesia, is undergoing significant growth and development. The link between religion and state results in the creation of ideals consistent with *maqashid al-shari'ah*, such as justice, harmony, pluralism, welfare, and goodness.

Keywords: Constitutional *Fiqh*, State, Pancasila.

Introduction

The connection between religion and state is frequently the subject of stimulating debate in scientific settings. From a content perspective, this topic is significant because it aspires to be an ideal structure for the dialectic style that exists between social life, nationalism, and state. It is not coincidental that this subject has been studied throughout the history of science, socio-religious movements, and social movements. The above-mentioned pattern of religious-state connections will shape the discipline of constitutional *fiqh*.¹ As explained by Abu Yasid², The Qur'an and hadith, as the primary sources of Islamic teachings, never discuss the connection between religion and state in considerable depth. On the other hand, revelation texts disclose a great deal about the broad and general connection between religion and state.

¹ Moh. Mahfud MD, "Fikih Konstitusi Negara Pancasila yang Islami", *Kompas* (16 April 2022), 7.

² Abu Yasid, *Mendialogkan Sistem Ketatanegaraan Islam*, Preface to the Book *Fiqh Tata Negara* (Yogyakarta: IRCiSoD, 2017), 8-9.

The general axioms are evident in the moral messages in *Surah An-Nahl* (16): 90, the principle of equality before the law (*al-musawah*) in *Surah Al-Hujurat* (49): 13, democratization (*al-shura*) in *Surah Ali-Imran* (3): 159, and upholding human rights and freedoms (*al-hurriyah*) in *Surah Al-Baqarah* (2): The dialectic of text meaning as it relates to changing eras and locations is critical. The entering point is to achieve the advantage in a pluralistic society while maintaining a respectable political style. All of these moral themes are enshrined in the *fiqh* of Indonesia's national constitution. The researcher wishes to broaden readers' horizons by presenting articles on constitutional *fiqh* within the framework of the Pancasila state in order to analyze constitutional science that is compatible with Islamic science in order to realize a just, prosperous, prosperous, and harmonious government that is consistent with Islam's goals of spreading benefit and preventing harm. The article employs the approach of library research.³, namely research that seeks to find out conceptually the existing theory.⁴ In this example, the researcher attempts to analyze data on constitutional *fiqh* in relation to this research, namely by evaluating the item under examination. The preceding research is an example of qualitative research, which is defined as research that elucidates a phenomena through the use of words to describe the genuine truth, rather than via the use of figures and statistics.⁵ This method of the research is utilized specifically to accommodate a comprehensive description of the thing under study.

Result and Discussions

Constitutional *Fiqh* in Indonesia

Constitutional *fiqh* is a scientific discipline defined by two critical terms. To begin, there is *fiqh*, which is a practical derivation from the Qur'an's teachings, and hadith, which is the normative basis for action. *Fiqh* is the science of the *shara'* rules as they relate to acts by elaborate reasoning derived from cognition and *ijtiha>d*.⁶ Therefore, Allah cannot be called a *faqih/fiqh* expert because for Allah there is nothing that is not clear.⁷ *Fiqh* is a term that refers to the study of *shar'i* laws (not rational laws) in the form of practice (not *shar'i* laws in the form of beliefs, such as the nature of *qudrah* obligatory for Allah, which is deduced in detail from the axioms of law, such as the axiom *aqim al-sala>ta*. This is a command in which the command implies an obligation; hence, prayer is mandatory, and the word *wal taqrabu> al-zina* also bans approaching adultery. The Qur'an, *sunmah*, *'ijma*, and *qiyas* are cited as sources.⁸

³ Burhan Ashofa, *Metode Penelitian Hukum* (Jakarta: Rineka Cipta, 1998),143.

⁴ Muhammad Nasir, *Metode Penelitian* (Jakarta: Ghalia Indonesia, 1995),54.

⁵ Djam'an Satori dan Aan Komariyah, *Metodologi Penelitian Kualitatif* (Bandung: Alfabeta, 2009), 25.

⁶ Jalal al-Din al-Mahalli, *al-Warāqat*, (Surabaya: al-Hidayah, tt), 13.

⁷ Sahid HM, *Legislasi Hukum Islam di Indonesia, Studi Formalisasi Syariat Islam* (Surabaya: Pustaka Idea, 2016), 9.

⁸ Muhammad Solikhudin, "Pengembangan Hukum Islam Kontemporer dari *Qawli* ke *Manhaji*", *Ahkam*, Vol. 7, No. 1 (July, 2019), 172-173. See Muhammad Shata al-Dimyathi, *I'ānah al- Ṭālibīn*, (Surabaya: al-Hidayah, tt), 14.

