

CAPITALISM AND MODERN LEGAL SYSTEM (A CHANCE FOR ISLAMIC LAW)

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Abstract

Tulisan ini menyoroti problematika yang melanda dunia hukum sekarang. Mengapa hukum modern gagal menciptakan keadilan sejati (*substantial justice*)? Selain itu, tulisan ini juga mencoba menelusuri mengapa sistem hukum modern yang berlaku saat ini, termasuk di Indonesia, sangat mudah ditegakkan terhadap kaum yang lemah, akan tetapi tidak berdaya memberangus kelompok elit, utamanya mereka yang memiliki modal yang besar. Bagaimana sesungguhnya *kawah candradimuka* alias *setting* medan sosial yang mewadahi lahirnya sistem hukum modern? Pada bagian akhir, penulis mengungkapkan ke arah mana *trend* studi hukum berkiblat sekarang sehubungan dengan telah gagalnya sistem hukum modern mengatasi problematika dunia saat ini dan bagaimana posisi (studi) hukum Islam dalam arus (studi hukum) tersebut.

Keywords: Law, modern legal system, capitalism, Islamic law.

Introduction

The industry revolution had created industrial (class) society, business class, and proletarian group in a society. The skilled employee and the economically rich middle-class bring about the existence of their wishes to gain certain positions in a state. Hence the *era of rights* focusing on civil and political rights of a citizen, and modern democratic state emerged (Bandoro, 1994: 4-5). In the next turn, the development of industrialization and capitalism followed by social, cultural, political, and economical changes in the western Europe society had born *the modern legal system* in the form of a formal-rational legal stipulation articulated through positive law.

The Emergence of Modern Legal System

Mochtar Kusumaatmadja (1982: 24-33) defines modern legal system as :

“ A positive legal system based on the principles and legal institutions of western states which mostly based on the principles and legal institutions of Roman ”

The emergence of modern legal system is in response to production system of neo-economy (capitalist). This is because the old system can no longer serve the developments of work effects of the capitalist economy system (Rahardjo, 1997).

Thus, it cannot be denied that the modern legal system is a construction derived from the social order of western society when capitalism developed in the nineteenth century. In other words, the social order of western society has a big contribution in bearing the modern legal system. Max Weber (n.d., : 724-725) states that the phase arranging of society and law in western Europe is a very clear one comparing with that in the civilization of other nations, such as in China or in the Middle East. The two nations mentioned latter also experienced a phase arranging of state law, but the law is not absolutely separated from Divine influence or traditional values. That's why David M. Trubek (n.d., : 724 – 725) in his work under the title *Max Weber on Law and the Rise of Capitalism* stated :

“Unlike the legal systems of other great civilization, European legal organization was highly differentiated. The European state separated law from other aspects of political activity... Legal rules were consciously fashioned and rule making was relative free of direct interference from religious influences and from other sources of traditional values... “

Then, Trubek stated that :

“Weber believe that European law was more rational than the legal systems of other civilizations... The failure of other civilizations to develop rational law help explain why only in Europe could modern, industrial capitalism arise.”

So, according to David M. Trubek, Weber even believes that the prevailing law in (western) Europe is more rational than that of other nations, and because of its rational nature, capitalism and industrialization can develop. In relation to this, I would like to quote Iskandar Alisjahbana's opinion (2000) stating that in terms of human development as an unimpaired individual, as a member of an *open society*, wishing to reach the next upper social stratum in prevailing social order, individual development and empowerment of European society persists fast and well. The processes of economic production with the capitalist nature needs a social order that can create a social arena where the economic processes can persist well. Thus, the urgent demand is the creation of logical-formal legal system that can provide a high predictability so that it can be inserted in economy production calculation.

Max Weber states that the procedure of law implementation that is more technically rational and using a stricter deduction method is a phase in legal development to the point where law can be mentioned as modern law (Rahardjo, 1999). In relation to what is mentioned as modern legal system, Weber's analysis can explain more clearly the connection between capitalism to modern legal system mentioned. David M. Trubek (Soetandyo Wignjosoebroto, 1999) who writes Max Weber's view on the relation between capitalism and modern legal system enounces:

"His survey of types of law indicated that only modern, rational law, or logically formal rationality, could provide the necessary of calculability. Legalism supported the development of capitalism by providing a stable and predictable atmosphere; ... Legalism is the only way to provide the degree of certainty necessary for the operation of the capitalism system"

Thus, David M. Trubek would like to enunciate that the result of Weber's survey indicates that only the modern and rational law – or a logical and rational-formal stipulation- can be utilized for exact measurable interests. In this case, legalism (will) leads the development of capitalism by creating a stable and predictable condition. Weber states that it is only the legalism can facilitate the persistence of capitalism system.

