

THE CONTRIBUTION OF DELIBERATIONS TO THE ESTABLISHMENT OF LAW IN INDONESIA IN THE PERSPECTIVE OF POLITICAL LEGISLATION

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Abstract

The contribution of Islamic law to the formation of law in Indonesia is quite developed, in line with the challenges of legal issues that are becoming increasingly complex with the times. The establishment of good laws or legislation in a country will regulate, discipline, and at the same time strengthen the rights of citizens. The politics of Islamic law is an effort by the government's policy towards the formulation of the positivization of Islamic law as part of the law that lives in society (living law). The main requirement for the procedure for legal formation in Islamic legal politics is the fulfillment of the principle of openness through deliberation to bring benefits to a legal policy and government political policy. The implementation of the deliberation describes leaders who are pro-active in extracting information from the community and the role of the community in legal policy making. Therefore, the participation of the community through deliberation is very relevant in making the birth of legal products and laws and regulations better, measurable, and on target because deliberation serves as a means of socialization and a reservoir of community aspirations related to the issue of law formation and government political policy making.

Keywords: deliberation, legal politics, constitution, openness, community participation.

Introduction

Islamic law in Indonesia is sociologically cultural, is a flowing law, and has been rooted in culture so that it can be said to be a living law or a law that lives in society. It is said to be living law because its application in some areas of Islamic law is considered sacred and has become part of a tradition or custom in Indonesian society.

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The birth of several legal theories, such as acceptance theory, acceptance in complex theory, acceptance exit theory, acceptance of a contrario theory, and existence theory, is a historical fact. Islamic law, which is still valid, has been a serious concern since the days of the Dutch East Indies.

The existence of these theories in themselves confirms that religion, law, and the state have a fairly strong linkage. The state exists based on laws that breathe Pancasila and protect religions and their adherents, and vice versa, namely, the life of the nation and state is supported by laws derived from religious values that develop in society. Even Mohammad Hatta, a founder of the Indonesian nation, once stated that Islamic sharia based on the Qur'an and Sunnah can be referred to as Indonesian laws and regulations so that Muslims have a legal system in accordance with Indonesian conditions. That is, the norms of Islamic law serve as the raw material and the main element for the formation of Indonesian national law.

The contribution of Islamic law to the formation of law in Indonesia is quite developed, in line with the challenges of increasingly complex legal issues over time. This new problem has never been found in law books written by *mujtahids* (law creators) before, so with consideration for the benefit of society, the scholars are trying their best to reinterpret it so that Islamic law is more actual and able to answer the challenges of the times. Because in reality now, the law cannot always be seen as a guarantor of legal certainty, an upholder of people's rights, or a guarantor of justice. There are so many obtuse legal regulations that do not interfere with arbitrariness, are unable to uphold justice, and cannot present themselves as guidelines that must be followed in resolving various cases that must be answered by law.

On the other hand, law is a political product, so when discussing legal politics, it tends to prioritize politics or the influence of the political system on the development of the law. If people yearn for the birth of a law with a responsive character, then what must first be sought is to organize their political or constitutional lives to become more democratic. Therefore, the existence of a government is a necessity to maintain religious order.

The government's obligation to maintain religious order is not without logical reasons; the government's sensitivity to religion actually has a fairly close relationship with the life of the state in Indonesia. Normatively, it can be seen in the Preamble to the 1945 Constitution (UUD) in the third paragraph, which states Indonesia's independence is thanks to the grace of Allah Almighty, and the fourth paragraph of the State Based on the One True God. This sentence is one of the representations of the state's (government's) recognition of the existence of religion, even though Indonesia is neither a religious nor

a secular state. Indonesia is a Pancasila country, which is a religious nation-state. The existence of religion is evident in the first precept of Pancasila, namely the One True Godhead. This is a country that is passionate about religion. In addition, the 1945 Constitution also regulates religion in a special article, namely Article 29. That is, the juridical position of Islamic law has been guaranteed to be enforced by several legal explanations governing the relationship between the state and religion. In fact, according to Hazairin, the existence of the article 29 has a great function in the Indonesian legal system, whose laws and regulations cannot contradict the teachings of the One True God.

