

CHAPTER IV
FINDING AND ANALYSIS

A. Mechanism of Succession of Head of State in Indonesian Democratic System and Islamic System

1. Mechanism of Succession of Head of State in Indonesian Democratic System

a. General Election in Indonesian Democratic System

According to John Locke and Rousseau, general election was born from the conception and great ideas of democracy which means the security of freedom, justice and equality for individuals in all fields. In democracy there are participative values and sovereignty that are upheld and must be exercised by citizens and state instruments, both in legislative, judicial and executive levels. People are given space to play an active role and become part of the democratic process.¹ General election is conducted periodically. In Indonesia, elections are held every five years while in the USA it is conducted every four years.²

¹Farahdiba, Pemilu Indonesia: Kiblat Negara Demokrasi dari Berbagai Referensi, *Jurnal Politik Profetik*, volume 3 (December, 2014)

²Jimly Asshiddiqie, 2014, *Pengantar Ilmu Hukum Tata Negara*, Jakarta, RajaGrafindo Persada, p. 416

Elections are part of the process as well as the outcome of a democratic system. A country can be called a democratic country if it has the following conditions:³

- 1) The form of government should be supported by a general consensus;
- 2) The rules and the general principles are made by elected representatives of the people through elections;
- 3) The head of state and the head of government is elected directly or indirectly through the electoral process. Leaders should be responsible for legislation governed by elected representatives;
- 4) Right to vote directly is given to the people on the basis of equality;
- 5) Departments and governmental duties are held by appointed officers on the basis of qualifications from all classes of citizens;
- 6) Sovereignty is defined as dealing and executing a particular will or aspiration. In the democratic system, the sovereignty is in the hands of the people. It means the people as a source of aspiration (law) and entitled to handle and carry out these aspirations;
- 7) Freedom of speech;

³Abdul Razak, "Syura dan Demokrasi: Persamaan dan Perbedaanya", *Media Akademika*, Volume 25 (July, 2010)

- 8) The people are free to embrace any religion;
- 9) Freedom of election system;
- 10) Recognition of the rights of majority and minority, making the majority vote as a conviction that can give a truth;
- 11) The political parties in democratic system play an important role;
- 12) Separation among legislative, executive, and judiciary;
- 13) Constitutional authority is the ultimate authority for the validity of any law and any implementation rules;
- 14) Freedom of act without violation the public interest.

The explanation of democracy is clear that the decision-making system within a democratic country use a system that involves the whole people, this system is called general election.

In Indonesia, the 1945 Constitution, Article 1, paragraph 2, states that "sovereignty is in the hands of the people and is practiced in accordance with the constitution". Then, in the Constitution 1945 Article 6A paragraph 1, about the election of the President of Indonesian, the Constitution entrusts to pass presidential elections directly by the people, "President and Vice President are elected in one partner directly by the people". It is also described in Chapter VII about the system of the General Election and it is clear stated in Article 22E paragraph 2 that "General elections are held to elect members of the People's

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

In democratic state the rule is the key to safeguarding the rights of its citizen including the values of democracy, the granting of the right to choose and to be chosen and the system which entitles citizen in every elections of ruler.

b. Stages of Election of Head of State in Indonesian Democratic System.

In the election system of the head of state in Indonesia must have stages to be passed. The provisions related to this stage must be standardized in the form of legal products, in Indonesia the stages are listed in the regulation of the General Election Commission. In the 2014 general election, the stages regarding the presidential election are listed in the General Election Commission Regulation No. 4 of 2014 on Stages, Programs and schedule of the election of president and vice president in 2014. The stages of the election of president and vice president in Indonesia are divided into three parts: the preparation stage, the implementation stage and the completion stage. The details of those stages are as follow:

1) Preparation stage

- a) Formulation, stipulation, and enactment of the rules for the holding of the President and Vice President Election;
- b) Socialization, publications, and education Voter;
- c) Simulation of voting and vote counting at the polling station;
- d) Working meetings, coordination meetings, and technical guidance for the General Election Commission at every level and overseas selection committee;
- e) Establishment of the *Adhoc* Election Organizing Body;
- f) Procurement and distribution of equipment for the election of the President and Vice President.

2) Implementation Stage

- a) Preparation of Voters List;
- b) Candidacy;
- c) Campaign and quiet period;
- d) Balloting and counting of rounds I;
- e) Recapitulation and recalculation of rounds I;
- f) Determination and announcement of President and Vice President of the round II;
- g) Inauguration of the elected President and Vice President;

3) Completion Stage

- a) Dissolution of the *Adhoc* Election Organizing Body;

- b) Evaluation of the implementation, compilation and submission of reports of Presidential and Vice Presidential Election by Regency/ Municipal General Election Commission and Provincial General Election Commission to General Election Commission;
- c) Evaluation of the implementation, compilation and submission of reports of the Presidential and Vice Presidential Election by the General Election Commission to the President and House of Representatives;
- d) Preparation of documentation;
- e) Archive management.

c. Principles of Election of Head of State in Indonesian Democratic System

The principles of General Election in a democratic state when viewed in general are as follows:

- 1) Political participation is at the core of a democratic country. It is determined by the presence or absence or high level of political participation of its citizens. The minimum standard of democracy is usually free election to ensure the rotation of the state controller without the exclusion of any political group; The active participation of citizen in the elections and in the process of policy

determination; Ensuring the implementation of human rights which gives freedom for citizens to organize themselves in free or in a political party, and express opinions in public forum and mass media. Based on previous definition about democracy, political participation is the basic principle for the availability of a democratic political system.

