

Revealing The Myth Of Rule Of Law

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Abstract

Rule of law, the still existed doctrine or tenet in a modern legal system till now. Rule of law is understood as doctrine in the law (science) which teaches that state should be governed by law and not governed by the one's rule (rule by man). As the implication, the rule of law doctrine puts law (rule of law) as "supreme commander." All the governmental issues, cases and governance must be based on the rule of law. Rule of law as part of the modern legal system actually does not escaped from influence of capitalism which grow in Europe since the 19th century. The rule of law doctrine in Western Europe has given good results since the 19th century for countries which their conditions in accordance with the expected social order to exist in the concept of the rule of law. But it should not be forgotten that the growth of rule of law principle cannot be separated from the patterns of public relations and community movements that places individual liberty as the main basic of community organizing. Rule of law comes from the recognition that individual liberty could be achieved in a society which governed by laws to limit the power of the state and guarantees economic rights. Gerald Turkel (1995) stated that the principle of the rule of law is not really meant to be as means or as instruments to solve the society problems such as poverty. Rule of law intended to create a more stable order for individuals and businesses related to their economic activity. Therefore, the myths about the rule of law must be revealed for the purposes of law enforcement in Indonesia, unless in future Indonesia is projected towards a capitalistic society based on free market mechanisms.

Keywords: *Rule of Law, Modern Legal Systems*

I. INTRODUCTION

A. Background

Philosophers thought can not be separated from the influence of the spirit of the social order in which he lives. Rationalism era can not be separated from the discussion of the historical development of society in Western Europe. European society is a society in which the development of civilization greatly influenced the development of world civilization to the present. Each stage is characterized by a social order that reflects the development of human thought at the time in question.

Community development movement in its history experienced significant changes during the industrialization that swept Western European countries. In the traditional society changes, where small-scale economic systems begin shaken by the process of industrialization as a large-scale economic system.

Historically, the rise of capitalism is closely linked to the development of rationalism thought and social order starting from the Renaissance time. Since the 16th century, the natural sciences freed themselves from the bonds of religious through the observations, comparisons, experiments and empirical falsification; that made secrets of nature began to unfold. In short, rationalism has placed human reason as the sole legitimate benchmarks for the activities, work and human life.

Law doctrines, developed from the paradigm of positivism, became so dominant in practice and legal education. Legal doctrines inspired by positivism paradigms, such as neutral, impartial, impersonal and objective to be teaching law that can not be denied its validity and become an integral part of legal education materials including in Indonesia.

It is inevitable that we always find it difficult to criticize the so-called "rule of law". This is understandable given the fact that our own selves directly or indirectly, is a product of so-called "rule of law" itself. Not surprisingly, according to Zinn, "the rule of law" is similar as a conspiracy, in the form of a mask of the power sources within the society. The logic of capitalism within the framework of law is now so easily found in the domination of market liberalization policies.¹

This paper has purpose to unravel the relationship between the social order of the development of capitalism in relation to the scientific and modern legal systems that affect the teaching of law science to the

¹Zinn, Michael *"The Conspiracy of Law" in The Rule of Law*, (ed) Robert Paul Wolfe. New York: Simon and Schuster, 1971

present and to unravel the relationship of modern legal systems and the concept of "the rule of law" that correlated to the free market economy and poverty?

B. Theory framework

This paper utilizes the thought of critical legal studies stating that the principle of "the rule of law" is not really meant to be a means of achieving the public purpose or as an instrument to solve community problems such as poverty. Rule of law intended to create a more stable structure for individuals and businesses associated with economic activity.

Under the doctrine of the rule of law, the complexity of economic activity is governed by the provisions of law which led to the provision of space for capitalism and the free market, individual identity is a top priority. Utilization of schools of critical thought is essentially to dismantle the myth of the modern legal system which is not really meant to solve the problem of poverty.

C. Research Methods

This study uses the law approachment of non-doctrinal, with studies domain of socio-legal that conceptualize law as a norm which is based on a particular philosophy and as a reality that is formed due to the dominant interests. Analysis of these writing uses the philosophical thought by the flow of critical legal theory.