Fiqh in language is understanding⁹, while in terms it is a science in the form of a definite law that is in harmony with reality taken from an axiom where the law is not a science of essence and nature such as the essence of *Zaid* and the nature of *Zaid* who is white, in the form of *shari'ah*, it is not a science of calculation law or custom where this *shari'ah* science is associated with the maker of *shari'ah*, namely Allah or the Prophet Muhammad, in the form of knowledge of practice, not knowledge of beliefs such as the obligatory nature of *qudrah*, obtained from detailed legal axioms, such as the expression *walā taqrabū al-zina* which contains prohibitions. If there is a prohibition then the law is haram. In conclusion, approaching adultery is unlawful.¹⁰

Furthermore, the state is the maximum organization of one or more groups of people that wish to unify, live in a certain territory, and establish a sovereign government.¹¹ According to Abu Daud Busroh, the state is an organization capable of imposing its will, which comprises collaboration and a division of responsibilities to accomplish specific goals within a specified time period.¹² According to Ni'matul Huda¹³, quoting Miriam Budiardjo¹⁴, states that The state is a social institution with the authority to control human interactions and to publicize manifestations of power in society. According to the foregoing definition, constitutional *fiqh* is the science of constitutional law that is harmonized with Islamic teachings collected through *ijtihad* from primary sources of Islamic law and supporting sources. This type of jurisprudence is inextricably linked to features of the rule of law that include the ideals of justice, deliberation, equality, and liberty within the context of moral responsibility.

The locus of constitutional *fiqh* in this case is Indonesia, as a democratic Pancasila state; if one examines the Pancasila state thoroughly, it has significance for responding to the issues posed by the transnational Islamic movement advocating for a *Khilafah* state. Islam lacks a standardized and precise understanding of the state and government. Islam, on the other hand, provides universal postulates concerning the connection between religion and state, allowing for greater flexibility in interpreting the evolution of civilization throughout history.

The function of human reason is critical in reconciling religious scriptures with the ever-changing realities of contemporary society. Conditions such as this demonstrate normalcy, and the study of the link between religion and the state is always fascinating. The field of constitutional jurisprudence, particularly in Indonesia, is undergoing significant growth and development. The link between religion and state results in the

⁹ Abdurrohman Kasdi, "Reconstruction of Fiqh Nusantara: Developing the Ijtihad Methodology in Formulating Fiqh from Indonesian Perspective", *QIIS: Qudus International Journal of Islamic Studies*, Volume 7, Number 2, 2019, 243.

¹⁰ Muhammad Solikhudin, "Pengembangan Hukum Islam Kontemporer dari *Qawli* ke *Manhaji*", *Ahkam*, Vol. 7, No. 1 (July, 2019), 172-173. See Ibrahim al-Bajuri, *Hāshiyah al-Shaikh Ibrāhim al-Bajuri* (Beirut: Dar al-Fikr, 2005), 25-26.

¹¹ Mexsasai Indra, *Dinamika Hukum Tata Negara di Indonesia* (Bandung: Refika Aditama, 2011), 1. See Moh. Mahfud MD, *Dasar dan Struktur Ketatanegaraan Indonesia* (Yogyakarta: UII Press, 1993), 72.

¹² Abu Daud Busrroh, *Ilmu Negara* (Jakarta: Bumi Aksara, 2011), 2.

¹³ Ni'matul Huda, *Ilmu Negara* (Jakarta: Rajawali Press, 2013), 2.

¹⁴ Miriam Budiardjo, *Dasar-dasar Ilmu Politik* (Jakarta: Gramedia Pustaka Utama, 1991), 38.

creation of ideals consistent with *maqasid al-shari'ah*, such as justice, harmony, welfare, and goodness. Political concerns are classified as *mualamah fiqh* (social law) in Islam. There are *fiqh* rules/legal maxims that declare that social law is in *mubalanas*/neutral principle, and there are other the *fiqh* rules/legal maxims that state that *mualamah fiqh* is permissible to practice unless it is determined that there is a prohibition.¹⁵

By referring to the prior two principles, it is clear that the provisions concerning political issues and government systems do not require lengthy theological text justifications. In Islam, the basis for establishing a government is the benefit, which is vocally conveyed in the form of global propositions in the form of broad principles in various moral arguments. Islam is extremely tolerant and compatible with the advancement of science, especially constitutional science, in terms of practical specifics. In the present day, the discourse of state and religion is rapidly forming and gaining strength. The State's conversation with a multiethnic, multiracial, multicultural, and even multireligious population segment has prompted numerous organizations to develop new constitutional notions that are more in keeping with the spirit of the times.

Numerous theories have been advanced by specialists about the link between the state and religion, including the theory of state religion, the secular state, and the symbiotic theory, which is a hybrid of the two. By examining the existing variety in Indonesia, this final hypothesis is deemed adequate for application. The existence of government system dynamics is a necessary and understandable phenomenon. Because Islam's political system is classified as *wasilah* (means), not *ghayah* (goals). The objective element conveys the concept of justice across the population, ensuring that they feel protected and live comfortably and prosperously. Thus, it is quite reasonable that the nature of the state and its system of administration are not precisely and exhaustively explained in the revelation text.

