



The Islamic Law-Based Design of Regional Head Post-Filling

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Article	Abstract
<p>Keywords: Post-filling; legal standing; principle of Islamic law.</p> <p>Article History Received: Oct 27, 2023; Reviewed: Nov 10, 2023; Accepted: Jan 1, 2024; Published: Jan 16, 2024.</p>	<p><i>This research aims to elaborate on the standing of Islamic law regarding regional head post-filling and how this post-filling is designed to conform with the principle of Islamic law. This research employed mixed methods and statutory, conceptual, case, and normative-theological approaches. The research results reveal that Islam holds the principles that can be adopted into the constructions of the national law in the matter of regional head post-filling. In the time to come, this post-filling should conform to the principle of <i>al muhajadhotu ala qodimis sholih wal akhdzu bil jaididil aslah</i>, in which this post-filling should refer to the applicable model coupled with the development of this model with an asymmetric post-filling system. With this approach, areas with direct regional head elections will face reduction. Consequently, the areas not eligible to establish direct elections should consider another model of election.</i></p>



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INTRODUCTION

Article 18 paragraph (4) of the 1945 Constitution of the Republic of Indonesia (henceforth referred to as the 1945 Constitution) states that governors, regents, and mayors representing Provinces, Regencies, and Cities must be elected under a democratic system. Second, filling Governor, Regent, and Mayor posts should take place under a democratic or direct election (Siboy, 2021), meaning that such a post-filling can only be held under the mechanism of election that involves all the members of the public. This election takes place every five years, giving only a five-year office term to an elected candidate. Remaining in the position after a five-year office term will require the official to rejoin candidacy in the next election.

This normative provision in the constitution as above sets the rule implying that fulfilling the position of a regional head must only involve either direct or indirect election (Siboy et al., 2023). On the contrary, this post-filling process may also consider lineage and other bases. For sure, the legal construction of this post-filling under the election mechanism has raised a debate over what underlies or dominates the legal construction of post-filling in this purview in Indonesia, leaving the standing of Islamic law questionable (Elvira et al., 2023; Yuli Isdiyanto et al., 2022). Another question is whether the construction of law regarding this post-filling as governed under the constitution is fully sourced from Islamic law, or Islamic law has not been considered at all. The debate over Islamic law within the purview of legal construction regarding regional head post-filling is deemed to be an act of mixing religious law and national law, and this tendency is considered sensitive and can spoil the spirit of religious pluralism in Indonesia. Putting Islamic law and the construction of national law in conflict should meet a separating line to ensure that no domination and force in certain religions and religious laws are involved (Ichwan et al., 2020; Roy, 2018).

This view is certainly inappropriate to debate about. The debate about the legal position in such post-filling is not intended to force Islamic law to serve as a pilot law on which regional head post-filling is based. This debate is intended to avert any potential of rejecting the national law. Failing to understand the standing of Islamic law within the construction of national law will result in refusal among religious people of the regional head post-filling and lead to delegitimizing the process of the post-filling. This will also lead further to a more extensive social conflict, jeopardizing the socio-political stability (Djen & Qodir, 2023). Communities with an inadequate understanding of religion may act unexpectedly and not accordingly. This situation has, therefore, urged the author to comprehensively analyze the standing of Islamic law and how the real design should appear in the regional head post-filling from the perspective of Islamic law (Wibowo et al., 2023).

Research on filling the position of a regional head based on the principle of Islamic law is considered rare and it has never been brought up for discussion. The research on regional head post-filling has always been around the perspective of Islamic law in the context of direct elections of regional heads, while this approach is nothing but one of the models involved in the process of regional head post-filling. Moreover, this post-filling may also take place based on designation and lineage. Research conducted by R. Tony Prayogo entitled *The Concept of Regional Head Election in Indonesia from an Islamic Perspective* only focuses on (i) post-filling through direct election. (ii) analysis only restricted to the perspective of Islamic Law regarding direct and indirect elections, (iii) research only based on Islamic law as in Al Quran, leaving the matter only restricted to two propositions about deliberations and leadership concept according to Islamic sharia (Prayogo, 2018).

The design of the post-filling in this context referring to Islamic law is essential to delve into to seek and formulate the proper principles of Islamic law of how the process of regional head post-filling takes place. The principles of Islamic law and this research are not restricted to the texts in the Quran as the primary sources of Islamic law but it also refers to the principles of Islamic law from other Islamic sources. The method used to search the Islamic law principles will help formulate the design of regional head post-filling relevant to Islamic law and national law, leading to the finding of the formulation of regional head post-filling that may serve as the balancing point between Islamic law and national law.

