

## Juridical Analysis of the Formation of Regional Regulations in Indonesia from the Perspective of Siyasah Dusturiyah

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### Abstrak

Three issues were examined in this study, namely: 1) How is the mechanism for the formation of Regional Regulations in Indonesia? 2) How is the Problems of Regional Regulation Formation in Indonesia?, 3) How is the Review of fiqh Siyasah Dusturiyah on the Mechanism of Formation of Regional Regulations in Indonesia? The objectives of this study are: How is the mechanism for the formation of Regional Regulations in Indonesia, how are the Problematics of the Formation of Regional Regulations in Indonesia and How is the Review of fiqh Siyasah Dusturiyah on the Mechanism of Formation of Regional Regulations in Indonesia. The type of research in this thesis is Normative Juridical research using a research approach Legislation, conceptual approach and comparative approach. With this method the author analyzes, examines and identifies laws and regulations relating to the provisions of the mechanism for the formation of local regulations under study. So as to produce a research mechanism for the formation of local regulations in Indonesia still has many problems, one of which is public participation and transparency (openness) of information. This is not in line with the basic principles of siyasah dusturiyah. Therefore, siyasah dusturiyah emphasizes the benefit for the benefit of many people.

**Keywords:** Regional Regulation, Siyasah Dusturiyah

### INTRODUCTION

In a Democratic State of Law, the Law has an important role in order to achieve the prosperity of the people by the state. So important is this role that the Law becomes a vital instrument in the administration of the Rule of Law. Especially regarding efforts to organize people's lives in the framework of order and order.<sup>1</sup> As a country that applies the principle of the rule of law, the formation of laws is something that needs to be considered and well regulated so that the formation of legal products is in accordance with the will and needs of the community. Law is one of the important aspects in national development. This is a juridical consequence of Article 1 Paragraph (3) of the 1945 Constitution which states that the Indonesian State is based on Law.

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<sup>1</sup> Yahya Ahmad Zein, *Reformasi Regulasi Melalui Penataan Jenis Peraturan Perundang-Undangan Di Luar Hirarkhi Berdasarkan UU No.12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan* (Jakarta: Prosiding Forum Akademik Kebijakan Reformasi Regulasi, 2019), h. 225.

According to Daniel S. Lev, the constitutional juridical affirmation by the founding fathers as above is very appropriate, because sociologically various groups of Indonesian society also support / agree to the rule of law for various reasons.<sup>2</sup> Law Number 13 of 2022 concerning amendments to Law Number 12 of 2011 concerning the Formation of Laws and Regulations was formed to create order in the Formation of Laws and Regulations, so that the conception and formulation of norms are precise, unanimous and harmonious, not conflicting and overlapping with each other. Through this Law, it is expected that all institutions authorized to form laws and regulations have specific guidelines that are standardized and standardized in the process and method of forming laws and regulations in a planned, integrated, and systematic manner.<sup>3</sup>

Furthermore, every legislation must take into account the effectiveness of the legislation in society, both philosophically, sociologically, and juridically.<sup>4</sup> In order for laws and regulations to apply properly and effectively, in the preparation technique there are three principles of enactment of laws and regulations, namely Juridical Principles, Philosophical Principles, Sociological Principles, must be fulfilled because it concerns whether or not the formulation of a Legislation.

Juridical principle is related to the necessity of the authority of the legislator, which means that every legislation must be made by an authorized body or official. There must be conformity between the type and content of the Legislation. The incompatibility of the type can be a reason to cancel the Laws and Regulations made. The requirement to follow certain procedures or procedures. If the procedure is not adhered to, then the Laws and Regulations are null and void or do not have binding force. The requirement does not contradict with the higher level Laws and Regulations.

The philosophical principle of laws and regulations related to the philosophical/ideological basis of the state, in the sense that the laws and regulations must pay serious attention to the values (legal image) contained in Pancasila. Every society expects that the law can create justice, order, and prosperity.

The sociological principle of Laws and Regulations relates to the conditions/reality living in the community in the form of needs or demands faced by the community, trends and expectations of the community. Therefore, the Laws and Regulations that have been made are expected to be accepted by the community and have effective enforcement. Laws and Regulations that are accepted by the society reasonably will have effective practices and do not require much institutional direction to implement them.

The birth of local regulations cannot be separated from the concept of decentralization, which is a logical consequence of democratization. Democratization is a process of change from an authoritarian government structure and system to a democratic government structure and system.<sup>5</sup> Based on the provisions of Article 33 jo. Article 40 of Law Number 13 of 2022 on the second amendment to Law Number 12 of 2011 states that Prolegda (read: Perda Formation Program) contains a program for the formation of provincial, district / city local regulations with the title of draft provincial, district / city local regulations, the material to be regulated and its relationship with other laws and regulations.