- 2) General Election recognizes the existence of universal suffrage. This right to vote is a fundamental principle for a state that embraces modern constitutional democracy. Election is an institutionalization of participation in the exercise of suffrage.

The right to vote of citizens is guaranteed in various legal instruments. Article 21 of the Universal Declaration of Human Rights (UDHR) provides that: (1) Everyone shall have the right to participate in the government of his own country, either directly or through the intermediary of his own country, either directly or by freely elected representatives; (2) Everyone has the right and equal opportunity to be appointed in the office of his government; (3) The will of the people shall be the basis of the authority of the government; This will have to be

expressed in fair and regular elections conducted under common and equal suffrage, as well as by secret ballot or in other ways which also guarantee the freedom of speech".

The 1945 Constitution stipulates that "All citizens shall be equal before the law and government and shall be obligated to impose such law and government with no exception." Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution provides that: "(1) Everyone is entitled to equitable recognition, guarantee, protection and legal certainty and equal treatment before the law"; "(3) every citizen shall be entitled to equal opportunity in government."

Article 43, Law No. 39 of 1999 on Human Rights regulates that, "Every citizen shall have the right to be elected and to vote in an election based on equal right through a direct, general, free, secret, honest and fair in accordance prevailing legislations. Then article 25 of ICCPR mentions, "Every citizen shall also have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions;

- a) To take part in the conduct of public affairs, directly or through freely to be chosen as representatives;
- b) To vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country. "

In addition, the Constitutional Court in the decision of the case Number 011-017/ PUU-I/ 2003 dated February 24th, 2004 states that, "Considering that the constitutional right of a citizen to vote and be a candidate is a right guaranteed by the constitution, international law or convention, the limitation of deviations, omissions and the abolition of such rights constitutes a violation of the right the nationality of the citizens."⁴

Principles of General Election in Indonesia are based on Article 22E of the 1945 Constitution

- 1) Universal, this principle can guarantee every citizen (regardless of sex, race, language, income, property, land,

⁴ Hasyim As'ary, "Arah Sistem Pendaftaran Pemilih Indonesia: Belajar dari Penagalaman Menuju Perbaikan", *Jurnal Pemilu dan Demokrasi*, II (February, 2012), P. 2-4

profession, class, education, religion and political belief) have the right to choose and to be chosen in the election.

- 2) Equality, this principle requires equal voting value for all voters.
- 3) Confidentiality, this principle assurance that no other party knows the voter's choice, which in practice is implemented in the form of the necessity of a voting ballot and a voting booth ensuring the confidentiality of choice.
- 4) Direct, this principle assurance that voters may elect candidates directly without any intermediaries. Basically, suffrage is the basic form of participatory democracy.

d. Sources of Law of Election of Head of State in Indonesian Democratic System

Sidney Hook defines of democracy as a form of government in which important government decisions or policy directions behind decisions are directly based on decisions of a majority given freely from the people. It means that the people provide issues concerning their lives, including in assessing the policies of the state that contributes to their lives.⁵

⁵Andriansyah, "Hukum dan Demokrasi", <https://blowrian.wordpress.com/2015/03/26/hukum-dan-demokrasi/>, accessed on Tuesday, April 13, 2017 at 12.50 am

In the democratic theory of participation, the essence of democracy is to ensure that decisions made by the government include citizens who may be affected by those decisions. Therefore, the definition of democracy is to encourage participation in making of decisions that affect their lives.⁶ Public participation in the formulation of legislation is a manifestation of the implementation of the principle of openness which is one of the principles in the formation of good legislation.

Based on above explanations, it can be concluded that the product of law in the democratic country is derived from collective agreements of people. It is certain that the people who have power in determining the policies are included in the determination of electoral regulations.

There are somethings that become the basic principle or legal basis in the implementation of the general election, namely:⁷

1. Ideal basis of Pancasila, values in Pancasila become the ideal basis in implementing general presidential election especially the value of populistic led by wisdom in deliberation/representatives as found in fourth pillar.

⁶Rahendro Jati, "Partisipasi Masyarakat Dalam Pembentukan Undang-Undang yang Responsif", *Jurnal Recht Vinding*, Vol. 1 No.3 (December 2012) p. 21

⁷Ahmad Masykur, "Tanggung Jawab", <https://belajar.kemdikbud.go.id/SumberBelajar/tampilajar.php?ver=12&idmateri=65&lvl1=1&lvl2=0&lvl3=0&kl=8>, accessed on Sunday June 19, 2017 at 5.20 pm