METHODS

This research on the design of regional head post-filling is based on the principle of Islamic law and categorized into mixed-methods research, considering that this research refers to positive (doctrinal) law existing in the qualification of legal science and Islamic law qualified in the Islamic law per se (non-doctrinal). This means, on the one side, this research is based on a type of legal research (juridical-normative) (Al-Fatih & Siboy, 2021) because it examines regulations regarding filling regional head positions based on positive law (*ius contitutum*). On the same side, this research is also based on Islamic law as this research also raises legal arguments in Islamic legal sources (*Qawaidul Fiqliyah*).

This research also employed statutory, case, conceptual, and theological-normative approaches (Al-Fatih, 2023). The legislative regulatory approach is an approach that makes several laws and regulations related to filling the position of regional head such as Law Number 10 of 2016 concerning Regional Head Elections, Law Number 29 of 2007 concerning the Provincial Government of Special Capital Region of Jakarta as the Capital of the Republic of Indonesia, Law Number 11 of 2006 concerning the Government of Aceh, Law Number 2 of 2021 concerning Special Autonomy for Papua, Law Number 13 of 2012 concerning the Privileges of the Special Region of Yogyakarta, Law Number 13 of 2012 concerning the Privileges of the Special Region of Yogyakarta, Law of the Republic of Indonesia Number 3 of 2022 concerning the National Capital. This approach to the legislation was then elaborated with the *qawaidul fiqliyah* approach as one of the sources of the birth and enactment of Islamic law. With this *qawaidul fiqliyah* approach pattern, the formulation of the source of Islamic law will be to influence the construction of national law in terms of regulating the filling of regional head positions. Primary, secondary, and tertiary data were garnered from online and offline data collection, inventory, and classification. All the legal materials were then analyzed in descriptive and analytical methods, followed by a prescriptive method.

RESULTS AND DISCUSSION

The Standing of Islamic Law in Regional Head Post-Filling

Islamic law regulates rules sourced from Islamic teaching (Hakim, 2020), including Al-Quran, Hadiths, *Ijma*, and *qiyas*, and it applies to its followers and cannot be forced to fit non-Muslims. Since Islamic law only applies to Muslims, this law is not equal to positive law (*ius constitutum*) that applies to all Indonesian citizens (Sutopo, 2018; Yasir et al., 2022). Indonesia is home to people of different faiths and religions, and this state recognizes Islam, Christian, Catholic, Hindu, Buddha, and Confucius (Butt, 2020; Kawangung, 2019).

These varied faiths imply that Indonesia complies with the national law or legislation applicable to all citizens of Indonesia (Silfiah, 2020). Legislation, therefore, is positioned as a positive law in Indonesia. In other words, national law is not equal to religious law/Islamic law. However, it is not that the national law does not recognize or is fully separate from Islamic law. Recognizing Islamic law as part of the national law is obvious in the presence of the legislation and judicial systems related to Islamic law such as Marriage Law and religious courts.

This matter is also linked to administrative practices of the state, including regional head post-filling, requiring the practices to fully conform with the national law. The example of this matter is reflected in the legislation governing regional government (Law Number 24 of 2003) and the election of a regional head (Law Number 10 of 2016). Consequently, the legal construction regarding post-filling in this context is not seen in both Al-Quran and Al-Hadiths. Some even view that electing a regional head to fill the position under a direct election mechanism is debatable before Islamic law or that it is not fully legitimate from an Islamic law perspective. This debatable condition is due to the following grounds:

First, there are no verses of the Quran as the highest source in Islam elaborating on the form/model of regional head post-filling. Of 114 verses in the Quran, none discusses this post-filling. The verses in the Quran related to such post-filling only touch leadership in a general scope. Therefore, post-filling related law should refer to the sources of Islamic law lower than the Quran such as hadiths, the *qaidah* of *fiqh*, *ijtihad*, and *qiyas*.

Second, the absence of the regulation concerning Islamic law in the scope of regional head post-filling also indicates that this regulation should not be dominated by the sources of Islamic law, but it should rather be more open to all sources of national law living in society. The bottom line is that there should be a cutting line between religion and administrative practices or religious intervention and public administration.