The above description shows that in Weber's view, there is an urgent aspect in law in developing capitalist economy, that is, a demand for creating a rational-formal legal system, which can support the making of a stable and predictable atmosphere. To attain such a condition, it needs rational-formal written legal rules prevailing and binding society to guarantee the predictability of the atmosphere to be reached. This is what Rahardjo (1999) mentions as the core of *legal security*, in the form of *rational-formal modern legal system* articulated through positive law. Next, still relating to Weber's view, David M. Trubek writes:

In his economy sociology, Weber stressed the importance for capitalist development of two aspects of law:

- (1) its relative degree of calculability, and
- (2) its capacity to develop substantive provisions –principally those relating to freedom of contract- necessary to the functioning of the market system. The former reason was the more important of the two.

Weber asserted that capitalism required a highly calculable normative order. His survey of types of law indicated that only modern, rational law, or logically formal rationality, could provide the necessary calculability. Legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure.

Legalism is the only way to provide the degree of certainty necessary for the operation of the capitalism system. Weber stated that the capitalism *could not continue if its control of resources were not upheld by the legal compulsion of the state; if its formally 'legal rights were not upheld by the threat of force.'*

Based on the Weber's view above, we can comprehend Satjipto Rahardjo's view, that the processes of capitalistic economy production needs a social order capable of making social domain where the economy processes can persist well. Therefore, the necessary demand is the making of a logical-formal legal system that can provide a high predictability so that it can be inserted in economy production calculation.

Furthermore, based on Weber's view, redescribed by Trubek, and also Satjipto Rahardjo's view, the writer can enunciate that :

- Modern legal system is the law born from the European social order in the nineteenth century with its liberal nature.
- The legal system with the nature of liberal legal justice is founded in the thought tradition believing that both in theory and practice, law can be constructed and be managed as a neutral institution.

Next, Soetandjo Wignjosoebroto (2000) states, this liberal legal justice idealize law as the product of positivization of norms agreed on having internal authority which will bind anyone, and can be enforced easily by neutralized judicial institution in its position as the one abstain from the intervention of executive one. By emergence of capitalism, the nature of law is no longer a spontaneous output of processes in society, but is a stipulation made, stated and published by state. That's why if we discuss on modern legal system, its connotation indicates to State of Law. The modern legal system has released the influence of natural law, which had dominated the world until the emergence of industrialization era in Europe. The modern legal system is no longer descended from divine nature. In this system, justice has been considered given by making positive law (acts). In other words, the justice to be enforced decided by positive law (acts) (Roberto M. Unger, 1986: 1).

Thus, the development of industrialization and capitalism is the factor supporting the bearing of modern legal system (Rahardjo, 1997: 3). In line with this, Boaventura de Sousa santos (Unger, 1986:1) states that what is mentioned as modern law (also so-called by Weber) is the law becoming the tool for managing market economy and developing its institution. As stated by Weber, this symptom according to Santos began to dawn at the beginning of capitalism development in the nineteenth century. Not different from that, Roberto M. Unger (1986: 1) also stated:

“The nineteenth century jurists were engaged in a search for the built-in legal structure of democracy and the market. The nation, ... had opted for a particular type of society: a commitment to a democratic republic and to a market system as a necessary part of that republic.”

Further, de Sousa (Unger, 1986: 1) adds, legal scientification which got to appear at the end of nineteenth century –and reached its peak at two decades after the Second World War- also aimed to protect the competitive market economy through freedom guaranteed by state role.

In the first period of capitalism development, state was set as no more than an institution with passive duties. It didn't interfere into its citizen's affairs, but in the case of public interest. State conception in the first period development of this classic capitalism is based on liberalism philosophy formulated in the adagium: *the least government is the best government*, to which Miriam Budiardjo (1977: 57) explains that the best government is the one who interfere least its citizen's affairs. In line with this, the field of law in this period marked by the compilation of private and business positive laws, including the regulation of marine transportation to guarantee more freedom for capitalism expansion to outer region supported by a strong legal stipulation. The legal development of private nature (which actually aimed at protecting the market economy system which is abstain from state's intervention) became so dominant in this period.