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<sup>2</sup> S Daniel Lev, *Hukum Dan Politik Di Indonesia: Keseimbangan Dan Perubahan*, 1st ed. (Jakarta: LP3ES, 1990), h. 386.

<sup>3</sup> Sekretariat Daerah, "Pembentukan Peraturan Perundang-Undangan," <https://biroorganisasi.jogjapro.go.id/v1>, Jurnal Online, diakses 17 Desember 2023.

<sup>4</sup> Sirajuddin, Fathurohman, and Zulkarnain, *Legislative Drafting* (Malang: Setara Press, 2015), h. 25.

<sup>5</sup> Rishwandha Imawan, *Desentralisasi Demokratisasi Dan Pembentukan Good Governance, Dalam Syamsudin Haris (Ed), Desentralisasi Dan Otonomi Daerah : Desentralisasi, Demokratisasi, Dan Akuntabilitas Pemerintahan Daerah* (Jakarta: LIPI Press, 2005), h. 5.

The material to be regulated and its relationship with other laws and regulations regarding the conception of the draft Provincial, Regency / City Regional Regulation, which includes: a. Background and purpose of preparation; b. Objectives to be realized; c. Subject matter, scope or object to be regulated; and d. Range and direction of regulation. The extent and direction of the regulation. The material to be regulated, which has been assessed and harmonized, is set forth in an academic paper. Furthermore, the provisions of Article 56 paragraph (2) jo. Article 63 of Law Number 13 Year 2022 states that draft Regional Regulations originating from the DPRD and Regional Head are accompanied by explanations or information and/or academic papers. However, in practice there are still many local regulations that are not in accordance with the applicable regulations, be it the formation, submission deadline and even the content material. Especially at the provincial/city level, since June 2016 Permendagri has announced the cancellation of at least 3,143 local regulations. Here are some examples of local regulations that do not comply with the provisions of Law No. 13 of 2022.

A local regulation in North Sumatra that does not comply with the provisions of Law No. 13 of 2022 on the Formation of Legislation is Medan City Local Regulation No. 3 of 2015 on Retribution for Health Services.<sup>6</sup> This local regulation is considered to be inconsistent with Law No. 13 of 2022 because it does not follow the provisions stipulated by the Central Government in determining Regional Tax and Retribution Rates. Article 8 paragraph (1) of Law Number 13 Year 2022 states that Regional Tax and Retribution Rates are determined by the Regional Government by taking into account the provisions stipulated by the Central Government.<sup>7</sup>

Article 1 of Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governments, in this article it is explained that the financial relationship between the Central Government and Regional Governments is a financial management system that regulates financial rights and obligations between the Central Government and Regional Governments which are carried out fairly, transparently, accountably, and harmoniously based on the Law.<sup>8</sup> However, in Medan City Local Regulation No. 3/2015, there is a determination of health service retribution rates that exceeds the provisions set by the government. In other words, the Perda does not follow the provisions of Law Number 13 Year 2022, which emphasizes that all regions must follow the policies and provisions that have been regulated nationally by the central government.

An example of a local regulation whose formation deadline is not in accordance with the provisions of Law Number 13 of 2022 on the second amendment to Law Number 12 of 2011 on the Formation of Legislation is Malang Regency Local Regulation Number 2 of 2017 on Retribution for Surface Water Use. This regulation is considered incompatible with Law No. 13 of 2022 because the time limit for its formation exceeds 1 (one) year from the end of the membership period of the Malang Regency DPRD as stipulated in Article 154 paragraph (1) of Law No. 13 of 2022.<sup>9</sup>

This article states that the discussion and stipulation of draft local regulations must be completed in the same session period, unless there are certain circumstances that can hinder the process. In the Formation of Malang Regency Local Regulation Number 2 of 2017, the time for the formation of the local regulation is not in accordance with the provisions of Law Number 13 of 2022 on the second amendment to Law Number 12 of 2011. This is because the membership period of the Malang Regency DPRD of the previous period has ended, and the formation of the local regulation was continued during the new membership period. This caused the time limit for the formation of the local regulation to exceed 1 (one) year from the end of

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<sup>6</sup> Putusan Mahkamah Konstitusi Nomor 56/PUU-XIV/2016

<sup>7</sup> Pasal 8 ayat (1) UU No 13 Tahun 2022

<sup>8</sup> Pasal 1 UU No 1 Tahun 2022

<sup>9</sup> Kristian Widya, "Problematisasi Dan Tantangan Desentralisasi Di Indonesia," *Jurnal Administrasi Publik* 4, no. 1 (2012).