2. Constitutional basis, namely the 1945 Constitution written in: firstly, the opening of the fourth paragraph that is "Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and their entire native land, and in order to improve the public welfare, to advance the intellectual life of the people and to contribute to the establishment of a world order based on freedom, abiding peace and social justice, the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realization of social justice for all of the people of Indonesia."; secondly, Article 1, paragraph 2, that is "Sovereignty is in the hands of the people and is executed under the constitution"; Thirdly, the general explanation of the system of State administration found in the 1945 Constitution.
3. Operational basis, namely the State Guidelines in the form of People's Consultative Council decree such as Decree No. IV/MPR/ 1999 on State Guidelines; and other legislations such as Law no. 42 of 2008 on president and vice president election; General Election commission Regulation No. 27 of 2014 on

Amendment to General Election Commission Regulation No. 16 of 2014 about the Campaign of Presidential and Vice Presidential Election, General Election Commission regulation No. 27 of 2014 on Amendments to General Election Commission Regulation No. 16 of 2014 on the Campaign of Presidential and Vice Presidential Election, General Election commission Regulation No 26 of 2014 on the Establishment and Working Procedure of Overseas Election Committee and Overseas Voter Administration Group in the Implementation of the General Election of President and Vice President of 2014, General Election Commission regulation No. 25 of 2014 on the Establishment and Administration of the Sub district Election Committee, the Voting Committee, and the Voters' Organizing Group in the Election of the President and Vice President of 2014.

From the above explanation it can be conclude that legal sources of election of the head of state in a democratic system is the law derived from the legislation that had been made by the competent authorities on the basis of mutual agreement. Therefore, the constitution and legislation are source of the main law in the implementation of the state system included in the election of head of state.

e. Requirement of Election of Head of State in Indonesian Democratic System

The applicable law derived from a commonly agreed and binding rule of law, meaning that when it comes to the requirements of the electorate and the person elected in the presidential and vice presidential elections, it shall be returned to the applicable rules or laws, as like in Indonesia, in Article 5 to Article 12 in Chapter III of Law no. 42 of 2008 on president and vice president election, but relate to the criteria specifically addressed in article 5 as to the following conditions:

Requirements of President and Vice President

- a) Deity to God Almighty;
- b) Indonesian citizen since his birth and never received any other nationality because of his or her own will;
- c) Never betrayed the state, nor ever committed any criminal act of corruption and other serious criminal offenses;
- d) Able spiritually and physically to perform duties and obligations as president and vice president;
- e) stay in the territory of the unitary Republic of Indonesia;
- f) Has reported his/ her wealth to the authorized institution checking the state assets report;

- g) Not in possession of individual debt and / or by legal entity which becomes its responsibility which is detrimental to the state finances;
- h) Not being declared bankrupt by court decision;
- i) Never commit a disgraceful act;
- j) Registered as voters;
- k) Has a Taxpayer Identification Number (NPWP) and has performed the tax obligation for the last 5 (five) years as evidenced by the Annual Income Tax Form of Individual Taxpayer;
- l) Has never served as President or Vice President for 2 (two) terms of office in the same position;
- m) Faithful to Pancasila as the basis of the state, the 1945 Constitution of the State of the Republic of Indonesia, and the ideal of the Proclamation of 17 August 1945;
- n) Have never been imprisoned on the basis of a court decision that has had permanent legal force for committing a criminal offense punishable with imprisonment of 5 (five) years or more;
- o) Aged at least 35 (thirty five) years;
- p) The lowest education is graduated from Senior High School (SMA). Madrasah Aliyah (MA), Vocational High School

(SMK), Vocational Madrasah Aliyah (MAK), or other similar forms;

- q) Not a member of a banned organization of the Indonesian Communist Party, including its mass organization, or not a person directly involved in G.30.S/ PKI; and
- r) Having a vision, mission and program in implementing the government of the Republic of Indonesia.

From the above requirements, the criteria of head of state is actually derived from the basic principles held by people and citizen listed in the constitution of a country and coupled with the needs of a country for a leader but certainly does not only benefit some parties but can be afforded by anyone.

f. Inauguration of Head of State in Indonesian Democratic System.

The period of position will not always be attached to a ruler but one day the office will be detached from him, even in a monarchic system, since the term of position will be discharged when the life span is over, especially in a democracy country whose time of position uses a periodization system or has a time of position term that has been regulated in law. One of the characteristics of a democratic country is that there is no absolute power, meaning that power is in the hands of the people so that

within a certain period of time the ruler must be replaced and returned to the people to be re-elected using the electoral system.

In relation to the inauguration of the head of State/ President in Indonesia, it is of course the People Consultative Assembly which has the authority to inaugurate as stated in Indonesia in Law number 42 of 2008 on General Election of President and Vice President. Article 161 paragraph (1) describes the president and vice president inaugurated by the MPR. Article 161 paragraph (2) describes the vice-president automatically becomes president if the elected president is unable to be inaugurated. Article 161 paragraph (1) describes the elected president and vice president to swear according to their religion or promise earnestly before the Plenary Session of the People's Consultative Assembly, coinciding with the end of the term of office of president and vice-president.

The following is the oath and promise that the president and vice president have to pronounce when they are inaugurated, as stipulated in Article 163.