Third, the murkiness reflected in Islamic law regarding the post-filling in this context also indicates that the regulation of this matter represents the right of the

government or lawmakers to decide which model for regional head post-filling is deemed appropriate for application in the state. Islamic law aims to give room to the government to optimize its authority to set the model concerned relevant to the conditions of each area across the Unitary State of the Republic of Indonesia (Anshari et al., 2022; Darmawan Al-Habib & Nur Qadar Ar Razak, 2021; Ramadhan, 2020).

Fourth, the absence of elaborate regulation concerning regional head post-filling stemming from the primary source of Islamic law also shows that the model set for this matter is not only within the scope of Islam or a particular religion. Instead, other religions may also deal with this matter. In other words, the absence of elaborate regulation underlying this matter indicates that all laws living in all recognized religions in this state may serve as the basis of the legal construction in regional head post-filling. It also shows how sensitive Islamic law has been in response to the conditions of the state. For example, in certain regions such as the Provinces of East Nusa Tenggara (NTT) and Bali, Muslims are not the majority. In this case, the conflict may arise when the construction of the national law only refers to Islamic law, particularly regarding this post-filling.

That is, Islamic law serves as a principle that underlies the presence of the regulation governing regional head post-filling. The principle at this level can be understood in the following ways:

1. Islamic law serves as a meta that interprets how the regulation of the regional head post-filling is made. Within this scope, the principles of Islamic law serve as the soul, and they can even function as legal norms in legislation. The principles of Islamic law adopted into the legislation are set as concrete norms, meaning that they have been amended and interpreted. For example, the principle of *albukmu yaduru ma'al illati Wujudan wa 'adaman* can be adopted into the norms with the phrase “filling the position of a regional head in every region is contingent upon the uniqueness or particularness living in that region”.
2. The principle of Islamic law can serve as the fundamental principle to be set out in the CHAPTER of the statute governing regional head post-filling principles. The existence of this provision will certainly require Islamic law to be set as norms in the concrete Articles of the statute. The provision of the chapter on the adopted principles in the statute requires the articles to be explicit as applicable in the system of lawmaking in Indonesia. The following diagram shows the system and structure depicting the standing of Islamic law as one of the principles in the law concerning regional head post-filling.

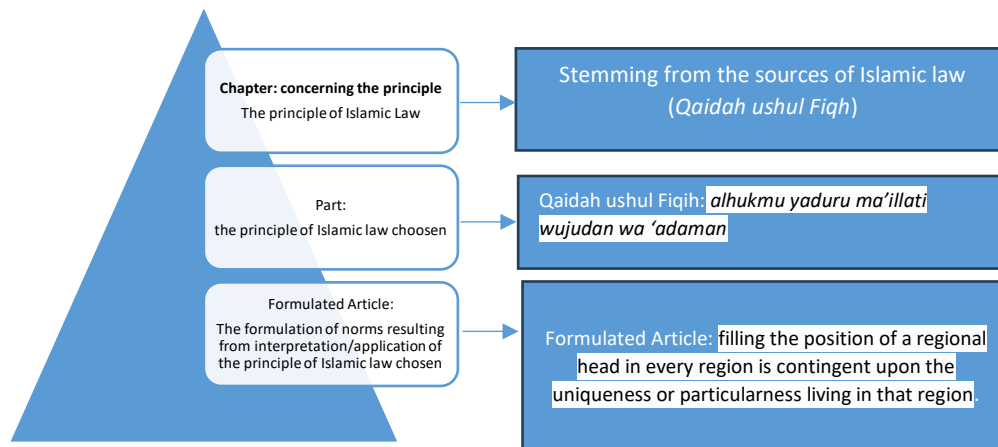


Figure 1. The position of Islamic law in the post-regional headship law.

3. The standing of Islamic law as one of the principles of regulating the regional head post-filling is also intended to serve as a shield to ward off conflict or judicial review regarding the regulation of this matter (Siboy et al., 2022). The standing of Islamic law accommodated within the principle of post-filling in this context will also serve as a principle under the guidelines set by judges in deciding the verdict of the case concerned. To decide a case in courts, not only do judges refer to norms, but they also test a norm by linking it with the principles that underlie the norms concerned. In other words, the norms in a related statute that fail to conform with the principles of Islamic law, especially those as technical regulatory provisions, are subject to revocation by judges.

The Design of Regional Head Post-Filling Based on the Principle of Islamic Law

The principles of Islamic law concretized to design the post-filling in this context are elaborated as follows: First, the principle of *dar'ul mafāsīd muqaddamun 'alā jalbil masālih* means that averting loss should be prioritized over taking benefits. The connection between this *qaidah* of *fiqh* and regional head post-filling lies in how the model of the post-filling should be put away from any potential of loss (*mafsadah*). For example, the direct election of regional heads in 2005 was seen to have given lots of benefits in the way that individuals were given the freedom to vote for candidates to fill the leadership positions.