the membership period of the Malang Regency DPRD. Based on this, Malang District Regulation No. 2/2017 on Retribution for Surface Water Use was declared invalid and null and void by the Supreme Court (MA).<sup>10</sup>

A local regulation in Bali that is not in accordance with the provisions of Law No. 13 of 2022 on the second amendment to Law No. 12 of 2011 on the Establishment of Legislation is Bali Provention Local Regulation No. 4 of 2018 on the Development of the Bali Provention National Strategic Tourism Area (KSPN). This regulation is considered not in accordance with Law Number 12 of 2011 because the regulation has authority that is not in accordance with the principles of Decentralization and Regional Autonomy as outlined in Law Number 23 of 2014 concerning Regional Government.<sup>11</sup>

Article 32 paragraph (1) of Law Number 23 Year 2014 states that local governments have the right to set policies to carry out government affairs that fall under their authority. In Bali Province Regional Regulation Number 4 of 2018 concerning the Development of the Bali Province National Strategic Tourism Area (KSPN), there is an article that authorizes the Governor of Bali to determine the Provincial Spatial Planning. In fact, the authority to determine the Regional Spatial Planning is the central authority based on Law Number 26 of 2007 concerning Spatial Planning.

Based on this, the Bali Province Regional Regulation Number 4 of 2018 concerning the Development of the National Strategic Tourism Area (KSPN) of Bali Province was declared invalid and null and void by the Supreme Court (MA) because it contradicted the provisions contained in Law Number 13 of 2022 on the second amendment to Law No. 12 of 2011 concerning the Formation of Legislation and Law Number 23 of 2014 concerning Regional Government.<sup>12</sup>

Constitutional System in Islamic history practiced by Muslims on the system of government and statehood one of which is the aspect of *Siyasah Dusturiyah*. it is also discussed, among others, the concepts of the constitution (the Basic Law of the State and the history of the birth of legislation in a country), Legislation (how the formulation of the Act, democratic institutions and shuro which is an important pillar in Legislation). In making laws and regulations or also called the power of legislation in *fiqh siyasah* called *al-sulthah al-tasyri'iyah* which in its implementation is carried out by Ahlu ahalliwal Aqdi used to show one of the authorities of the Islamic government in making and determining the law.

Legislative power *al-sulthah al-tasyri'iyah* means the power or authority of the Islamic government to determine the laws that will be enacted and implemented by its people based on the provisions that have been revealed by Allah SWT in Islamic law. Thus the elements of legislation in Islam include: the government as the holder of the power to determine the law to be enforced in Islamic society, the Islamic community that will implement it, the content of the rules or laws must be in accordance with the values of Islamic law. So the legislative power of *al-sulthah al-tasyri'iyah* carries out its *siyasah syar'iyah* duties carried out by Ahlu ahalliwal Aqdi to make a law that will be enforced in Islamic society for the benefit of Muslims, in accordance with Islamic teachings.<sup>13</sup>

## METHOD

The research method is an absolute element in a study. According to Juliansyah Noor, the research method is a basic assumption about a matter that is used as a foothold for thinking and

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<sup>10</sup> Leo Gustino, "Pembatalan 3.143 Peraturan Daerah: Suatu Analisis Singkat," *Jurnal Ilmu Pemerintahan* 3, no. 1 (2017).

<sup>11</sup> Benni Erick and T Risman, "Pembatalan Peraturan Daerah Pasca Putusan Mahkamah Konstitusi," *Jurnal Sosial Humaniora Sigl* 6, no. 2 (2020).

<sup>12</sup> Muhammad. Iqbal, *Fiqh Siyasah Kontekstualisasi Doktrin Politik Islam* (Jakarta: Prenadamedia Group, 2014), h. 177.

<sup>13</sup> Iqbal,.... h. 187-188.

acting in carrying out research.<sup>14</sup> In writing scientific papers, of course, there are several methods used, both from data collection and processing.

The type of research used in this research is Normative Legal Research, according to Peter Mahmud Marzuki Normative Legal Research is a process for finding legal rules, legal principles, and legal doctrines to answer the legal problems at hand.<sup>15</sup> (legal research) is usually “only” a document study, which uses legal sources in the form of laws and regulations, court decisions or decrees, contracts/agreements/accords, legal theories, and scholars' opinions related to this research.<sup>16</sup> This research is also known as library research, namely by studying books, laws and regulations and other documents related to this research. Normative legal research essentially examines the law conceptualized as norms or rules that apply in society and become a reference for everyone's behavior.

## RESEARCH RESULTS

### Problematics of Local Regulation Formation in Indonesia

The formation of local regulations is a manifestation of the authority given to local governments in the context of implementing Regional Autonomy to carry out their rights and obligations.<sup>17</sup> In its formation, a series of principles have been established, including clarity of purpose, appropriate institutions or forming organs, suitability between types and content material, implementability, usefulness and usability, clarity of formulation and openness.