Presidential (Vice Presidential) Oath:

“I swear before God to fulfil the duties of the President of the Republic of Indonesia (Vice President of the Republic of Indonesia) as fairly and justly as possible, to uphold the

Constitution and to enforce all laws and regulations in its entirety and to serve the people and the nation. “⁸

2. Mechanism of Succession of Head of state in Islamic System

a. Shura in Islamic System

In the Al-Quran surah Ali-Imran verse 159 it is mentioned "It is part of the Mercy of Allah that you do deal gently with them. Were you severe or harsh-hearted, they would have broken away from about you: so pass over (their fault), and ask for (Allah's) forgiveness for them; and consult them in affairs (of moment). Then, when you have taken a decision put your trust in Allah. For Allah loves those who put their trust (in Him)"⁹ Then in the chapter Asy-Shura verse 38, it is found "Those who listen to their Lord, and establish regular Prayer; who (conduct) their affairs by mutual Consultation; who spend out of what we bestow on them for Sustenance".¹⁰ With the revelation of this verse Prophet Muhammad knew that the shura system has become a liability covered by the apostolic tasks. He must explain to the community how the shura is carried out and how the relevance of normative nuance of shura in the daily life of the people in the form of praxis.

⁸Laela Zahra, ini tata cara pelantikan presiden dan wakil presiden, <http://news.metrotvnews.com/read/2014/10/11/303526/ini-tata-cara-pelantikan-presiden-dan-wakil-presiden>, Tuesday, June 13, 2017 at 1.16 am

⁹Abdullah Yusuf Ali, 2008, The Meaning of Holy Quran Text, Translation and Commentary, Kuala Lumpur, Islamic Book Trust, p. 142

¹⁰*Ibid* p. 1049

The term Shura is taken from the word *Syaawara* means *lil mushari'akah*, meaning giving each other opinion, suggestion, or view. According to Abu Ali AL-Tabarsi, shura is deliberation to get the truth, Al-Asfahani also defines shura as formulating opinions through talks of various parties with the aim of knowing the various thoughts for the achievement of something formulation.¹¹ In shura all members are free to express their opinions. Freedom of dialogue is expected to be known weakness of opinion expressed, so the decision does not contain weaknesses.¹²

Therefore, the system of shura is used as a system to determine the head of state/ president in Islam, for example shura is applied in the election of the caliph Abu Bakr, Umar bin Khatab, Usman bin Affan and Ali bin Abi Thalib who prioritized the shura system that can unite the views. The election the caliph in that time did not involve the whole community as only the elected people were given the opportunity to conduct deliberations. In the election of Abu Bakar Assidiq, for example, there were only five friends who joined the deliberation. Then, in the election of Umar, he was only appointed by Abu Bakar but he asked for the approval of other people first. Next the election of Usman Bin Affan was conducted

¹¹ Abdul Razak, *Syura dan Demokrasi: Persamaan dan perbedaannya*, Volume 25 No 3, (July 2010) p.296

¹² Yunahar Ilyas, 2012, *Kuliah Ahlaq*, Yogyakarta, LPPI, p. 229

by six people namely Ali bin Abi Thalib, Utsman bin Affan, Saad bin Abu Waqqash, Abd Al-Rahman bin Auf, Zubair bin Awwam and Thalhah bin Ubaidillah and Abdullah bin Umar without voting. Meanwhile in the time of Ali bin Abi Talib after Usman Bin Affan died, muslims went to his house to swear him though he initially refused it. In the era of Umaiyah and Abbasyiah Kingdoms, the transfer of leadership was not done through the concept of shura but the system of monarchy.

b. Stages of Succession of Head of State in Islamic System

In terms of succession of head of state in Islamic system, shura has the stages such as: preparation, implementation and completion. The explanation of stages is as follows:¹³

1) Preparation stage

Each participant of the shura prepares the contribution of thought based on the agenda to be discussed, ranging from the philosophical nature of knowing the *syar'i* arguments, the consideration of benefits and *madharat*, to the choices of technical strategies. Shura that has been agreed to be implemented should be scheduled so the participants do not forget the time and place.

¹³ Fadhleewrite, "Manajemen Syura (Rapat) Efektif dan Produktif", <https://fadhleewrite.wordpress.com/2008/07/18/manajemen-syura-rapat-efektif-dan-produktif/> accessed on Tuesday, June 13, 2017 at 1. 20 am

Shura should be socialized first in terms of agenda, time and place a few days before its implementation. The time span between socialization and execution should not be so sudden that it can provide an opportunity for invited participants to prepare the agenda well.

In addition to preparation of thought, it must be prepared also in terms of *ruhiyah*, which means preparation in terms of faith and good intentions, because shura is a moment in policy making, of course the people expect the closest to the good and truth and it can only be obtained if there is *hidayah* and blessing from Allah SWT. Therefore, *muraqabatullah* or approach to Allah SWT is a thing to be done first, such as praying *istiharah* etc.

In addition, it should also be prepared in technical terms such as *baramij* or order in the implementation of shura later, then facilities such as comfort, availability of equipment etc.

2) Implementation stage

a) Shura must be accompanied by sincerity, compassion, tenderness, forgiveness. In verse 159 of surah *Ali-Imran* it is found “*fa bimaah rahmatin minallaahi linta lahum*” (It is part of the Mercy of Allah that you do deal gently with them) indicates the existence of the command to be gentle and to spread peace in the hearts of the deliberate people.