II. Discussion

A. Capitalism and Growth of Modern Legal Systems

The industrial revolution can not be denied has created a society (class) industrial, mercantile class and proletarian groups in society. Class differentiation is what marks the advent of an era of rights that focuses on civil rights, political citizen and the modern democratic state.²

Furthermore, the development of industrialization and capitalism are followed by changes of the social, cultural, political and economic of Western Europe's societies that has spawned a modern legal system and its form is a legal provision that formal-rational, otherwise (articulated) through the positive law. Mochtar Kusumaatmadja defined modern legal systems as *"Positive legal system based on the principles and legal institutions of the West are to a large extent is based on the principles and institutions of Roman law."*³

Satjipto Rahardjo asserts that the modern legal system is a response to the production system of capitalism.⁴ It is difficult to deny that the modern legal system is a construction derived from the social order of Western Europe during the development of capitalism in the 19th century. Thus, the social order of Western Europe has a major role in the birth of the modern legal system. The rational nature was a great social scene for the development of capitalism and industrialization. David M.Trubek⁵ 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 activityLegal rules were consciously fashioned and rule making was relative free of direct interference from religious influences and from other sources of traditional values.....Weber believe that European law was more rational than the legal systems of other civilizations... The failure of other civilizations to developational law help explain why only in Europe could modern, industrial capitalism arise..."*⁶

The capitalist economic processes require social order and capable of creating social field where the economic process goes well. Hence, the important thing is to create a system of formal-logical law provided high predictability that is needed within the calculation process of economic production.

Max Weber himself states that the legal procedure using the rational techniques and the deduction methods increasingly stringent and a stage in the development of the law, so that the law may be referred to as a modern

²Modern democratic state in this paper referred to as the countries that emerge in the 19th century in Western Europe as a result of the influence of the Industrial Revolution and the French Revolution against the absolutist state model of century - 16 and 17.

³Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Binacipta Bandung, 1982, hal 138.

⁴Satjipto Rahardjo, "Mempertahankan Pikiran Holistik dan Watak Hukum Indonesia", on *Masalah- Masalah Hukum*, Edisi Khusus, FH UNDIP, Semarang, 1997.

⁵David M.Trubek, *Max Weber on Law and the Rise of Capitalism*, Yale School Studies in Law and Modernization, No.4, (without years), p 724 - 725.

⁶*Ibid*

law.⁷ In connection with the modern legal system, analysis of Max Weber furthermore clarify the relationship of capitalism and modern legal system. David M.Trubek⁸ rewrote the view of Weber about the relationship between the law and the development of capitalism :

“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”.

Furthermore, Trubek writes⁹ :

“ 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 state that 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”.

Trubek has purpose to assert that the Weber’s survey shows that only a rational and modern legal, or rational formal rules and logical - which can be used for the purposes that can be measured with certainty. The implication of legalism¹⁰ (will) encourage the development of capitalism through the creation of stable and predictable conditions.

Trubek's commentary shows that in Weber's view, there are aspects to the law in the development of the capitalist economic which demands the creation of formal-rational legal system that can support the creation of conditions for a stable and predictable (a stable and predictable atmosphere). In order to realize this condition is needed the rational- formal written laws, that apply and binding the community to ensure the predictability of state to be achieved.

This is by Satjipto Rahardjo referred as the core of the rule of law¹¹, its form is a modern legal system of formal-rational and always expressed (articulated) through the positive law. Based on Max Weber’s opinion, who described again by Trubek, and also by Satjipto Rahardjo, it can be said that:

- modern legal system is a law born of European society in the 19th century patterned liberal (liberal legal order);
- legal system is patterned liberal legal justice is built in the tradition of thought that believes that in theory, and in practice, the law will be constructed and managed as a neutral institution.

B. Relations of Capitalism, Modern Legal Systems and Rule of Law

Idealizing the liberal legal justice, law as a result of legal norms positivisation that have been agreed will have internal authority which would bind anyone, and can be easily enforced by a judicial body as an

⁷ David M. Trubek, *supra*, no.62, footnote 73 .

⁸David M. Trubek, *supra*, no.62,hal 740 .

⁹Trubek,*supra*,no.62 ,p 724-725.