However, such direct elections have often involved money politics, where votes were sold and serious violations in the election processes took place (Al Fatih & Nur, 2023; Davies, 2021; Okthariza, 2020). This practice began at the start of the election. Money politics often takes place between the candidates of regional heads and political parties and voters (Habibi & Nurmandi, 2021; Sari et al., 2023; Syauket, 2022). Money

politics between the candidates and political parties often involves some amount of money given as “Dowry” to allow for a recommendation of certain persons to fill the candidacy (Mustika & Rodiyah, 2023; Noor et al., 2021). At this stage, supply and demand rise as a mutualism symbiosis. Candidates for regional heads need a recommendation of political parties to allow them to sit for candidacy, while political parties need funds for internal needs.

Political money between the candidates and voters involves some amounts of money given by the candidates to voters as part of persuasion (Fadli et al., 2018). Money politics persists from time to time, indicating that candidates were elected not because of their competence but because of their financial power which led to the domination of the election of regional elections (Mukti & Rodiyah, 2020).

The situation above sparks a quandary of whether to retain the model of a direct regional head election, considering that it gives benefits to people notwithstanding the practices of money politics that spoil democratic elections (direct, universal, free, secret, honest, and fair voting). If the concept of *qidah dar’ul mafāsīd muqaddamun ‘alā jalblil masālib* is set as a steppingstone, the regional head elections do not have to apply simply because the benefits of direct elections have to be ruled out to avert any potential of money politics practices termed *mafsadah*. The absence of direct elections will for sure raise a debate (Kennedy & Suhendarto, 2020), considering that this may be taken as a tendency to regress toward indirect democracy. Current direct elections have been the antithesis of the regional head post-filling that was formerly indirect.

Direct elections have been a considerable goal to bring about ideal local democracy (Manar, 2018; Sinaga, 2018), and to introduce the antithesis of indirect elections represented by the involvement of the Regional House of Representatives (DPRD), in which this former election was also laden with the practices of money politics (Al Fatih & Nur, 2023). Therefore, direct elections of regional heads by the DPRD can hardly be separated from money politics. If, from the perspective of the principle *dar’ul mafāsīd muqaddamun ‘alā jalbil maṣāliḥ*, the involvement of money politics is deemed to be the practice of *mafsadah*, either direct election or indirect election by the DPRD is deemed an improper method of election and there is a loophole of the model of election that should comply with the principle of *dar’ul mafāsīd muqaddamun ‘alā jalbil maṣāliḥ*—the model that considers benefits, not *mafsadah*.

If the model of post-filling involving either direct or indirect election (by the DPRD) is proven to radiate *mafsadah* (money politics), or to fail to conform to the principle of *dar’ul mafāsīd muqaddamun ‘alā jalbil maṣāliḥ*, the process of such regional head post-filling under election methods must be avoided. That is, this process of post-filling should involve other methods that rule out election:

1. Designation. This mechanism can be done by the central government, particularly the President of the Republic of Indonesia and the Minister of Home Affairs to appoint persons as regional heads, including Governors,

Regents/Mayors of regions. This mechanism once took place in 2022-2024, when regional head elections faced a deferral.

2. Dynasty/lineage. This way of electing a regional head may involve the replacement of a retired leader by his/her son. This model applies in Yogyakarta. The position of a Governor or Vice Governor was passed down to Hamengkubuwono and the Vice Governor to Paku Alam. However, this model will not be applicable in Indonesia as a democratic state, not a monarchy. When this system is forced to apply in the state, it will create a huge shift from a democratic state to a monarchy.
3. Administrative position/professional career. If the process of regional head post-filling is laden with *mafsadah*, it should shift to a post-filling mechanism within the purview of State Civil Apparatuses (ASN)/administrative position. However, this mechanism will lead to arguments over the meaning of the regional head position designed as a political position, requiring this position to take place according to the process of election that complies with the provision of Article 18 paragraph 4 of the 1945 Constitution stating that a regional head is elected democratically. The shift from the election model in regional head post-filling to the designation model will place the appointed person in an official position under the central government because this administrative position is determined by the position above it or the position within the career relation between higher official positions and subordinates. This will leave an impact on the applicable system of government in the system of the Unitary State of the Republic of Indonesia. The practice of regional head post-filling that involves designation and positioning the elected regional head in an administrative post or the representative of the central government does not conform with the regional autonomy that allows every region to self-govern its regional administration and determine who should fill the position as a regional head. However, appointing a regional head should still have its solution. This mechanism may consider the appointment of a regional head by a high government official/the President with the names of the candidates recommended by regional areas. In other words, several names should be submitted for recommendation for the position of regional heads by the President.