“*Walau kunta fazhghan ghalizhal-qalbi lanfadhdhu min haulik*” (Were you severe or harsh-hearted, they would have broken away from about you:), then the deliberations should be able to accept every different, unselfish and intentional argument to find the best, the atmosphere that must be raised should be as revealed by Imam Ibn Kathir in his book, *Tafsir Al-Quranil-'Azhim*, is an atmosphere of intimacy and cleanliness of the heart that they are more eager to carry out the deliberation.

“*Fa’fu ‘anhum wastaghfir lahum wa syaawirhum fil-amr*” (so pass over (their fault), and ask for (Allah’s) forgiveness for them; and consult them in affairs (of moment). Then the participants of the shura should create an atmosphere of peace and apologize to Allah before and after doing all things related to shura. The purpose of these activities are to ask forgiveness of Allah for all the mistakes made by the participants of deliberations such as wasted talk, rudeness in talking accidentally, and so on

- b) Humble & do not criticize *qiyadah* or leader's opinion before asking for a detailed explanation.
- c) Do not blame the opinion of others, but simply expressed his opinion with *hujjah* or experience.

3) Completion Stage

In the final stages, what must be done is to obey and accept every decision that has been agreed in the assembly of shura with a sincere sense.

c. Principles of Succession of Head of State in Islamic System

The first principle is based on the surah of Ast-Shura (42): 38 and *Ali Imran* (3): 159 which emphasize the importance of *musyawarah* in Islam. This principle is also reinforced by Prophet himself, such as the deliberation of Rasulullah SAW with his companions when discussing the strategy of Islam against the *Musyrik* people in the Uhud war in year of 3 Hijriyah. This method was well known and became the proposition of the importance of the function and the role of shura.

The second principle is *ta'awun*, which is based on the surah of *Al-Maidah* (5): 2 which states the existence of a demand for cooperation for the interest of God and human self-interest.

The third principle is often found in the Qur'an as the equivalent of the word "*Salih*" ie *mashlahah*. This principle serves as a moral force so that every individual does good and benefits the other (*amar ma'ruf nahi munkar*)

The fourth principle is *taghyir* or change. This principle can be found in the surah of *Ar-Rad* (13); 11 which states that humans play a major role in determining life changes.

The fifth principle is the practice (*amalan*) Khulafaur Rasyidin, as committed by Abu Bakar, the culture of shura always keep by the muslim during that time in an effort to strengthen the political system of Muslims. Abu Bakar for example often hold meetings to speak in some important matters with the friends of the Muhajir and Ansar. The members of Majlis Shura at that time were Ali Abi Talib, Umar ibn Khatab, Ustman ibn Affan, Zayid ibn Thabit, Abdullah ibn Mas'ud, Anas Malik, Abu Musa Al-Asari, Muadz ibn Jabal, Abdul Rahman bin Auf, and Kaab bin Ubai. Similarly, in the time of Saidina Umar Al-khatab the shura institution continued to flourish and run with its members consisting of Ali bin Abi Thalib, Ustman ibn Affan, Talhah bin Ubaydilah, Al Zubyar bin Awam, Saad bin Abi Waqqas, and Abdul Rahman bin Auf.

In the principle of shura, the majority vote does not determine the decision, because minority vote can be a good decision. The conclusion in shura is totally determined by the best opinion and acceptable.

These are to be noted about shura:

- 1) Great Shura is a matter related to the politics of the people, upheld by *Ahlu hall wal aqdh*. They are scholars of the righteous and sincere people.
- 2) Surely, Shura-believers will not justify the haram, nor prohibit the halal, do not regard evil as truth, nor regard the truth as false, unlike democracy and elections and their followers, they justify the haram and forbid the lawful, regard the vanity of truth, even defend evil.
- 3) Shura is done only in rare cases. As for the existing and clear case of Allah and Messenger, there is no more deliberation on it. Unlike the democracy system, which has wide scopes and may be conducted very often
- 4) Shura is not an on-going obligation at all times, but depends on circumstances and needs. Sometimes it is mandatory at certain times and at other times it is not mandatory. Therefore Rasullah SAW never conduct deliberations on other cases (which is obviously the truth of God)
- 5) Shura is based on Islamic Shari'a, whereas democracy rejects the Islamic Shari'a and accuses it of being weak
- 6) Shura was instructed when the coming of Islam, whereas democracy appeared in the 13th or 14th century of Hijriyah

- 7) Democracy means "the law of the people for the people". Meanwhile Shura is deliberation. So there is no creation of new laws that have no global basis or in detail. In shura there is *ta'awun* in understanding the truth and applying it.¹⁴

d. Sources of Law of Succession of Head of State in Islamic System

The first caliph's election was held in an emergency. The role of the leader in Islam is so important that after the death of the Prophet Muhammad, the companions immediately discussed to find a replacement for the Muslim leader at that time.

Essentially before the Prophet Muhammad died, the Prophet never address or provide explanations related to the replacement the head of state after him, so the appointment of the head of state after the Prophet was chosen based on the *ijtihad* of the companions, including the election mechanism of leaders who are returned to the agreement of the people in the deliberations. The Qur'an and the Hadith of the Prophet are still used as references in doing *ijtihad*, Al Quran and hadith explained about the values of leadership, criteria of leaders and others.