¹⁰Legalism, according Soetandyo Wignyosoebroto is a legal doctrine that has been in the form dipositifkan lege is the result of collective consensus and has been neutralized as a rule of law (the objective) and no longer the rule of man (which is subjective). See, Soetandyo Wignyosoebroto, ,” *Perubahan Paradigma Dalam Ilmu Hukum Pada Masa Peralihan Milenium (Dari Abad 20 Ke Abad 21)*”, peper for National Seminar on Law Paradigm In Entering the Third Millennium, Diponegoro University, Semarang, 18 November 2000

¹¹ Satjipto Rahardjo, “ Kepastian Hukum “ , *KOMPAS*, 2 Desember 1999 .

independent and free from the executive intervention.¹² With the birth of capitalism, then the legal no longer spontaneous as a result of processes in society, but a provision that was made, declared and published by the state.

Talking about the modern legal system, the connotation refers to state law.. Modern legal system has release the legal effect of the law of nature (natural law) that for so long dominated the world until the advent of the industrial era in Europe. In these system, the justice has been given by creating the positive law. In the other words, justice is upheld by positive law.¹³

According to Satjipto Rahardjo¹⁴, the development of industrialization and capitalism are all factors that helped the birth of modern legal system and Boaventura De Sousa Santos confirmed that modern law is the law as a means to regulate the market economic and the development of the institution.

Santos added, the scientification of law began to grow in the late nineteenth century - and culminated in the two decades after World War II - also aims to protect the competitive market economic through the liberty guaranteed by the role of the state¹⁵. In the first period of the development of capitalism, the state placed the institution in charge just as a passive, non-interference in the affairs of its citizens, except in matters relating to the interests of public.

Conception of the state in the first period of the development of classical capitalism is based on the liberalism philosophy "*the least government is the best government*". The implication in this period is the development of law marked by the drafting of positive laws that is private (civil) and commercial law including sea transport arrangements to ensure the freedom of capitalism expansion outside the region. The development of private law became very dominant in this period.

Santos reinforces the Webber statements that what is referred as a modern law is the law as a means to regulate the market economic and the development of the institution¹⁶. Likewise, Roberto M.Unger also stated that legal experts in the nineteenth century has been working hard to draw up a legal structure in which the built-in democracy and the market¹⁷.

Unger himself criticized that the liberalism¹⁸ produces the change of individual moral and political in modern society which is dangerous. In a liberal society, welfare which is being the main purpose of Laize Faire doctrines can not be fulfilled because of the inequality of power and human greed lust, thus, creating misery for most members of society. Welfare in the end only be enjoyed by a group of people who have more power.

C. Rule of Law and Poverty

In the context of social, relationships and actions of the government to its citizens based on the rules and procedures that are impersonal and unbiased (as impartial). From this then comes the concept of the rule of law. Thus, difficult to deny that the concept of the rule of law has a specific social sources, ie capitalist society in Europe in the 19th century¹⁹.

Related to the rule of law, Andrew Altman²⁰ writes : "*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*". Appropriate to that opinion, the most important element of a liberal legal philosophy is the principle of the rule of law. With the concept of the rule of law, then the mechanism of demand and supply, capital investment for the sake of profit accumulation, ownership (ownership of property) to obtain guarantees predictability and security. The same thing was also said by Gerald Turkel²¹ :

¹²Soetandyo Wignyoebroto, "*Doktrin Supremasi Hukum : Sebuah Tinjauan Kritis Dari Perspektif Historik*", on *Wajah Hukum Di Era Reformasi*, Citra Aditya Bakti, Bandung, 2000,hal 161 – 178

¹³Satjipto Rahardjo, *supra*, no.31.

¹⁴Satjipto Rahardjo, "*Mempertahankan Pikiran Holistik dan Watak Hukum Indonesia*" dalam Jurnal *Masalah – Masalah Hukum*, special edition , FH Undip, Semarang, 1997, hal 3-8 .

¹⁵Boaventura De Sousa Santos, *supra*, no. 7, hal 72-73.

¹⁶Boaventura De Sousa Santos, *supra*, no.7 hal 72-73.

¹⁷Roberto M.Unger, *The Critical Legal Studies Movement*, Harvard University Press,1986,p 1.