Second, deliberation is governed in the highest sources of Islamic law and national law. In Islam, deliberation is governed in surah Al Imran verse 159 of the Quran stating *Fa bimā rahmatim minallābi linta labum, walau kunta fazzan galizal-qalbi lanfadḍu min ḥaulika fa'fu 'an-hum wastagfir labum wa syāwir-hum fil-amr, fa iżā 'aẓamta fa tawakkal 'alallāh, innallāha yuḥibbul-mutawakkilīn,*” and the national law also governs this matter in the fourth principle of Pancasila mentioning “Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives”. The principle of

deliberation serves as the fundamental of discussions to resolve legal-political problems (Kurnia & Syahrudin, 2022)(Risky et al., 2023). Deliberation requires the parties involved to sit together for a way out. This process involves discussion and exchange of views regardless of their social statuses or the number of followers (Hamdi, 2020). The solution picked from this principle is given not based on the voting but on the agreement of all parties.

Deliberation may also serve as the basis of regional head post-filling which may lead to the following possibilities:

1. Regional head post-filling through deliberation does not rule out democratic post-filling, recalling that regional head post-filling represents the principle of deliberation set out in Pancasila. Although it does not take direct election, regional head post-filling through deliberation remains democratic because the model of the election concerned only serves as an instrument. It indicates that the definition of democracy is not restricted to the election model used. If the model is acceptable and relevant to people's expectations, electing a regional head through deliberation is considered democratic.
2. The process of electing a regional head with the deliberation principle is an efficient model in the post-filling because this approach will not require a great number of people, activities, and much cost. On the contrary, direct elections have always spent trillions of rupiah to elect regional heads and vice-heads. A regional head election may even spend about Rp. 1,982,784,821,288. This amount is sourced from the state budget, not including the amount spent for candidate pairs and their supporters. However, electing regional heads and vice-heads through deliberation will certainly help cut the cost to less than billions, making the process more time-saving to obtain results.
3. Regional head post-filling through deliberation can also avert polarization in society. This assumption arises because, in deliberation, the tendency of a divided society can be anticipated. Parties involved in the process of regional head post-filling are those with excellent quality who can think comprehensively and are not easily affected by dividing political issues. This approach is different from the post-filling through direct election which tends to lead to societal polarization. In direct voting, the condition where the voters' knowledge about issues does not suffice will leave them easily affected and provoked by race-, religion-, tribe- and community-related issues. Varied kinds of conflict are obvious in regional head elections, indicating that the election process involving the participation of the members of the public just gets them closer to horizontal conflict.
4. Regional head post-filling through deliberation will certainly minimize unfair results, considering that this mechanism gives mutual agreement, rendering the results credible. This condition certainly helps minimize disputes or

claims that may be filed in court. Trials have often taken place following massive violations committed by certain parties in some areas, requiring the validity of voting results to be settled in courts.

Third, the principle of *Al-'Aadatu mubakkamah* is the fifth *qaidah* in *qawaidul fiqiyah*. This principle (العادة محكمة) indicates that habitual activities recognized and accepted in society will serve as legal standards. The habitual activities in this context are not restricted to those that take place under the law/legislation, but these activities may be passed down throughout generations in a community. This condition can be represented by these two models: *noken* is a popular model used in direct voting. This voting system is based on customary law living in the society of Papua. With this system, the pattern of post-filling in this context may involve the model living in a community and representing the local wisdom of the community. This model will also help maintain the pre-existing tradition. However, retaining this system in a community will be deemed too traditional and undemocratic. This preconceived idea emerges from the fact that many Indonesians do not strongly refer to proper assessment standards. Most people believe that whatever fails to adjust to the current development or Western models will not thrive.

The way of thinking as above should not be applied and it is considered a fallacy. Modernity/advancement should not refer to the replacement of a pre-existing tradition living in a society with something new, but it should rather be understood as something within the logic of *al mubafadbotu ala qodimis sholib wal akhdzu bil jadidil aslah--* maintaining what has existed (and is appropriate) while simultaneously adopting something new. That is, traditions passed down throughout generations remain modern and advanced as long as they still work properly in a community and fit people's lives (Bourdieu et al., 2019). Similarly, *noken* in Papua is considered appropriate if the locals of Papua still accept it and consider it proper.