To comprehensively understand the mechanism of law formation in a country, it must first understand the political system it adheres to, without exception, including Indonesia. The political system can be interpreted as a collection of various activities within the state related to the public interest, including the process of goal setting, efforts to realize goals, decision-making, selection, and preparation of its priority scale. In addition, the political system can also be interpreted as a conception that contains, among other things, provisions about who is the source of state power, who is the executor of the power, what the basis is and to whom the authority to exercise that power is given, and to whom the executor of the power is responsible. Thus, it can be understood that the political system reflects at least two things. First, how state power is exercised by state institutions; and second, how the mechanism for filling posts in those institutions is carried out. These two things must be considered regarding the political system that is closely related to the establishment of laws in a country, including in Indonesia.

RESEARCH METHODS

Political Principles of Islamic Law in the Formation of Law

The formation of good laws or regulations from a country will limit, regulate, regulate and at the same time strengthen the legal rights of citizens. Efforts for transparency or openness in law enforcement can reduce the negative impacts (*amar makruf*) and at the same time increase the positive impacts (*nahi munkar*) of citizen activities. If the legal system runs well, then a just and prosperous society will easily be realized. This means that the Indonesian state can demonstrate its existence as a rule of law state whose consequence as referred to in Article 1 paragraph (3) of the third amendment to the 1945 Constitution is the realization of 3 (three) basic principles that must be upheld by every citizen, namely a rule of law; equality before the law; and law enforcement in a way that is not against the law.

Using the term political law means agreeing that law cannot be separated from political, ideological, religious, economic, socio-cultural aspects and so on. Law is understood as a product of political power and therefore almost every legal product is produced by certain political powers. Finally, the legal instrumental function as a tool of power is more dominant than other functions.

Meanwhile, the existence of the theolytic operation of Islamic law is part of the government's policy efforts towards formulating the positivization of Islamic law as one of the living laws in society (living law), namely by paying attention to aspects of diversity (plurality) and the broader interests of the nation (integrity). Indonesian Muslims, in realizing religious life, have institutionalized various kinds of activities covering various aspects that touch almost all dimensions of life in society, nation, and state. However, considering that Indonesia is a Pancasila State, which means it is neither a secular nor a religious state, the manifestations of the values contained in the Al-Qur'an and As-Sunnah certainly have a different specificity from the institutionalization and application of Islamic teachings in other countries. country.

William Zevenbergen said the politics of law is a study that tries to answer the question of what legal norms and what kind of law should be made law because the invitation itself is a form of legal policy. Legal policy includes the process of making and implementing laws that can indicate the nature and direction in which the law will be built. In other words, legal politics provides a foundation for a more appropriate legal formation process, situations and conditions, cultures, and values that develop in society by taking into account society's needs for the law itself. An Indonesian legal officer, Mochtar Kusumaatmadja, argues that legal politics is a combination of legal policy and legislation in the context of legal renewal. If the legislation is intended as an effective legal arrangement, the process of forming a law must be able to accommodate all matters relevant to the issues that will be regulated in the law.

Meanwhile, Abdul Wahhab Khallaf, an expert on Islamic law, said that legal politics is a science that examines constitutionality, especially regarding the laws and regulations of a country based on the principles of religious law aimed at maintaining order and benefits and regulating the situation so that humans can live safely and peacefully, although not all such laws in particular have the handle of sharia (Qur'an and Sunnah). To corroborate his opinion, Abdul Wahhab Khallaf cited the opinion of some jurists who define Islamic legal politics as an extension of the role of the ruler to realize human benefits as long as it does not conflict with the fundamentals of religion. That principle is what makes Islamic legal politics develop dynamically in all aspects of human life,

including in organizing the social life of the nation and state society.

The enactment of Islamic law does not mean fundamentally moving Islamic sharia into a legal product that dominates its policy direction. However, through strict efforts to formulate and methodologize the legal transformation used so that it is in line with encouraging the acceleration of legal development, guidance, and renewal nationwide, Islamic law legislation actually has a positive contribution to making to strengthening the commitment of Muslims to maintaining national unity, or maintaining the consistency of the Indonesian state based on the 1945 Constitution and Pancasila.