In principle, when there is a problem at the time of the caliph, the deliberation is the best way done by the Companions to reach

¹⁴Abdul Razak, *Op.Cit.*, p. 298-299

consensus. In the history of Islamic politics, Abu Bakar was the second head of state after Prophet Muhammad and he was elected by *ijm'al-ummah* or agreement of the Ummah.

The mechanism of the election of the caliph in the past had used the principle of deliberation when the election of Abu Bakar Sidik and it is done by senior companions. At that time deliberation was conducted by the *ansar* and *muhajir*, but still the *quraish* tribe who put forward, because it is considered more qualified. Abu Bakar offers two prominent figures that Umar bin Khatab and Ubaidillah bin Jarah are both Quraysh figures, although in the end Umar immediately stood up and declared his *bai'at* to Abu Bakr Sidik. Deliberation does not involve many friends but quite represented with five friends. Deliberation did not involve many people, only five represented people because the condition at that time was very urgent. The people present at the time they were prominent figures and they presented the superiority of their respective groups. In the end, the agreement was Abu Bakar to succeed Prophet Muhammad. The decision-making method at the time was *qiyas*, because Abu Bakar was often asked by the Prophet Muhammad to replace him in certain ways, such as replacing the

prayer imam.¹⁵ Finally, companions did *bai'at* in Saqifah the Sa'idah to Abu Bakar.

Based on above explanation, in Al-Qur'an and the Prophet's Hadith there are no detailed rules in the mechanism of the election of the caliph or the head of state; it is not because the Al-Quran is incomplete. The values of solving the problems are still described therein. Basically the Qur'an covers all aspects of life *As-Syumul* such as economic aspects, politics, cultural law, art, science and others¹⁶.

e. Requirements of Succession of Head of State in Islamic System

In the system of election of Islam, some requirements or criteria are also applied and they must be fulfilled by a prospective leader. Requirements are based on Al Quran, Hadist and Ijtihad.

1) Requirements of candidate Head of State / Khalifah

The book of *Al Imamatul Udzma'inda Ahlil Sunnati wal Jama'ah* by Sheikh ad Dumaijji explains about *syurutul imam*, or the requirements of a khalifah or head of state that are:¹⁷

¹⁵Sutisna, 2014, *Pemilihan Kepala Negara Perspektif Hukum Islam dan Hukum Positif Indonesia*, Yogyakarta, Deepublish p. 161-163

¹⁶ Yunahar Ilyas, 2013, *Kuliah Aqidah Islam*, Yogyakarta, LPPI. P. 123

¹⁷*Ibid* p. 335-336

- a) Islam
- b) *Baligh*
- c) Sound mind
- d) Independent
- e) Man
- f) Knowledgeable
- g) Fair
- h) Mentally capable
- i) Physically capable
- j) There is no barrier to becoming a *khalifah*
- k) From the Quraisy tribe

Meanwhile, Sheikh An-Nabhany in the book *Muqaddimah Dustur* elaborates that the requirements of the head of state are:

- a) Man
- b) Muslim
- c) Independent
- d) *Baligh*
- e) Knowledgeable
- f) Fair
- g) Capable.

Imam Al Mawardi in his book *Al Ahkam A-Sulthaniyyah* explains that there are seven conditions that must be possessed

by the person entitled to be nominated as head of state (*khalifah*), namely:

- a) *Al-Adalah* or fair in every criteria
- b) Knowledgeable for *ijtihad*
- c) Healthy (complete senses)
- d) No defects are impeded from moving and fast in action
- e) Have a good vision
- f) Brave and guard the people
- g) Quraisy

The Islamic leadership in principle is very concerned about the ability of a leader as stated in the requirements put forward by Imam Al-Mawardi that prospective leaders must have the knowledge that makes them able to do *ijtihad* to face the incidents that arise and to make legal policy. So the average leader in Islam is the Ulama who have the same nature as the Prophet namely a smart (*patonah*) leader.

2) The requirements of persons involved in Shura

People involved in shura were determined on the basis of individual competence in terms of their knowledge, expertise and experience known as Al-Ahl-halli wa al-'aqd.¹⁸

¹⁸*Abdul Razak, Op.Cit* p. 306

f. Inauguration of Head of State in Islamic System

In the Khalifah system between sovereignty (*al-Siyadah*) and power (*Al-Sulthan*) are distinguished explicitly. Sovereignty in the *khalifah Islamiyah* is in the hands of Shari'a. Islam accepts Allah as the only owner to the authority to make laws in any case. Islam does not provide any human opportunity to establish a law, even though one law, because all human being in the earth either the people or the khalifah have the status as *mukallaf* (the party who gets the legal burden) and they are obliged to submit and obey the whole law made by Allah SWT.

The power is given to the ummah from sovereignty of Allah. The people are given the right to determine the ruler who runs the sovereignty of Allah. The ruler must meet the criteria set by Shari'a. In Shari'a a khalifah can only has power through *bai'at* as the only method determined by Shari'a in appointment of khalifah.