However, the revelation text delivers it generically and universally in this scenario, allowing individuals to informally build a governance structure that is appropriate to their current concerns and the dynamics that surround them. Due to the fact that the explicit idea of political difficulties and government systems is not defined in depth in the revealed book, Muslims are left to make technical arrangements while referring to universal reasoning or numerous verses in the Qur'an and hadith that are universal in character. In other words, a set of ethical and moral principles that are compatible with the state's governance structure and mechanism is adequate to serve as a theological-philosophical foundation for political conduct. This theological-philosophical foundation is regarded to represent Islam's entire nature, allowing Islamic teachings to be delivered in a comprehensive and faultless manner in all parts of life.

Islam, conceptually, does not respect the separation of religion and state as defined by the secular state. Islam is comprehensive in nature, with the belief that the state is an integral element of Islam. As a result, the adage, *al-Islam di>n wa dawlah*, was formed that Islam is both a religion and a state. In the historical story of religion and the state, the state-religious school of thought frequently criticizes the secular state school of

¹⁵ Abu Yasid, Mendialogkan Sistem Ketatanegaraan Islam, Preface to the Book *Fiqh Tata Negara* (Yogyakarta: IRCiSoD, 2017), 9-10.

thought for separating religion and the state, which has distinct ramifications for the state-religious school of thought's horizon of thinking. These types of counter-narratives gain traction in the setting of the emergence of a nation-state and the diversity that surrounds it. Indonesia is the most democratic country in the world. This is strengthened by the 1998 reform phenomenon, which aimed to strengthen the state administrative system.

The rise of the concept of a state with a *Khilafah* governance system is a dynamic in the connection between state and religion, as well as the influence of the 1998 reforms, since it is the reason for arguments in the field of democracy regarding the implementation of sharia in each nation. Horizon thinking in this manner flourishes and must be dealt with prudently and forcefully. This divergence of opinion does not need to be honed to the point of provoking a protracted fight if it is capable of resolving the *sharia* issue proportionately in accordance with its original purpose. *Sharia* is frequently regarded as a series of events that result in specific laws in religious teachings, which result in the official implementation of *sharia*. Whereas the *sharia*'s essence is a code of conduct that can liberate people from oppression and other negative aspects of life in favor of kindness and fairness.

Globally, sharia is defined as a *manhaj* (method) for obtaining advantages that must be supported within a framework of government. The real-world example is Indonesia's application of democratic rule of law in line with the constitution, including the issue of power sharing and the Pancasila state that is the Indonesian state's defining feature. All of them are sharia, which refers to techniques for enforcing Islamic principles in social activities, as well as in terms of country and state. This is referred to as the formation of constitutional *fiqh* inside the framework of the Pancasila state, which has the function of disseminating grace within the framework of the Indonesian state administration, which may be continually updated to meet contemporary demands.

Aspects of Rule of Law in Constitutional *Fiqh* .

In Indonesia, constitutional *fiqh* emphasizes two critical aspects of the rule of law: a knowledge of the constitution and a democratic system that is consistent with the Qur'an's teachings on equality before the law and democratization. Both of these points are consistent with '*urf sahih*'¹⁶, because it has become a habit of the Indonesian people through the thoughts and experiences of the Indonesian people. According to Tahir Azhary,¹⁷ as quoted by Triwulan Tutik¹⁸, the thought of the rule of law started from the time of Plato with his idea that a good state administration is based on a good (law) arrangement which is termed *nomoi*. Then the idea of the rule of law became

¹⁶ Habit ('*urf*) a certain society that can be used as evidence, in this case '*urf sahih*'. This is in accordance with al-Burnu's expression that what is done by humans is evidence that must be done with him. See Muhammad Shidqi bin Ahmad al-Burnu, *al-Waji'z* (Riyadh: Maktabah al-Taubah, 1415 H./1993 M.), 237.

¹⁷ Muhammad Tahir Azhary, *Negara Hukum: Suatu Studi Tentang Prinsip-Prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini* (Jakarta: Bulan Bintang, 1992), 66.

¹⁸ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 61.

increasingly popular in the 17th century as a result of the political situation in Europe which was dominated by absolutism.

In reality, the concept of a rule of law evolved in two legal systems: the Continental European system known as *Rechtsstaats* developed in France, the Netherlands, and the countries they colonized, and the Anglo-Saxon system known as Rule of Law developed in England, the United States of America, and Australia.¹⁹ Imanuel Kant and Frederick Julius Stahl both endorsed the concept of a Continental European *Rechtsstaat*. This concept is built on four pillars: first, human rights are recognized and protected; second, the state is founded on the trias politica theory; third, government administration is based on the rule of law; and fourth, there is a state administrative court tasked with resolving cases of law violations. Meanwhile, A.V. Dicey echoed the concept of an Anglo-Saxon rule of law. This concept, according to him, is composed of three components: first, the rule of law; second, equality before the law; and third, a constitution founded on individual rights. According to these experts, the concept of a rule of law refers to a state that does not tolerate the abdication of authority without control. A country with a way of life that is governed by just and democratic rules. The surrounding power must adhere to the appropriate rules.