On that basis, it is important that it be argued that for the determinants of legal policy to pay attention to the various interests of the people through democratic mechanisms to understand customary norms, religious values, and socio-cultural conditions in order to positivize the legal products that are born, they truly aren't laws that have been in force in society (living laws). On the other hand, it must also be understood that the formation of legal products is born from the influence of a dominant power in politics, both from within the institutions of the state authorized and from outside the institutions of the state through political mechanisms. Meanwhile, the demands of the people can occur if justice is not met with the formation of the law and the birth of legal decisions. All of these things can happen if the laws of a country are not properly implemented by the government.

Thus, in order to bring maximum benefits to a political policy as well as a legal policy, the most important thing to do is to discuss every matter that should be discussed. Furthermore, paying close attention to some legal and political principles that have the basic basis and purpose of sharia from the Qur'an and Sunnah. The basic principles of Islamic legal politics in the formation of laws and regulations include at least: not being contrary to Islamic law; aiming at upholding justice; placing the equality of human standing before the law; embodying benefits and keeping emergencies away; and its formation procedure prioritizing openness through the path of deliberation principle.

Such transcendental values are the basic foundation for the formation of legislation anywhere. When viewed in the context of Indonesian, the lack of openness in deliberations between the government and the community required by the politics of Islamic law (*siyâsah syariah*) in the process of forming legislation is essentially in line with the basic principles in the discussion of the formation of laws and regulations contained in the Law (UU) No. 12 of 2011 concerning the establishment of laws and regulations, especially article 5 letter g on the principle of "openness", and in article 96 paragraphs (1) and (2) letters a, b, c, and d concerning the involvement of "*community participation*".

The basic principles of Islamic law and politics regarding the establishment of laws and regulations in line with the principles of openness and community participation in Law No. 12 of 2011 are not without reason. The tradition of deliberation consensus in Indonesia is actually a cultural heritage derived from religious norms and customs that have been passed down since the time of the ancestors and are prevailing in society in a simple form. Then, in its development, the main principles of the deliberation tradition were maintained and adapted to the larger modern state structure by the founders of the Indonesian nation, as actualized in the ideology of Pancasila and the 1945 Constitution. If you look deeper, the deliberation of consensus contained in the fourth precept of Pancasila, "People led by the wisdom of the representatives of the people" (Democracy, led by the wisdom of the representatives of the people), is actually adopted from the tradition of the heritage of the ancestors of the Indonesian nation, which is still preserved in the life of the modern community to the present.

The tradition of deliberation and consensus is one of the principles of statehood, and compiled in a constitutional structure, it is a concrete example of a form of strengthening the values of tradition in the life of the nation and state. However, it is an almost inevitable habit when the government and parliament draft laws or implement national laws, and in the decision-making process there is always a strong conflict of interest. So that in the end, the philosophical values that are the essence of the existence of the deliberative function of the consensus itself become displaced. The foundation of these noble values has faded and been replaced by values derived from the cultures of other countries, so that in practice they seem very contrary to the original principles of life and traditions of the Indonesian nation.

The deliberation of consensus, which has always been a guide in making decisions on the implementation of national law by the government and parliament, has turned into a voting system with the principle of one man, one vote that prioritizes the rights of individuals and certain groups. On that basis, to maintain authenticity and preserve the tradition of wisdom in solving problems in people's social lives, which is the most valuable heritage of ancestors, as an icon of Indonesian democracy that distinguishes it from the democratic principles of other countries, Every process of taking national legal wisdom by the government and parliament, ideally prioritizing the principles of deliberation, consensus, and social justice as a fulfillment of the principles of "openness" and "community participation," in order to achieve a broad society for all Indonesians, does not conflict with the objectives of sharia and the mandate of the Constitution of

RESULT AND ANALYSIS

The Relevance of Deliberations for Law Formation in Indonesia

Discussing the principles of implementing an ideal of deliberation is still very rare; this is because there is no comprehensive and continuous deliberative practice on various problems in the social life of the community, nation, and state. Nonetheless, the discussion of deliberation as a principle that must be upheld in the joints of human life is very much present. To provide concrete answers to the needs of mankind, fundamentally, Islam teaches its people to have deliberations (*syûrâ*). With its various concepts and arguments, Islam has never refused to serve rational insistence or reasoning impulses over human arguments. In fact, not only is it limited to the issue of *syûrâ* (deliberation), but Islam in all aspects contained in the dimension of human life gives its views and teachings, so that man is always guided in navigating the ark of life still based on the values of Divine revelation.