Local regulations must also not conflict with higher laws and regulations. In addition to having a strategic position and various functions, regional regulations also have their own content material, according to Soehino, the material that can be regulated in Regional Regulations includes:<sup>18</sup>

1. Materials or matters that place a burden on the population, such as local taxes and levies.
2. Materials or matters that reduce the freedom of the population, such as establishing prohibitions and obligations that are usually accompanied by threats or criminal sanctions
3. Materials or matters that limit the rights of residents, for example, the establishment of boundary lines
4. Materials or matters that have been stipulated in laws and regulations of an equal and higher level must be regulated by Regional Regulation

The wave of democracy that was accompanied by changes in the national political system in the era of the reformation government to this day has increasingly shown strong symptoms of the desire of local people to break away from the entanglement of local governments, especially in the context of relations between provincial, district / city governments down to the sub-district level.

The phenomenon of injustice in the social, political, economic, educational, legal and cultural dimensions seems to be the main trigger for several regions at the provincial level that want to break away from the provincial government and district governments. In addition, the reality of equitable distribution of development both at the central and regional levels also

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<sup>14</sup> Juliansyah Noor, *Metode Penelitian*, 1st ed. (Jakarta: Kencana, 2015), h. 254.

<sup>15</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005), h. 47.

<sup>16</sup> Muhaimin Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), h. 45.

<sup>17</sup> Eka NAM Sihombing, *Menggagas Peraturan Daerah Aspiratif, Dalam M. Solly Lubis, Paradigma Kebijakan Hukum Reformasi* (Jakarta: Sofmedia, 2016), h. 189.

<sup>18</sup> Soehino, *Hukum Tata Negara, Penyusunan Dan Penetapan Peraturan Daerah* (Yogyakarta: Liberty, 1997), h. 8.

provoked protests from the community. Regions that have vast natural wealth but in reality are far from the touch of development justice, even ironically many regions are rich in natural resources but education and income levels and even welfare have never been obtained.<sup>19</sup>

Autonomy granted to Regency and City Regions is implemented by providing broad, real and responsible authority to the Regional Government in a proportional manner. This means that the delegation of responsibility will be followed by arrangements for the distribution, equitable utilization of national resources, and consideration of central and regional finances. The implementation of the implementation of Regional Autonomy raises various problems and impacts due to the unpreparedness of each Region in implementing Regional Autonomy which is also different.<sup>20</sup>

Regional authority granted on the principle of decentralization, namely the formation of Regional Regulations, still leaves problems. Conceptually, the stages and mechanisms in the formation of local regulations have been regulated in detail in the Laws and Regulations, but in practice there are still several problematic local regulations that have been revoked and canceled by the Ministry of Home Affairs, this is what makes the formation of Regional Regulations considered inefficient.<sup>21</sup>

According to the Ministry of Finance, the investment for one local regulation reaches three hundred million rupiah. This is not a small figure if it is allocated for the welfare of the people, not to mention if it is multiplied by each Regional Regulation issued by the Regency / City and Province.

Supposedly with the decentralization of the Region, it is truly optimized in the hope of developing the potential contained in the region. Therefore, the use of regional finances in each form of regional regulation is truly maximized. The emergence of local regulations that are later canceled and revoked, is a concern for the inefficiency of a local regulation.

In June 2016, Permendagri announced the cancellation of at least 3,143 local regulations. The annulment consists of various aspects, one of the most prominent is the existence of local regulations that hamper the growth of the regional economy, extend the bureaucracy and also local regulations with religious nuances. There are at least several factors that make a local regulation problematic.

- a. first, the lack of community participation.
- b. Secondly, draft regulations that are discussed often depend on lobbying conducted within the DPRD with the interests of each faction.
- c. Third, the process of forming local regulations is only considered as a routine.
- d. Fourth, there are limited regional human resources who have the ability to predict problems that will arise in relation to the drafting of local regulations.
- e. Fifth, local governments wish to accelerate the economy, one of which is by increasing local levies through local regulations.<sup>22</sup>

One thing that needs to be underlined and considered is that in drafting local regulations that use the state financial budget, it should really be maximized so that the local regulations are not canceled (in vain). If calculated from 3,143 canceled local regulations with a budget of 300

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<sup>19</sup> Muhammad Busrizalti, *Hukum Pemda Otonomi Daerah Dan Implikasinya* (Yogyakarta: Total Media, 2013), h. 153.

<sup>20</sup> Mohamad Roky Huzaeni and Nuril Firdausiah, "Inefisiensi Peraturan Daerah Di Indonesia," *Rechtenstudent Journal* 3, no. 1 (2022).