According to Garry F. Bell in his article *The New Indonesia Laws Relation to Regional Autonomy Good Intentions, Confusing Laws*²⁰ and *Indonesia: The New Regional Autonomy Laws, Two Years Later*²¹ which contains the constitution in Indonesia, it can be understood that Indonesia adheres to the concept of a continental legal state *Rechtsstaat*. However, according to R.M. Ananda B. Kusuma²², Indonesia adheres to the Continental *Rechtsstaat* principle and the Rule of Law. In this regard, Indonesia has the principle of a dual rule of law. First, because Indonesia was once colonized by the Dutch, it uses the *Rechtsstaat* principle, namely in resolving legal cases based on general to specific principles by looking at the constitution contained in the legislation. Second, Indonesia also uses the concept of the Rule of Law, it is proven that when a judge is tasked with solving a problem, he can perform *ijtihad* in solving cases.

Since 1945, Indonesia has declared itself a state of law, as indicated in the 1945 Constitution's proclamation that "Indonesia is a state based on law and not a state based on mere power". This notion is reinforced by an addendum to Article 1 Paragraph 3 of the 1945 Constitution, which specifies that "the Indonesian state is a state of law." According to this concept, four critical aspects must be accomplished in Indonesia: first, human rights; second, power distribution; third, law-based governance; and fourth, administrative justice. There are two critical parts to grasping the rule of law, including a comprehension of the constitution and the democratic system, or people's sovereignty.

¹⁹ Titik Triwulan Tutik, "Pembaharuan Hukum Tata Negara Indonesia dalam Rangka Mewujudkan Cita Negara Hukum Nasional", *Al-Daulah* (Vol. 8 No. 2 :October 2018), 374.

²⁰ Garry F. Bell, "The New Indonesia Laws Relation to Regional Autonomy Good Intentions, Confusing Laws" *Asian-Pacific Law and Policy Journal* (Vol. 2 Issue 1: Winter 2001).

²¹ Garry F. Bell, "Indonesia: The New Regional Autonomy Laws, Two Years Later", *Southeast Asian Affairs* (Issue1:2003), 119.

²² Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 62.

Understanding the constitution entails recognizing that governance is founded on fundamental law (the constitution), not on arbitrary authority (absolutism). The natural conclusion of this thinking is that, as the executive retains government authority under the Constitution, the state government led by the President has the right to submit legislation to the people's representative institutions. The president enacts government rules to ensure that laws are enforced. In light of this, the President may establish rules only if they are based on or are a continuation of the Constitution.

The constitution has the basic meaning of a political arrangement called the state. The constitution describes the entire state administration system of a country, including the rules that shape, regulate or govern the State. Some of the constitutions are written as decisions of the competent body, in the form of a constitution or laws and some are not written in the form of usages, understandings, customs or conventions. Understanding the constitution according to Charles Howard McIlwain²³, quoted by Triwulan Tutik²⁴, which contains the existence of two important principles: first, the law that limits the possibility of arbitrary power; second, full political accountability from the government to the governed.

In addition to understanding the constitution, there is also a democratic system which is an important aspect in a state of law. Democracy is an institutional plan for reaching political decisions in which individuals gain the power to decide how to compete competitively for the people's vote.²⁵ According to Affan Ghaffar, democracy has two forms: first, normative meaning, namely democracy which is ideally intended to be carried out by a country. Second, empirical democracy, namely democracy in its manifestation in the world of practical politics.²⁶ If democracy is associated with state organizations, it can be interpreted as state organization which is carried out by the people themselves or with the consent of the people because sovereignty is in the hands of the people. From this it can be understood that the essence of democracy is a system of society and state and government that emphasizes power in the hands of the people which has three meanings, namely: government of people; government by people; and government for people.

There are three ideal ideals or guiding principles of democracy: equality, liberty, and egalitarianism. Law enforcement and the protection of human rights are inextricably linked to democracy, as law enforcement is concerned with achieving equal rights and obligations for citizens, whereas human rights protection is concerned with ensuring the continuity of citizens' freedom to perform their duties, obligations, and obtain their rights. Thus, democracy, law enforcement, and the preservation of human rights form an inseparable triangle.

²³ Charles Howard McIlwain, *Constitutionalism: Ancient and modern* (United States: Lawbook exchange, 2017).

²⁴ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 66.

²⁵ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 68.

²⁶ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 68.

A country is deemed to have a democratic system if it possesses three key characteristics. This covers, first and foremost, state creation governance. The process of state creation has a significant impact on the quality, character, and pattern of interactions that will be developed. Second, the foundation of governmental authority. This refers to the concept of power, responsiveness to society, and a distributive and populist power structure. Thirdly, citizen control. The people, as sovereigns, balance and control the executive and legislative branches of government. Realizing a democratic life in the praxis of the nation and state is not as easy as turning the hand. Democracy can develop rapidly, if there are non-artificial efforts from all citizens who can create a conducive culture as the realization of the mind set (reason of thinking) and social setting (society design). The real format of this embodiment is that democracy is used as a way of life (view of life) in the joints of public life in order to create the common good as stated in the rules of *fiqh*.