Fourth, the principle of *Albukmu Yaduru Ma'al Illati Wujudan Wa 'Adaman* is the *qaidah* of *ushul fiqh* that can be recommended for regional head post-filling. This principle emphasizes the idea that law revolves around its state (*illat*) affected by time and evolving traditions. The principle of *ushul fiqh* is parallel to the legal principle arguing that 'the same laws for diverse citizens' is as unfair as 'diverse laws for the same citizens. The process of regional head post-filling in each region should be congruous with the status and position of each region and its financial capability. At this level, examples can be taken from the distribution of religion based on Indonesia's geographical lines. Namely, there are provinces where Muslims dominate and provinces where non-Muslims or Christians dominate. In this case, two provinces can be highlighted. Namely, Nangro Aceh Darussalam (NAD) Province and Papua Province. NAD is a Muslim-majority province, while Papua is a non-Muslim-majority province. By this pattern, the filling pattern that applies in Aceh cannot be applied or enforced in Papua. For example, candidates for regional head or Governor of Aceh

must be able to read the Al-Qur'an (Article 13 Aceh Qanun Number 3 of 2008 concerning Local Political Parties Contesting the Aceh DPR and Regency/City DPR Elections in Aceh, as mandated in Law No. 11 2006 concerning Aceh Government). On this basis, the fact that the Governor of Aceh is always a Muslim and the Governor of Papua is Christian is something that needs no further question.

The above principle indicates that the asymmetric election method in this context remains the best choice. So far, asymmetric regional head post-filling only accommodates the Special Region of Yogyakarta, the Special Autonomous Region (Papua and Aceh), the Special Capital Region of Jakarta, and the Capital City of Nusantara. However, the regional budget in the regions with small numbers of population is not accommodated. This situation requires more applications of the asymmetric model in regional head post-filling in the regions.

Fifth, the legitimacy or trustworthiness principle in such post-filling implies that an official position is built based on honesty and trust given to a person. It is inappropriate for people to vigorously compete for a position, as this tendency may trigger them to think of unfair conduct to get to the expected goal. Those to be trusted should be expected by people. With the principle of trustworthiness, the regulation regarding post-filling should be able to give people the right to vote and to be voted as a candidate. Giving wider access to the rights above will encourage people to legitimate regional heads more, and wider rights given to people will give wider access to being voted and sitting in the state governance. Simultaneously, more people will have the right to be voted, giving more choices relevant to people's expectations (Astuti & Marlina, 2022; Shevchuk et al., 2023), unlike restricted rights to be voted that may spoil consistency and force them to vote for listed political figures they do not really know.

Trustworthiness, therefore, is expected to lead to more open regional head post-filling in terms of who is eligible to vote and to be voted. This question, however, remains a common problem in the process of regional head post-filling through either election or designation. With all the designs of regional head post-filling per the principles of Islamic law, the post-filling in this context can still refer to currently applicable systems such as those under the asymmetric system while adopting several other models relevant to the principles of Islamic law elaborated above. That is, it is essential to maintain the pre-existing models relevant to the principles of Islamic law while innovating or referring to a new model. The choice of this legal politics is in line with the principle of *Almuhafadatu ala qadhimis sholeh wal ajdu biljadidil aslah*.

CONCLUSION

Regional head post-filling represents a process based on the principles of Islamic law. The adoption of Islamic law principles may involve the sources of the teaching of Islamic law as part of the construction of positive law as the basis of regional head

elections. The available sources of the teaching of Islamic law are those stemming from *qaidul fiqih* and *maqol*. First, the principle of *dar'ul mafāsīd muqaddamun 'alā jalbil maṣāliḥ* can serve as the basis for averting the potential of post-filling laden with money politics as *mafsadah*. Second, deliberation, an alternative to a direct regional head election, is a more cost-saving process of election. Third, *Al-'Aadatu mubakkamah* is a principle based on a habitual activity held as a tradition for regional head post-filling, representing the culture of the locals. Adopting varied principles of Islamic law will help turn the system asymmetric, relevant to what is regulated in *qaidul fiqih* stating *Abukmu Yaduru Ma'al Illati Wujudan Wa 'Adaman* and the legal principle stating 'the same laws for diverse citizens' is as unfair as 'diverse laws for the same citizens.

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