<sup>21</sup> Sebelum adanya putusan MK Tentang Pembatalan Peraturan Daerah Pasca Putusan Mahkamah Konstitusi Nomor 56/PUU-XIV/2016 dan Nomor 137/PUU-XIII/2015 yang menyerahkan kewenangan pengujian dan pembatalan perda pada Mahkamah Agung

<sup>22</sup> Luky Sandra Amalia, "Peraturan Daerah Bermasalah," *Masyarakat Indonesia* 37, no. 1 (2017).

million per local regulation, a figure of around 9 trillion Rupiah of state budget is obtained to make the regulation, from here a local regulation is said to be inefficient.

The number of problematic local regulations is also caused by the number of local regulation drafters who do not understand the techniques of drafting legislation including the principles that must be contained therein, or pay less attention to higher laws and regulations. In addition, it is also caused by the limited ability of legislators to understand the substance or material of local regulations, and many local regulations are not in accordance with the aspirations of the people they represent. Material problems are actually not only caused by the inability of the drafter, but also often caused by the influence of many interests in local regulations so that there is a tug of war. Muhammad Suharjono Other factors causing problematic local regulations are as follows:<sup>23</sup>

- a. The implementation of Regional Autonomy has resulted in various problems when applied in the field, because the implementation of Regional Autonomy is strongly influenced by factors including the ability of the implementer, the ability to finance, the availability of tools and materials, and the ability of human resources in the organization including the ability to carry out the legislative process. Regional Autonomy is still colored by the interests of local elites who try to use Regional Autonomy as a momentum to achieve their political interests.
- b. The shift of authority in the formation of local regulations to DPRD has not resulted in better local regulation products. This is because the shift in authority was not followed by the legislative capacity of the DPRD, DPRD members themselves never received special training on the formation of laws and regulations, and the public was not given the space to channel their aspirations or participate in scrutinizing draft local regulations.
- c. There is a misunderstanding of the application of legal politics, so that it is used as a means of political deals in the material content of a Local Regulation.

Muhammad Suharjono, also emphasized that in general, the weak legislative capacity of council members cannot be separated from the recruitment system of DPRD members. It is known that currently the selection of candidates for council members by political parties is not based on the quality of the candidates. Political flow and pragmatic interests are currently the model of political parties in recruiting legislative candidates.

Popularity in all its forms and types becomes a reference for determining candidates, someone who has been or is popular in the community, no matter because of his expertise in entertaining the public, or because of the crimes he has committed, such as corruptors, can still become a member of the council, thus it is not surprising that many legal products or regional regulations are problematic until they are canceled.<sup>24</sup>

According to Jimly Asshiddiqie, in the formation of a legal product, the principle of *lex superior derogat lex inferior* is known, which means that lower regulations must not conflict with higher regulations. However, this principle can be limited by the principle of *lex specialis derogat lex generalis*, which means that general regulations will be inferior to special regulations. With this principle, the implementation of general regulations throughout the region can take into account the possibilities that are specific to the region.

This specificity can be expressed in the form of regulations that are meant to apply specifically to the region concerned.<sup>25</sup> However, in this context, the decentralization of local

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<sup>23</sup> Muhammad Suharjono, "Pembentukan Peraturan Daerah Yang Responsif Dalam Mendukung Otonomi Daerah," *Jurnal Ilmu Hukum* 10, no. 19 (2014).

<sup>24</sup> Suharjono.

<sup>25</sup> Jimly Asshiddiqie, *Desentralisasi Dan Pluralisme Hukum Dalam Kapita Selekta Teori Hukum* (Jakarta: FH-UI, 2000), h. 84-85.

regulations tends to recognize *lex superior derogat lex inferior* and override *lex specialist derogat lex generalis*. Basically, local regulations are policies that have been determined by the head of the region after obtaining joint approval from the DPRD and each region has the authority to form local regulations. However, regions cannot simply form local regulations, but must refer to the legislation. there are several conditions that must be fulfilled in each form of local regulations including:<sup>26</sup>

1. Local Regulations must not conflict with the public interest or higher regulations.
2. Local Regulations are a further elaboration of higher laws and regulations.
3. Local Regulations are needed in the context of implementing Regional Autonomy and assistance tasks
4. The formation of local regulations must pay attention to the characteristics of each region

Based on the provisions of Article 33 jo. Article 40 of Law Number 13 of 2022 on the second amendment to Law Number 12 of 2011 states that Prolegda (read: Local Regulation Formation Program) contains a program for the formation of Provincial, Regency / City Regional Regulations with the title of the draft Provincial, Regency / City Regional Regulation, the material to be regulated and its relationship with other laws and regulations.