Aspects of The Distribution of Resources in Constitutional *Fiqh*

After the rule of law aspect in constitutional *fiqh*, there is also an aspect of power sharing which can be called the trias politica concept which can be used as a breakthrough in the era of the credibility crisis, because it is very difficult, if not impossible, to find a leader who is truly honest and sincere and have integrity. With the division of power, including executive, judicial and legislative²⁷, it is expected to minimize the occurrence of a monopoly of power in the hands of the leader. Coupled with the control of the people as the application of *amar ma'ru'uf nahi munkar* to the government, the more the possibility of arbitrariness is closed.²⁸ The concept of *trias politica* is in accordance with *maslahah mursalah*, especially *maslahah al-Bu'ti* which states that *maslahah* is benefit that leads to enjoyment and rejects harm. *Maslahah* according to *al-Buti*, there are several important limitations, namely: first, if it is in line with the objectives of the *Shari'ah* in His creatures which includes the maintenance of the five universal principles of Islam. Second, the benefit is not contrary to the Scriptures. Third, the benefit does not conflict with *Sunnah*. Fourth, the benefit does not conflict with *Qiyas*. Fifth, these benefits do not negate other benefits that are more important or in harmony.²⁹

Avoidance of arbitrariness and supervision of the people is the result when the *trias politica* which contains *maslahah* is carried out properly. This concept is also in line with democracy which is a system identical to *shura*, in this case there is no doubt that it is

²⁷ Legislation does not imply hostility to God's law, as legislation in parliament is concerned with ambiguous *sharia norms*. See Sukron Kamil, *Pemikiran Politik Islam Tematik* (Jakarta: Kencana, 2013), 107.

²⁸ Alfanul Makky et al, *Kritik Ideologi Radikal: Deradikalisasi Doktrin Keagamaan Ekstrem dalam Upaya Meneguhkan Islam Berwawasan Kebangsaan* (Kediri: Lirboyo Press dan Lawang Songo, 2019), 258.

²⁹ Muhammad Sa'id Ramadan al-Buti, *Dawabit al-Maslahah fi al-Shari'ah al-Islamiyyah*, (Beirut: Muasasah al-Risalah, 1982), 23. See Muhammad Solikhudin, "Pemikiran Muhammad Sa'id Ramadan al-Buti Tentang Maslahah dan Batasan-Batasannya", *Mahakim* (Vo. 3 No. 1: January 2019), 29-30.

compatible with Islamic teachings.³⁰ The discourse of power sharing has always been associated with Montesquieu. According to him, in every government there are three types of power, namely legislative, executive and judicial where these three powers must be separated, both regarding their duties and equipment.³¹

According to Sukardja, government is distinguished in a broad sense and in a narrow sense. In a broad sense, government includes legislative, executive and judicial powers. Government in a narrow sense is only about executive power. Legislative power functions to form laws and judicial power is the power to adjudicate disputes. State power according to *siyasa fiqh*, consists of *al-sultah al-tashri'iyah* (legislative), *al-sultah al-tanfidziyyah* (executive) and *al-sultah al-qadlaiyyah* (judicial). At the beginning of the constitutional history of Muslims, the three powers did not stand alone, but in modern times each is independent and is a division, not separation.³² Government in modern times is led by a head of state as the President. In agreement with Ahmad Sukardja, Ismail Suny argued that the division of government authority was not always flawless, since it was not always totally distinct from one another and occasionally impacted one another. If one observes the theory of separation of powers in the United Kingdom and the United States, one will see that it does not apply in England, which has a parliamentary system, and the United States, which has a presidential system.³³

Borrowing from Ivor Jennings's theory, it is possible to deduce that the 1945 Constitution does not adhere to the separation of powers in a material sense, in the sense that the division of power is maintained primarily through state functions, which demonstrates the existence of separation into three parts. The 1945 Constitution recognizes the separation of powers primarily in a legal sense, and hence does not sustain it in practice. In plain English, the 1945 Constitution acknowledges merely the division of powers, not their separation.³⁴ In Soepomo's opinion, the 1945 Constitution had its own system, namely based on the division of power. Although in the division of power, each state institution has a specific task, in this system it is possible to have cooperation between state institutions. From this it can be understood that the 1945 Constitution does not adhere to the separation of power, but in the constitutional system according to the 1945 Constitution, the division of power is recognized as follows: first, basically the 1945 Constitution recognizes the division of power; secondly, the 1945 Constitution divides power into three institutions which are regulated by basic position and function; third, there is cooperation between state institutions in carrying out their functions and duties in accordance with the laws and regulations; Fourth, the judicial power in

³⁰ Alfanul Makky et al, Kritik Ideologi Radikal: Deradikalisasi Doktrin Keagamaan Ekstrem dalam Upaya Meneguhkan Islam Berwawasan Kebangsaan (Kediri: Lirboy Press dan Lawang Songo, 2019), 258.

³¹ Titik Triwulan Tutik, Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945 (Jakarta: Kencana, 2011), 74.

³² Ahmad Sukardja, Hukum Tata Negara dan Adminitrasi Negara dalam Perspektif Fikih Siyasa (Jakarta: Sinar Grafika, 2014), 240.