In order not to confuse and get lost in search of the true meaning of deliberation and to find the answer, of course, it must refer to the Divine revelation that has been believed to be a guide for man. Thus, as a religious man, I will at least find the peace of the soul in the answer explained by Divine revelation. On the subject of deliberations, the Qur'an says:

"Then it is because of the grace of God that you are gentle towards them. If you're being harsh again, they're certainly distancing themselves from your surroundings. Therefore, forgive them, beg for mercy for them, and consult with them in the matter. Then, when you have made up your mind, turn to God. Indeed, God likes those who are devoted to Him". (QS. Ali Imran [3]: 159). Then in a different verse, it is stated: "And (for) those who accept (obey) the call of their Lord and establish prayer, it is their business (decided) by deliberation among them..." (QS. Al-Shura [42]: 38).

The term "*deliberation*" comes from the word *musyawarah*, which is the masdar form of the word *syawara-yusyâwiru*, which is with the roots of the words *syin*, *waw*, and *ra'* in the *fa'ala* pattern. The structure of the root word means "*to appear and offer something*" and "*to take something*", From this last word comes the expression *syawartu fulânan fî amrî* (I take the *fulan's* opinion on my affairs). Etymologically, deliberation comes from the word *shawara*, which means to negotiate, counsel, or say and propose something. where the meaning of the basis of the word deliberation is to issue and appear (*al-Istikhrâj wa al-Izhar*).

In terminology, deliberation is defined as an attempt to generate an opinion from an expert to reach the closest point to the truth for the public good (*mashlahah al-amm*). When searched by the Qur'an, there are at least four words derived from the verb *shawara*, namely *asyâra* (beckoning), *tasyâwur* (deliberating opinions with each other), *syâwir* (asking for opinions), and *syârâ* (being preacquainted, consulted). These last two words are relevant to political life or leadership.

The concept of deliberation has always been an important theme in any conversation about democratic politics and is especially inseparable from the political concept of Islamic law. Deliberation is a social system that contains the principle of sharia as a command of God given to the Prophet Saw to be exemplified by mankind. That is, in solving the social problems of the community or peoplehood of a country, if it is not carried out by way of deliberation, it has essentially abandoned sharia. Deliberation can be interpreted as the approval of a decision in society that concerns the common interest. Deliberation is also a picture of how the faithful solve their social problems. On that basis, to achieve a level of benefit, a two-way reciprocal relationship, which is the principle of openness and participation of the parties participating in the deliberations to solve common problems, is an absolute thing to be said to be a deliberation.

When further reviewed, the essence of deliberation points to the reality of human equality before the law, freedom of expression of opinion, and substantive justice for all parties. The implementation of deliberations for the continuation of the social life of the community means not just realizing the political interests of certain groups in a country but rather prioritizing lofty ideals above the interests of all groups. On the other hand, the essence of deliberation is a system of collecting raw materials from all walks of life for the preparation of laws and regulations that, if viewed academically, can naturally meet scientific principles.

When choosing the path to carry out open deliberation on problems that develop in social life, it means giving the community the opportunity to dialogue and discuss by putting forward polite arguments that are moral, logical, realistic, and normative. The existence of deliberation as a container for ideas and concepts of thought on a common problem in state life has an important role as a bulk for the people against being arbitrary and tending to act unjustly.

In this regard, it is very interesting to pay attention to Ibn Taimiyah's concept of deliberation. According to him, the concept of deliberation is as broad as the concept he put forward about baiat (promise to be

faithful). He wants a more effective and general deliberation. A leader should ask not only for consideration from the clergy but also from all classes in society and anyone who is able to give a dynamic opinion. However, there are restrictions that surround the enactment of deliberations in a reasonable manner. Not all problems can be used as material for deliberation. For example, the basic teachings of Islam, which are the basics of religion, no longer need to be questioned or discussed. Discussing the validity of these teachings is instead seen as kufr and a far-fetched act (heresy). In his book *Siyâsah al-Syar'îyyah*, Ibn Taimiyah, a legendary figure who had authority in the field of Islamic legal politics, stated:

Every leader must have deliberations; indeed, Allah commanded the Prophet Saw to have deliberations: "Therefore forgive them, beg forgiveness for them, and consult with them in the matter. Then, when you have made up your mind, turn to God. Indeed, God stalks those who surrender (put their trust in) Him". It is narrated from Abu Hurairah r.a. that he said: "No one has more deliberations with his companion than the Messenger of Allah Saw". Some argue that if the Prophet Saw was commanded to deliberately soften the hearts of his companions, to be followed by the generations that followed, and to obtain the opinions of the companions on the subject that did not come down to revelation about him, for example, in the matter of the strategy of war or partial problems (e.g., related to social life, customs, laws), etc., then people other than the Prophet Saw are more required to have deliberations.