In the second period of capitalism development the shift of social order from the concept of non-intervention state to its citizen's affairs to the concept that state must play role in citizen's affairs took place. This is because, in the social order at the first period, capitalism brought about gaps and even chaos in society in some European countries. That's why a state must play a more role in public affairs. This encouraged implication in legal field, that the law then developed in this second period of capitalism accentuated on public law. However, the principles of free market economy were not dismissed at all, so that public law developed from western European view at the time based on the framework of combination between the free market principles and the idea of *welfare state* (that state must provide people's welfare and social justice). Therefore, State Administrative Law descended from western European view at the beginning of twentieth century was arranged to serve citizen's interest and it strictly decided the limit of state's action. Constitutional Law based on the assumption of individual freedom. State must guarantee human rights

through political process and a very limited, measurable, and predictable administration.

In social context, relations, and government's action to its citizen was based on regulation and procedure with its impersonal and impartial nature. Hence, the concept of rule of law emerged then. Thus, it cannot be denied that the concept of rule of law has a specific social source, that is, capitalist society in Europe in the nineteenth century (Gerald Turkel, 1995: 48 – 49). In relation to this, Andrew Altman (1985: 10-11) wrote:

“there can be no doubt that a vital element of liberal legal philosophy is the principle that a society ought to operate under the rule of law.”

In accordance with the above view, the most important element of liberal legal philosophy is the rule of law. With the rule of law concept, the mechanism of supply and demand, investment for profit accumulation, ownership of property can get guarantee for security and predictability. However, the writer needs to underline in relation to the rule of law, as Gerald Turkel stated (1995: 48-49):

“the rule of law ... is not oriented toward social goals or solving social problems by creating and implementing policies. Law is not an arena for solving problems of poverty, unemployment ... Rather, the rule of law provides a stable order for individuals and business to pursue their economic interests. It is a framework for the conduct of social and economic activities. Like the rules of chess or baseball, the rule of law applies to all players equal and impartially without concern for the outcome of the game.”

The statement above implies that the conception of rule of law actually has nothing to do with *substantial justice* expected to emerge as the outcome of legal enforcement. It is no more than a guide for a game, not for producing an outcome. Therefore, in the perspective of Critical Legal Studies, the concept of *the rule of law is no more than a myth*. This implies in the Andrew Altman's statement (Turkel, 1995: 48-49):

“The central contention of Critical Legal Studies is that the rule of law is a myth”.

According to critical legal studies, the implication of the rule of law concept is, through law, a strong party will legitimize its domination. Through this domination, people are led to trust that they are managed by “*rule of law not of men*”. This is in line with what Millovanovic (1994: 95) said:

“Several foci unite those within CLS ... one of law’s functions, is to legitimize domination by power elites. People in society are led to believe that they are governed by the rule of law not of men.”

However, in law-making and law enforcement side-takings always take place because of the existence of *liberal legal order* in society, including international society. The adherents of Critical Legal Studies believe that the logics and the structure of law emerge from the existence of *power relationships* in society. The existence of law is to support interests or classes in society who form the law. In this viewpoint, the rich and the strong, can utilize law as a tool to make oppressions to society as the method for defending their position.

Concluding Remark

The above discussion shows that modern legal system is impossible to provide a *real justice*, because it was actually not created for that. It was created to defend the strong and the rich interests. It takes sides in whoever has capital. The more capital you have, the more you can utilize the law to defend your interests. The owner of huge capital will manage the law. The case of American intervention to Iraq and Afghanistan is one of thousand examples. No law can stop the action. This shows that the modern legal system not only have failed to create peace, but also have become the trigger of chaos in the world.

The critical jurists all over the world shout over and over again: “Return the law to its moral and cultural roots”. They are sick of formal justice provided by the modern legal system. Injustice may emerge in the mask of justice in such a legal system. The modern legal system is condemned even at where it was formerly indulged in glorification: Europe and the U.S.A. Today, those jurists are searching for alternative laws. That’s why in Doctoral degree for

legal studies, one must study Eastern Laws (China, Japan, and Korea) and Islamic law. Among those laws, Islamic Law had ever been applied in the part of Europe and the other part of the world for centuries.

Since the modern (western) legal system had failed to create peace and justice, it is expected that eastern legal system can be the solution to it. As a Muslim, one must encourage Islamic law to provide a solution in creating real justice and peace in the world. A serious study in Islamic law is needed for that. The method of Islamic law study should be extended. Muslim jurists should provide themselves with legal sociology, legal anthropology, legal psychology, legal construction and the like to deepen Islamic Law. Without these, Islamic Law will be stagnant and the method of Islamic Law studies will be out of date.

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