³³ Titik Triwulan Tutik, Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945 (Jakarta: Kencana, 2011), 74-75.

³⁴ Titik Triwulan Tutik, Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945 (Jakarta: Kencana, 2011), 75.

carrying out its duties is an independent power, free from the influence of other powers, both executive and legislative. In addition, there is no mention of the public prosecutor's agency (Agency) in the 1945 Constitution.³⁵ Regarding this matter, according to Ismail Suny, in a legal state what is important is not the presence or absence of a trias politica, the problem is whether or not the tools of state power can be avoided from tyrannical bureaucratic practices and this does not depend on the separation of powers itself, but lies in the existence of a democratic state joint called popular sovereignty.

Aspects of The Pancasila State in Constitutional *Fiqh*

The *fiqh* of state administration in Indonesia also has an aspect of the Pancasila state. Pancasila in this sense is often called the basic philosophy of the state (philosofische Grondslag), the ideology of the state (staatidee). In this case Pancasila is used as the basis for regulating state government or in other languages Pancasila is used as the basis for regulating state administration. From a historical point of view, Pancasila as the basis of the State was first proposed by Ir. Sukarno at the trial of the Investigating Committee for Preparatory Work for Independence (BPUPKI) on June 1, 1945. When the BPUPKI met to discuss a filosofische Grondslag for an independent Indonesia, it was determined that Pancasila would be the name of the state's fundamental philosophy and way of life. Although there are various distinct sequences and formulations in that situation. The history of Pancasila cannot be divorced from the history of the 1945 Constitution. Pancasila's status as the state's foundation implies that all actions of the Indonesian people and state must be consistent with Pancasila. This is because Pancasila is derived from the Indonesian nation's culture, and hence has a very broad function and role in the practice of statehood and nationhood. Pancasila is regarded as the foundation of the Indonesian state due to the fact that it incorporates various principles (five in all) that may be summarized as follows³⁶:

1. Believe in The One and Only God.

The Indonesian people's traditions, customs, and culture are inextricably linked to the practice of religious teachings. Indonesians have been affected by religious traditions and ideals from ancient times. From Hinduism, Buddhism, Christianity, and Islam to other indigenous beliefs like animism and dynamism, all of which contributed to the construction of the Indonesian people's character.³⁷ For instance, Javanese history and culture are inextricably linked to Islam, Hinduism, and Buddhism. Each of these three faiths contributes significantly to and refines the Javanese people's structures, values, customs, and traditions. As a result, the Malay, Minangkabau, and Acehnese peoples are inextricably linked to Islamic civilisation. Toraja and Papua also absorb a great deal from the major Christian civilizations of the world. Religion has a fundamental role in moulding the character of the Indonesian people and cannot be overlooked. According to this logic, the archipelago's genuine people are religious. As a result, the nation's

³⁵ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 76.

³⁶ Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara di Indonesia Pasca Amandemen UUD 1945* (Jakarta: Kencana, 2011), 79.

³⁷ Muhammad Al-Ayubi et al, *Nasionalisme Religius: Manhaj Kebangsaan Ulama Nusantara* (Kediri: Lirboyo Press, 2020), 231.

founders based the first precepts on the idea of "Belief in One Supreme God." Because religion has grown ingrained in the archipelago's culture. Additionally, the term "Belief in The One and Only God" appears to have represented the Indonesian people's life, since they are predominantly a religious nation.

The State of Indonesia is a country built on a religious nationality based on the values of belief in God Almighty. For Muslims themselves, belief in God Almighty is very important. It is the essence of the teachings of monotheism. As explained in Surah al-Baqarah: 163 and al-Anbiya ': 25. Additionally, the premise of "Belief in The One and Only God," which is Pancasila's first precept, gives the concept of religious freedom. Assure safety and equal rights for all faith adherents. That is, the state may not compel someone to practice a religion. The state founded on "Belief in The One and Only God" protects each citizen's right to embrace and worship according to their own faith. As stated in Article 29 (2) of the 1945 Constitution, "The State guarantees the independence of each resident to embrace their respective religions and to worship according to their religion and beliefs." In the context of Islam, religious freedom is reflected in the first precepts like this, according to the word of God in Surah al-Baqarah: 256 and Surah al-Kafirun: 6.

In the Medina charter, the Prophet Muhammad himself never forced anyone to embrace Islam. The Prophet gave freedom to the people of Medina to embrace and believe in the religion he believed in. All residents are recognized as citizens of the same country, despite their different religions. In line with the Medina charter, Pancasila is the basis that can unite the plurality of this nation. The first precept is an idea that has been very developed in the culture of the people of the archipelago for centuries. The spiritual values contained in it are able to unite the Indonesian nation.