The material to be regulated and its relationship with other laws and regulations regarding the conception of the draft Provincial, Regency / City Regional Regulation, which includes: a. Background and purpose of preparation; b. Objectives to be realized; c. Subject matter, scope or object to be regulated; and d. Range and direction of regulation. The extent and direction of the regulation. The regulated material, which has been assessed and harmonized, is set forth in an academic paper. Furthermore, the provisions of Article 56 paragraph (2) jo. Article 63 of Law Number 13 of 2022 on the second amendment to Law Number 12 of 2011 states that draft Regional Regulations originating from DPRD and Regional Heads are accompanied by explanations or information and/or academic papers.<sup>27</sup>

Actually, there is no problem with local regulations as long as they do not violate higher laws and do not harm the community. However, if the local regulation is considered deviant, the higher government or authorized institution can cancel or revoke it. This needs to be done to prevent disintegration between the interests of the Central Government and Local Government.

In the formation of local regulations, both from the initiative of the DPRD and from the head of the region, it should be carried out through appropriate stages which include planning, preparation, discussion, ratification, and enactment. The process of public involvement is a determining factor in the assessment of legislative work. DPRD and regional heads should therefore no longer pursue the quantity of local regulations but rather the quality of local regulations that will be discussed.

## **Review of Fiqh Siyasah Dusturiyah on the Formation of Regional Regulations in Indonesia**

Siyasah dusturiyah is part of fiqh siyasah, within the scope of fiqh siyasah, it has several branches, among others, siyasah dusturiyah.<sup>28</sup> Siyasah dusturiyah itself discusses the issue of

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<sup>26</sup> Michael A Pangemanan, "Urgensi Program Pembentukan Perda (Propemperda) Sebagai Instrument Perencanaan Dalam Mengarahkan Dan Mendorong Pembentukan Peraturan Daerah.," *Lex Privatum* 4, no. 8 (2016), h. 28.

<sup>27</sup> Eka N.A.M. Sihombing, "Problematisa Penyusunan Program Pembentukan Peraturan Daerah (Problems On Forming Local Regulations Programs)," *Jurnal Legislasi Indonesia* 13, no. 3 (2013).

<sup>28</sup> Muhammad Aziz Zakiruddin, Kamsi Kamsi, and Ahmad Bahiej, "Siyasah Syar'iyah Paradigm of Hajj Financial Management Regulation in Indonesia," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 (2022): 531–552.



state legislation in line with Islamic law. This means that the constitution must refer to and reflect the principles of Islamic law, which are extracted from the Qur'an and As-Sunnah, both regarding creed, worship, morals, muamalah, as well as everything related to state administration.<sup>29</sup> State administration in *siyasah dusturiyah* there are three institutions that are the same as those in the Indonesian state, namely the Legislative institution (*al-sultah al-tasri'iyah*), the Executive institution (*alsultah al-tanfidziyah*), and the Judiciary institution (*al-sultah al-qadha'iyah*).

Lawmaking in the Legislature (*al-sultah al-tasri'iyah*), must refer to the values contained in the Qur'an and As-Sunnah. Which prioritizes the interests of the Islamic community.<sup>30</sup> In *Fiqh Siyasah Dusturiyah* there is a theory of *tasri'iyah* or the Field of *Siyasah* which discusses the issue of *ahlu al-aqdi* or referred to as representatives of the people who are tasked with making laws in a country such as the Constitution, Laws, Implementation Regulations, Regional Regulations and so on.

*Ahlu al-aqdi* in *Siyasah Dusturiyah* examines 4 parts of the study, one of which is the Constitution. In the constitution, the sources and rules of legislation in a country are discussed, both in the form of material sources, historical sources, sources of legislation and interpretation. In *Fiqh Siyasah*, the constitution itself is referred to as *Dusturi*, the word comes from Persian. Which has its original meaning is to have authority in the field of religion and politics.

In its later development, the word was used to mean the religious leader, *Majusi*. After experiencing expansion in Arabic, the word *dusturi* developed its understanding into a principle, foundation or form. According to the terminology of *dusturi*, it means a set of rules that regulate the basis of cooperative relations between the two parties of society in a country, both conventions and constitutions, the word *dusturi* has also been absorbed in Indonesian which has a translation, namely the basic law of a country.<sup>31</sup>

This institution of *ahlul halli wal aqdi* is a representative institution that accommodates and channels the aspirations or voices of the people. as well as this institution that determines and appoints the head of state as the leader of the government. The institution of *ahlul halli wal aqdi* has the authority to direct people's lives to the *maslahat*, and is authorized to make laws that are binding on all people in matters that are not expressly regulated by the Qur'an and Hadith.