There are several Hadiths which show that *bai'at* was given from People to the Caliph such as the Hadith narrated by Ubadah bin Shamit which means:

“We do *Bai'at* to the Messenger of Allah to listen and obey his orders, both in difficult and easy circumstances,

whether in circumstances we enjoy or hate, and really we put first (HR Muslim)”

Narrated from Jarir bin Abdullah, he said which means:

"I do *bai'at* to the Messenger of Allah to establish prayers, pay zakat, and give advice to all Muslims (HR Al-Bukhari)”

Based on these hadits, a caliph gain power from the people through *bai'at*, it was practiced by companions for *Al-Khulafa Al-rashidin*. They all became caliphs after getting *bai'at* from the people.

The people have the right to appoint whoever they choose. In the *bai'at* the power of the Ummah was handed over to the Caliph to regulate the affairs of the people based on Al-Quran and Hadith.¹⁹

¹⁹Mustofa kamal, Beberapa Aspek Tentang Pengangkatan dan Pemberhentian Pemimpin, https://www.academia.edu/11621857/Makalah_Fikih_Pengangkatan_and_Pemberhentian_Pemimpin, accessed on Sunday Juny 19, 2017 at 5.17 pm

B. Comparison of Succession of Head of State in Indonesian Democratic System and Islamic System

1. Similarities of Succession of Head of state in Indonesian Democratic System and Islamic System

After conducting an analysis related to the election of head of state in Islamic system and democracy in Indonesia, there are some similarities such as:

- a. The involvement of people in the determination of the head of state although having different role. The system of shura in Islam which involves some people to determine the head of state, actually similar to an indirect democratic system. Democracy recognizes this kind of system which is not involving all the people but only some people representing others. In Indonesia, the election was done by the representative body, that is the people's consultative assembly. The people's consultative assembly itself is the representative institution of the people which was the highest position in the state structure of Indonesia, but should be noted that in shura people are only asked to give opinions whereas in indirect democracy majority vote is the determinant.
- b. The requirement of the Head of State, first, the maturity level of a leader. In Islam, Head of State must be *baligh*, meaning that is the head of state must be mature. Criteria of baligh in Islam for man are experiencing of wet dream and for woman are getting menstruating.

Requirement of Head of State in Indonesia must be aged at least 35 (thirty five) years. Second, in term of capacity of knowledge, in Islam Head of State must be knowledgeable, able to do *ijtihad* to face the incidents that arise and to make legal policy. In Indonesia, criteria of leader has standard in education. Minimum standard of education is high school which is an indicator of a person's knowledge. Third, in term of physically and mentally healthy, in Indonesia, the requirement of Head of State must be able mentally and physically to perform duties and obligations as president and vice president. In the criteria of Islamic system also requires that the head of the state must be physically and mentally healthy to lead *ummat*. Forth, in term of citizenship, Indonesia system has a requirement for head of state that must be from Indonesia citizenship likewise in Islamic system only Quraisy people can became a Head of State.

- c. The inauguration of Head of State in Indonesia and Islamic system has little similarity. Inauguration in Islam is called *Bai'at*. *Bai'at* and inauguration are conducted by the people but in different way. In Indonesia, People's representative Assembly is special institution that has authority to do the inauguration, but in the Islamic system is directly by the people.

2. Differences of Succession of Head of state in Indonesian Democratic System and Islamic System

Based on the explanation of the system in the election of Head of State/ President in Islam and Indonesia, both of them have a different system, namely:

- a. Shura itself is defined as a mechanism to ask opinion (*Thalab Ar-ra'y*) from the people who are empowered in the process. The majority vote in this system is not always the reason in determining a decision, but the decision can be taken from a minority voice with good consideration. In addition, involvement of people in shura is limited, although basically Islam has a principle of freedom of speech. In shura system, the election of leader is determined by some people who are selected based on their scholarship, expertise, and experience (*al-ahl al-halli wa al-a'qd*) that consist of ulama, community leader and high commander of army that keep the community.²⁰ When compared with the general election system, the involvement of all people is very important, because in democracy the people are parties who have absolute power. According to Abraham Linclon, democracy itself is from the people, by the people and for the people. In general election, society is given the right to choose and determine who will be the leader for them in their

²⁰*Ibid* p. 306

country without exception. The majority vote is an indicator or determinant in deciding of head of state.

- b. The principle in the election system and shura are clearly different. The principle of source of shura comes from the provisions of Allah SWT contained in the Qur'an and Hadits. The general election is derived from the law made by human based on culture democracy because the law basically comes from a certain community of human life.²¹ The principle of shura has more emphasis on how the system produces decisions that really from the deliberation and agreed together. The principle of shura produces decision that provides benefits that arise in the deliberation and becoming good values in the decision-making process. Shura system must contain elements or principles of mutual help (*taawun*), principle of benefit (*Maslahah*), principle to make a change towards the right (*taghyir*), and the principle of implementing in every case to be resolved (*Amalan*). In contrast, the principle of general election in Indonesia is more democratic as participation can be given entirely to the people, either the right to choose or to be chosen so there are many laws that safeguard the people's rights in democracy. In Indonesia, some principles become the guidelines that philosophically or technically derived from democratic values such as universal principles that guarantee anyone to have rights choose; the principle of equality that

²¹ Satjipto Rahardjo, 2012, *Ilmu Hukum*, Bandung: PT Citra Aditya Bakti p. 263

guarantee every individual has the same position and rights in the election of the head of state; the principle of confidentiality that safeguards the intervention or involvement of others' influence and direct principle that individual rights cannot be given or transferred to others because it is an absolute right for a person.