2. Just and Civilized Humanity

The second precept contains three important points that must be considered, namely: humanity, justice and civility. Humanity is related to the nature of a human being. This means that the nature and dignity of a human being must be used as a moral reference in the life of the nation and state. In addition, in Islam, Allah has glorified humans. He is a creature that is considered the most perfect. As explained in Surah al-Isra ': 70. Human dignity is a natural right. He is under the protection of Islam, as a moral and ethical foundation, regardless of his social and religious status. No one may demean, exploit or trample on the dignity of others. This humanitarian vision aims to realize humanist and harmonious relations in a pluralistic nation. The diversity that Indonesia has is a matter of understanding and a reality that is impossible to standardize. Primordial differences, such as race, ethnicity, culture, customs, language and religion are not a reason to fight each other. Because differences are actually used as capital to get to know each other. As explained in Surah al-Hujurat: 13. This verse explains the universal appeal of humanity. *Ukhuwah insa>niyyah* must continue to be cared for as stated in the second precept.

The second point of the second principle of Pancasila is fair. Fair is a vocabulary that is absorbed from Arabic. This word is often mentioned in the Qur'an and the hadith of the Prophet Muhammad which calls for justice. As explained in Surah an-Nahl: 90. Justice is a basic principle that is highly emphasized in Islam. Especially in the context

of law enforcement, humans are required to enforce the law as fairly as possible. This is as stated in Surah an-Nisa ': 58. In addition, justice must also be served to everyone. Even for people they hate. As explained in Surah al-Maidah: 8. In the context of humanity, the word fair is understood as an effort to treat humans equally by giving their rights proportionally. Without discriminatory treatment based on subjective things, such as heredity, social status and so on. Diversity of ethnicity, religion, race, culture and others is not a reason to take discriminatory actions against others.

3. The Unity of Indonesia

Indonesia is a huge and diversified country with the potential for division. Egoism, exclusivism, and absolutism fueled by religious, ethnic, and national distinctions will seriously undermine a country's survival. The nation's founding fathers were well aware of the divides that plagued the colonial period. As a result, the founding fathers of this nation prioritized Indonesian unity as the third priority.³⁸ Unity is an idea that can unite the differences in elements from various styles and diversity of nations known as the slogan *Bhineka Tunggal Ika*. This slogan was then sown in the common steps towards a common goal. In Islam, this third precept is in accordance with Surah Ali-Imran: 103. The relationship to Allah in this verse can be interpreted as a congregation. In Islamic terms, the word congregation is not just narrowed down to the meaning of a crowd of people, but rather to the conscious unification of people in a structured forum and pattern of togetherness.

4. Democracy Guided by The Inner Wisdom in The Unanimity Arising Out of Deliberations amongst Representatives

Democracy is a broad term that encompasses all aspects of human life. Democracy may also be defined as a democratic system, a form of governance in which the people have the greatest authority. This system is distinct from feudalism, which is more concerned with the king's and ruling elite's interests. The fourth principle stresses, in this sense, that state policies may be determined via mutual agreement based on the public interest.³⁹ The governing elite does not alter the course of state policy. Because all governmental policies are guided by the public interest or advantage. According to fiqh's standards, the leader's policies must be directed toward the common benefit.⁴⁰ In addition, the fourth precept is also a guide for leaders to carry out God's mandate with a sense of responsibility, fairness and integrity. The term wisdom is the wisdom of someone who can lead to the best choice, because of the breadth of knowledge possessed. This attitude will lead to the title *al-hakim* (wise person). This word of wisdom is in accordance with Surah al-Baqarah: 269. When the phrase wisdom of wisdom is associated with leadership, it means that the leaders of this nation are chosen people who have goodness, wisdom and wisdom as well as extensive knowledge in carrying out the mandate of the state.

³⁸ Muhammad Al-Ayubi et al, *Nasionalisme Religius: Manhaj Kebangsaan Ulama Nusantara* (Kediri: Lirboy Press, 2020), 240-242.

³⁹ Muhammad Al-Ayubi et al, *Nasionalisme Religius: Manhaj Kebangsaan Ulama Nusantara* (Kediri: Lirboy Press, 2020), 242-245.

⁴⁰ Sayyid Abi Bakar al-Ahdali al-Yamani al-Shafi'i, *al-Faraid al-Bahiyah fi al-Qawaid al-Fiqhiyyah* (Kediri: Madrasah Hidayatul Muftadi-in, 2004), 48.

Wisdom of wisdom can also be interpreted as an effort to carry out state duties fairly and responsibly. Because, all the policies given will be based on the interests and benefits of the people. While deliberation/representation is the principle of deliberation which aims to determine the direction of state policy. In the context of a modern state, the form of deliberation is carried out through parliament or people's representatives. Deliberations are carried out by representatives of the people who really know what the people need by considering the values of benefit which are the core of *maqasid al-shari'ah* which has an impact on social welfare. The content of the fourth precept is in line with Surah ash-Syura: 38 and Surah Ali-Imran: 159. Thus, the fourth precept emphasizes that the Indonesian nation is a country that always prioritizes the interests of the people over individual interests. Despite the fact that there is corruption everywhere, at least with the principle of democracy, then sovereignty is in the hands of the people, individual interests can be minimized and monitored by the people as the holder of the highest power.