The stages of the mechanism for making *qanun* (Law) hold the highest power and authority in the hands of the head of State, the President, or in classical Islamic political terms the Caliph is typical of modern systems of power where power is constitutionally built.<sup>32</sup> Caliph as the highest leader of a State has the right to establish the rule of law or *qanun* which is not expressly regulated in the Qur'an and hadith. In addition to the power to establish the rule of law, namely the caliph, the role of *al-sulthahal-Tashri'iyah* is also entitled to establish the rule of law or *qanun* implemented by the institution *Ahlu al-halli wal Aqdi*. However, the absolute power and authority to determine a law is the right of Allah SWT and his Messenger. As the word of the Prophet Saw which reads:

عَنْ أَصْحَابِ مُعَاذٍ مِنْ أَهْلِ جَمُصٍ قَالَ: وَقَالَ مَرَّةً عَنْ مُعَاذٍ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمَّا بَعَثَ مُعَاذًا إِلَى الْيَمَنِ قَالَ لَهُ: «كَيْفَ تَقْضِي إِذَا عَرَضَ لَكَ قَضَاءٌ؟» قَالَ: أَقْضِي بِكِتَابِ اللَّهِ قَالَ: «فَإِنْ لَمْ يَجِدْ

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<sup>29</sup> Suparman Usman, *Hukum Islam: Asas- Asas Dan Pengantar Studi Tata Hukum Indonesia* (Jakarta: Gama Media Pratama, 2002), h. 122-127.

<sup>30</sup> Ledo Saputra, "Tinjauan Yuridis Pembentukan Undang-Undang Model Omnibus Law Dalam Sistem Hukum Indonesia Perspektif *Siyasah Dusturiyah*" (Institut Agama Islam Negeri (IAIN) Bengkulu, 2021).

<sup>31</sup> Nur Kholbi Dimas, "Analisis Fikih *Siyasah Dusturiyah* Terhadap Proses Pembentukan Peraturan PerUndang-Undangan Di Indonesia" (UIN Sunan Ampel, Surabaya, 2019).

<sup>32</sup> Masdar Farid Mas'udi, *Siyasah Konstitusi UUD 1945 Dalam Perspektif Islam* (Jakarta: Pustaka Alvabet, 2010), h. 77.

فِي كِتَابِ اللَّهِ؟» قَالَ: أَفْضِي بِسُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «فَإِنْ لَمْ تَجِدْ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟» قَالَ: أَجْتَهِدُ بِرَأْيِي وَلَا أَلُو قَالَ: فَضَرَبَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَدَهُ فِي صَدْرِي وَقَالَ: «الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ رَسُولَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لِمَا يُرْضِي رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ»

*"The people of Himsh reported from Mu'adh that the Messenger of Allah sent him to Yemen. The Messenger of Allah asked, "How will you decide when there is a legal issue?" Mu'adh replied, "I will decide based on the book of Allah." The Messenger of Allah asked, "If you do not find a basis in the book of Allah?" Mu'adh said, "I will judge based on the sunnah of the Messenger of Allah." The Messenger said, "If you do not find it in the sunnah of the Messenger?" Mu'adh replied, "I will judge based on my opinion." The Messenger of Allah patted Mu'adh on the chest and said, "Praise be to Allah who guides the messenger of the Messenger of Allah to what the Messenger of Allah likes". (HR. Al-Baihaqi No. 3250).<sup>33</sup>*

According to the hadith above, this means that the original sovereignty belongs only to Allah SWT. If the demands of social development require establishing a rule of law that was not previously contained in the nash, thus allowing a caliph or leader to deliberate with ahlul halli wal Aqdi. Where to produce a rule of law to fight for the public good related to matters not contained in the nash. In the Qur'an also explains the legal basis of Al-Ahlu al-halli wal Aqdi in determining the law in Surah An-Nisa verses 58-59, which reads:

﴿إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

*"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing. O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result." (Q.S. An-Nisa: 58-59)*

The content of these two verses explains about the two groups of believers and disbelievers, namely about pleasure and punishment, so now the Qur'an teaches a guide to life, namely about trustworthiness. Indeed, Allah, the Most High, tells you to deliver the trust completely and on time to those who are entitled to receive it, and Allah also tells you that when you determine the law between people who disagree, you should determine it with a fair decision. Indeed, Allah, who has commanded you to uphold your trusts and enjoined you to be just, is the best of those who instruct you. Indeed, Allah is the All-Hearing, All-Seeing Lord.