- c. The source of law between the shura system and the general election is clearly very different. Shura is a system existing in Islamic religious teachings. In the Islamic religion it is clear that only law of Allah as source of all provisions. In the succession of the head of state related to technical is not regulated detail in the Qur'an or Hadits. Mechanism of the succession of Head of State by using *ijtihad* which is derived from the provisions or values in the Qur'an and Hadith. Whereas in the general election in the Indonesia system is clear that the source of the law comes from laws made by human. All legal product is taken by approval of the majority of people, either directly or representative in parliament. Therefore, in the general election the legal basis is divided into three parts: the ideal basis which is derived from the basic principles of a democratic state, then the constitutional basis which is the main source or basic rule of the election that exist in the constitution of a Indonesia state and the last is operational basis which is a technical rule made on the basis of human agreement to facilitate the implementation of election.

- d. Regarding the requirement of the head of state, if it is concluded in the Shura system, there should be two different basic principles. In Islamic system it is required the head of state as a Muslim. It is based on the word of Allah SWT in the surah *Al-Maidah* verse 57 which means "O you who believe! Take not for friends and protectors those who take your religion for a mockery or sport whether among those who received the Scripture before you or among those who reject Faith; but fear you Allah, if you have faith (indeed) ".²² In Islamic System, Head of State must be a man, based on surah *An-Nisa* verse 34 which means "Husbands are protectors and maintainers of their (wives), because Allah has given the one more (strength) than the other, and because they support them from their means"²³ so that non-Muslims and women cannot become head of state. Whereas in democracy it becomes a contradiction because the principle of democracy gives the right to anyone. In Indonesian democracy system there is no regulation of a head of state comes from any denominations or it is acceptable either woman or a man.
- e. Inauguration of the head of state. In Islam a head of state has the authority to lead when *bai'at* was done to him. The people are only a mediator because true sovereignty is in the hand of Allah SWT. In Islam, *bai'at* is done not by a state institution but directly by the

²² Abdullah Yusuf Ali, *Op.Cit* p. 221

²³ *Ibid* p. 162

people. Whereas in Indonesia system, inauguration is conducted by People's Consultative Assembly as the institution representing of people. The inauguration in the democratic system is a way for giving power to the head of state from of people.

Based on the comparison of the succession system of head of state in Indonesia democratic system and Islamic system, it can be concluded in the table below:

Table:1. Comparison of Succession between Indonesian Democratic And Islamic System

Category	Democratic System	Islamic System
System	General election is a voting system that conducted by the people directly to elect the head of state as a form of absolute people's involvement. In this system the majority vote determine the appointment of head of state	Shura is a way of making opinion (deliberation). Members of shura are selected in accordance with good competence to determine the head of state. In this system the majority vote does not determine the appointment of head of state/khalifah
Stage	a. Preparation stage consist of preparation of legal instruments, socialization, establishment of auxiliary institutions and distribution of equipment to the lowest level of territory, polling station; b. Implementation stage consist of nomination, campaign,	a. Preparation stage consist of preparing people who understand law, <i>sharia</i> and also have good intention; b. Implementation stage, mangers conduct dialogue in forum or deliberation and also pay attention to ethics in the <i>majlis</i> accordance with the value of Islamic

	voting, counting and inauguration; c. Completion stage, consist of dissolution of auxiliary institutions, reporting and accountability, archiving.	teachings; c. Completion stage, all the people commit to running and accepting every shura decision.
Principle	Principle in this system generally emphasizes the essence of democracy to providing the involvement of the people as sovereign and giving the right to choose and to be chosen. The special principles are general, equality, honest, direct.	Principle in this system generally emphasize good results and provide benefit from mutual agreement (<i>mufakat</i>). The special principles are deliberation, <i>taawun</i> , <i>masalahah</i> , <i>taghyir</i> , <i>practice</i> .
Source	Legal source in this system comes from human product and it is divided into several basis, namely the ideal basis, the constitutional basis and operational basis	Legal source in this system comes from the provision of God which is existed in the Al Quran, Hadith and Ijma
Requirement	In a democratic system, the requirements of the head of state are more open, because one of principle of democracy is the equal rights and freedoms while other requirements relate to the standard capacity of a head of state	There are two fundamental requirements of head of state, that are not found in the Indonesia democratic system requirement namely must be muslim and male, while other requirements related to the standard capacity of a head of state
Inaguration	The principle in the inauguration of the head of state in the democratic system is the people who have	The principle is Allah SWT who has sovereignty. The process of doing <i>ba'iat</i> is only an intermediary.

	sovereignty giving power to a head of state to run the governance which is conducted by People's Consultative Assembly	There is no a granting of people power to a head of state. <i>Bai'at</i> process is done directly by the people
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