5. Social Justice for The Whole of The People of Indonesia

This last precept is a description of the ideals of the Indonesian people in living the life of the nation and state. The ideals of the Indonesian people are to create justice and social order in all areas of life, whether economic, social, political and so on, including spiritual life related to religious issues. The ideal of creating a just and prosperous society has actually been embedded for a long time in the slogan: *gemah ripah loh jinawi, tata tentrem kerta raharja*.⁴¹ This fifth precept aspires to the absence of inequality and inequality in various fields among all Indonesian people, especially in the economy. All Indonesian people must feel this justice, not just being monopolized by a few groups. There must be no political, legal, economic or development system that favors some groups unfairly. This spirit of justice is in line with Surah al-Hasr: 7.

Pancasila in the first precepts reflects the teachings of monotheism and each of its precepts does not contradict Islamic teachings. The values contained in Pancasila are in accordance with the Qur'an and hadith as well as universal Islamic teachings, therefore the noble values that serve as the basis of the state are agreed upon and justified by Islam. The basis of the state in the form of Pancasila and the religion of Islam are two things that are in line and support each other. The Unitary State of the Republic of Indonesia is a legitimate state and must be defended from a religious point of view. Pancasila is the only state basis that can protect all groups and strengthen unity, so accepting and practicing Pancasila is part of practicing Islamic teachings.⁴²

Therefore, Pancasila is in accordance with Jamaluddin' Atiyah's *maqasid al-shari'ah*⁴³, he states four kinds of maqasid, namely maqasid for personal, family, nation/people and humans in general. In *maqasid al-ummah* includes maintaining

⁴¹ Muhammad Al-Ayubi et al, Nasionalisme Religius: Manhaj Kebangsaan Ulama Nusantara (Kediri: Lirboyo Press, 2020),245-247.

⁴² Alfanul Makky et al, Kritik Ideologi Radikal: Deradikalisasi Doktrin Keagamaan Ekstrem dalam Upaya Meneguhkan Islam Berwawasan Kebangsaan (Kediri: Lirboyo Press dan Lawang Songo, 2019),421-424.

⁴³ Jamāl al-dīn 'Aṭīyyah, Towards Realization of the Higher Intents of Islamic Law, *Maqāṣid al-Sharī'ah: A Functional Approach* (Washington: IIIT, 2007), 153-160. Jamāl al-dīn 'Aṭīyyah dan Wahbah Zuhailly, *Tajdīd al-Fiqh al-Islamī* (Beirut: Dār al-Fikr al-Mu'asir, 2000), 196.

security, managing institutional organizations in a community, upholding justice, maintaining religion and character, helping each other, spreading knowledge and guarding the minds of the people, and building the earth and saving the people or community.⁴⁴

In *maqasid al-insaniyah*, divided into several things, helping each other, knowing each other and complementing each other, realizing general leadership on earth and responsibility for what is led, realizing world peace that is built on the basis of justice, international protection of human rights humanity, and spreading Islamic da'wah or Islamic values.⁴⁵ The emphasis is on humanity, peace, upholding justice and preaching Islam which is rahmatan lil 'alamin. This must be carried out continuously. The Pancasila state does not exclude Muslims from enforcing and defending Islamic law. However, the struggle to preserve religion in the Pancasila state must be organized according to wisdom and wisdom principles, must avoid pitting one religion against another, and must use religion as a source of inspiration for values that can be processed eclectically in Indonesian welfare institutions provided by the Indonesian government. constitution and ideology.

Conclusion

Constitutional *fiqh* is the study of constitutional law that is based on Islamic principles collected through *ijtiha>d* from basic sources of Islamic law and supplementary sources. This type of *fiqh* is inextricably linked to parts of the rule of law that embody the values of justice, deliberation, equality, and liberty within the context of moral responsibility. The locus of constitutional *fiqh* in this case is Indonesia, as a democratic Pancasila state; if one examines the Pancasila state thoroughly, it has significance for responding to the issues posed by the transnational Islamic movement advocating for a *Khila>fah* state. Islam lacks a standardized and precise understanding of the state and government. Islam, on the other hand, gives universal postulates concerning the connection between religion and state, allowing for greater flexibility in interpreting the evolution of civilization throughout history. Human reason is critical in linking religious writings to current realities, such as the term "rule of law," power division, and the state of Pancasila in Indonesia, all of which are connected to religious texts and principles. Conditions such as this demonstrate normalcy, and the study of the link between religion and the state is always fascinating. The field of constitutional *fiqh*, particularly in Indonesia, is undergoing significant growth and development. The implication of the relationship between religion and the state is the emergence of values of justice, harmony, welfare and goodness in accordance with *maqa>sid al-shari>'ah*.

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⁴⁴ Jamāl al-dīn 'Atīyyah, Naḥwa Tafīl Maqāsid al-Sharī'ah, (Damaskus: Dār al-Fikr, 2003), 148-164.

⁴⁵ Jamāl al-dīn 'Atīyyah, Naḥwa Tafīl Maqāsid al-Sharī'ah, (Damaskus: Dār al-Fikr, 2003), 164-172.

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