This view describes a leader who pro-actively extracts information from the public to build the authority of the state and, at the same time, describes the active role of society in the political decision-making of government and the formation of laws, which at the time of the Prophet Muhammad Saw was represented by friends. The lack of public participation in the formation of laws or legislation by authorized political institutions will be the cause of the emergence of larger legal problems. The existence of community participation will certainly make the birth of legal and regulatory products better, more measurable, and on target. Therefore, deliberation is a transparent means that, in addition to functioning as a socialization tool, also serves as a forum for supporting people's aspirations related to legal policy-making issues and government political policies.

Of the several principles of governance in Islam, the principle of deliberation is the most important principle practiced by the Prophet Saw throughout his time as the leader of the people and head of state in Medina. Deliberation (*syurâ*) is a form of joint efforts in finding solutions to every problem of social, national, and state life until reaching an agreement while still adhering to sharia norms based on

the Qur'an and Sunnah. Meanwhile, the government institution that holds deliberations (*syur assemblyâ*) among its authorities is to form a draft law and establish it as a product of laws to be enacted in a country based on the provisions of sharia norms in order to achieve the purpose of benefit.

However, it is important to understand that deliberation is only a tool to achieve a society that is actually limited and not even needed when the legal position on an issue has been explained by revelation. However, it is obligatory for Muslims to carry out actions on issues not explained by revelation. If an approach based on sharia is seen as a general framework and not a specific constitution, it will be widely open to areas that have not been legally affirmed, so creativity of thought and imagination become important.

Regulating public affairs is part of the ultimate religious obligation, but that does not mean that religion cannot exist without a state. Muhammad Asad said that the purpose of the state is not the colonization of one nation over another or the use of a certain culture to defeat other cultures, but only to carry out the law as a practical system for all aspects of human life. Ahead of state cannot possibly exercise his power except to those who follow the Sharia, derived from divine law. Sharia could not have been perfectly realized without the state's support. Similarly, it is impossible for Islamic sharia to be realized if its rulers do not sincerely submit to the rules of Islam itself.

Therefore, the most important thing is how to make the state maximally active as a means or tool of law enforcement derived from religion. Heads of state or capable leaders are those who rely on the principle of deliberation (*syura*) in arranging the various problems in the lives of their people, because in it there is the grace of God. The head of state's role in carrying out the law cannot be separated from the main purpose of sharia law (*maqâshid al-syarî'ah*), which is the creation of a benefit for all human beings. Al-Syatibi says that the main goals of sharia law are the maintenance of religion (*hifz al-din*), the maintenance of the soul (*hifz al-nafs*), the maintenance of offspring (*hifz al-nasl*), the maintenance of reason (*hifz al-Aql*), and the maintenance of property (*hifz al-mal*). All of these goals lead to the realization of benefits.

Then the leader or head of state is obliged to consider and accept various recommendations from the community as long as they are solutions that are in line with sharia values. On the other hand, he must refuse, regardless of any consequences, if asked to give advice that tends to be contrary to sharia norms. If leaders are faced with an urgent situation with various options that must be considered for an immediate decision, then they must determine the choice that is most

in line with sharia and brings the most harm to all their people.

CONCLUSION

Deliberation (Musyawarah) is a transparent tool that, besides functioning as a socialization tool, also functions as a channel for community aspirations related to issues of making government political and legal policies. The deliberative view describes a leader who is proactive in gathering information from the public to build state authority and, at the same time, describes the active role of the community in the development of government political decisions and the process of forming laws. The lack of public participation in the formation of laws or statutory regulations by authorized political institutions will be the cause of larger legal problems. On the other hand, public participation will certainly result in better, measurable, and targeted legal and regulatory products.

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