According to al-Anshari Ahlu al-halli wal Aqdi can be appointed in three ways. First, by means of general elections held periodically. Second, election by means of selection within the

<sup>33</sup> K. Khoirul. Huda, "Tiga Dalil Bolehnya Manusia Membuat Hukum" (UIN Syarif Hidayatullah Jakarta, 2018).

scope of society. Third, members appointed by the head of state. As Ahlu al-halli wal Aqdi according to abu al-maududi has a number of duties that he must perform. Among them are:

1. Enforcing a rule that is expressly prescribed in the Shari'ah and formulating legislation that is binding on the people on matters that are not yet in the Qur'an and Sunnah.
2. guidelines in the Qur'an and Sunnah that have more than one interpretation are entitled to decide which interpretation should be placed in the law.
3. If there is no clear indication in the Qur'an and Sunnah then it must enforce a law relating to the same issue. This institution can implement a legal formula without any restrictions as long as it does not contradict the Shari'ah.<sup>34</sup>

Fiqh Siyasah Dusturiyah explains that in terms of the formation of Qonun it is carried out only by deliberation within the scope of members of Ahlu al- halli wal Aqdi, in this musyawarah the community is invited to express its opinion in forming Qonun and its nature is not binding, Ahlu al-halli wal Aqdi has the right to form a Qonun that is binding on all Muslims in the country concerned on matters that have not been regulated in detail in the Qur'an and sunnah.

The laws and regulations that will be issued by the authority of Ahlul Halli wal Aqdi must follow the provisions of these two sources of Islamic law. Therefore, in this case there are two functions of the institution of ahlul halli wal aqdi. First, in matters where the provisions are already contained in the texts of the Quran and Sunnah, the laws issued by Ahlul Halli wal Aqdi are divine laws that are prescribed by Him in the Quran and explained by the Prophet SAW in the Hadith.<sup>35</sup> However, this is very little, because in principle the two sources of Islamic teachings address many global issues and explain very little in detail.

While the development of society is so fast and complex that it requires the right answers to anticipate it. Therefore, the legislative power or Ahlul halli wal Aqdi.<sup>36</sup> The second function is to carry out creative reasoning (ijtihad) on issues that are not explicitly explained by the nash. This is where the need for Ahlul halli wal Aqdi is filled by mujtahids and fatwa experts as explained above. They perform ijtihad to determine the law by qiyas (analogy).

They try to find i'llat or legal causes that exist in the problems that arise and adjust to the provisions of the nash, ijtihad legislators must refer to the principles of jalb al-mashalih and daf al-mafasid (taking maslahat and rejecting kemudorotan). The power of ahlul halli wal aqdi is what runs the al-sultah al-tasri "yah institution to make a good law. In siyasah dusturiyah the rights and obligations of the people or citizens are the obligations of the head of state. The rights of citizens in Islam consist of political rights and general rights. Namely:

1. Right to choose (*Haqq Al-Intikhab*)
2. The right to be invited to deliberate (*Haqq Al-Musyawarat*) In its implementation, there are deliberations that use a representative system or al-wikalah.

Representation (al-wikalah) to the Head of State over the people is a bound representation of the people (al- wikalat al-muqayyadat). Among the bindings is the obligation of the Head of State to consult with the people. This has been clearly stated in the Quran, which is found in Surah Ali Imran verse 159 which reads:

وَاسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِي الْأَمْرِ

*"And consult with them in their affairs" (Q.S. Ali Imran: 159).*

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<sup>34</sup> Munawir Sjadzali, *Islam Dan Tata Negara Ajaran, Sejarah Dan Pemikiran* (Jakarta: UI Press, 1990, h. 169).

<sup>35</sup> Suyuti Pulungan, *Fiqh Siyasah Ajaran, Sejarah Dan Pemikiran* (Jakarta: PT. Raja Grafindo Persada, 2002), h. 6.

<sup>36</sup> Iqbal, *Fiqh Siyasah Kontekstualisasi Doktrin Politik Islam*"... h. 3-4.

Associated with the formation of local regulations in Indonesia, the formation itself is certainly inseparable from the role of the Government in this case the Head of the Region as the Head of Government together with the DPRD to represent the role of the community, as well as the role of Ahlul halli wal Aqdi in the Islamic State, this institution has the right to form good laws for the community.

Based on the explanation above, regarding the formation of laws / laws according to siyasah dusturiyah, if analyzed from the Giographical State of Indonesia which is rich in cultural customs, then in the formation of Regional Regulations in Indonesia. Islamic values that contain benefits for the wider community can be applied and adopted in Regional Regulation policies.

## CONCLUSION

Problems that arise in the Formation of Regional Regulations in Indonesia include the ability and understanding of the formation of regional regulations by the policy makers themselves, so that this greatly affects the regional regulations produced, and then this causes the existence of regional regulation products that conflict with applicable laws and regulations.

As for the review of Piqih Siyasah Dusturiyah, related to policies made in the Formation of Regional Regulations in Indonesia. Then Islamic values that are beneficial to many people may be adopted and applied as long as it does not conflict with the applicable laws and regulations.

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