¹⁸Unger was quoted as saying by James Doyle mentions "rmdalam structure" dar iliberalisme consisting of six principles: (1) rationality and hawanafsu, (2) arbitrary desire, (3) analysis, (4) The rules and values , (5) subjective value, and (6) individualism. See, James Boyle, *The Politic of Reason: Critical Legal Theory And Local Social Thought*, University of Pennsylvania Law Review, April, 1985,p 4.

¹⁹Gerald Turkel, *Law and Society : Critical Approaches*, Allyn and Bacon, Toronto, 1995.,p.48-49.

²⁰Andrew Altman, *Critical Legal Studies: A Liberal Critique*, Princeton University Press, New Jersey,1985, p.10-11.

²¹*Ibid*

*“ 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 above statement implies that the conception of the rule of law at the fact does not deal with the substantial of justice, which is expected to emerge as a result (outcome) of law enforcement. It's merely as "a handle for the game not to create results." Thus, the application of the conception of the rule of law on a global scale is not necessarily able to bring justice for the Third World countries.

Under the principle of rule of law, the public believes that the relationships between them are limited by the provisions of law and the role of legal institutions. But should not be forgotten that the growth of the rule of law can not be separated from the patterns of public relations and community movements that places individual liberty as the bedrock of community organizing (*the liberty of the individual as a basic principle of social organization*).

Boaventura de Sousa Santos (1995), also explained that scientification and modern legal systems are built on 19th century, and reached its peak in the two decades after World War II - also aims to protect the competitive market economic through the liberty guaranteed by the role of the state. It is intended to serve the interests of social order patterned of a competitive free market and through the freedom guaranteed by democracy.

The experts of the law sociology (Weber, 1968; Trubek, 1972; Turkel, 1995 and Unger, 1976) argues that: the rule of law comes from the recognition that individual liberty can be achieved in a society governed by laws to limit the power of the state and guarantees the economic rights. Identification of the rule of law by Gerald Turkel can be considered in the social context in Indonesia as follows:

1. *The rule of law, is not oriented toward social goals or solving social problems by creating and implementing policies ;*
2. *In rule of law, law is not an arena for solving problems of poverty ;*
3. *Rather, the rule of law provides a stable order for individuals and businesses to pursue their economic interests.*

As a result, when the dynamic of society becomes increasingly complex, economic activity is governed by the provisions of law which led to the provision of space for capitalism and the free market, individual identity became more important than collective identity. As a result, society becomes increasingly fragmented on the basis of religion or nationality, then the law will grow to be a means for resolving disputes within the community and instruments of individual activity regulatory. Patterns of these social life will further increase the tendency of weakening, the sense of togetherness, and caring for others in the community.

The study of Gerald Turkel encourages us to see the relationship with the state of Indonesia today. The study of Gerald Turkel has relevance as a tool of analysis of the state of Indonesia where the doctrine of rule of law (in the classical sense) has "earned his place". This implies, rule of law is often considered appropriate in the context of Indonesia, where the laws that apply in Indonesia is to facilitate and provide space for the development of capitalist economy and a free market that manifests itself in a variety of privatization.

The implication of the social life patterns in Indonesia would be threatened by a weak sense of community, and caring for others in the community. Economic activity will be dominated by business practices with a very high level of competition, the neglect of solidarity, neglect towards achieving common prosperity and environmental damage. Realizing that, then the doctrine of rule of law in the present context in Indonesia should not be interpreted merely to facilitate the development of a free market is competitive, but instead, should be sought to be the cornerstone of the rule of law that directs the implementation of a market economic with the social justice.

III. Conclusion

Growth of the rule of law essentially can not be separated by the patterns of public relations and community movements that places individual liberty as the main bedrock of the development of society. Rule of

law comes from the recognition that individual liberty can be achieved in a society governed by laws to limit state power and guarantee the economic rights. The study of Boaventura De Sousa Santos has explained that the growth of the modern legal system, is strongly influenced by the convergence between the positivism paradigm and the capitalism as the economic ideology and behavior.

Poverty arises because the choice of a capitalistic economic ideology that patterned of free markets through liberalization who guided the rule of law based on the concept of the rule of law. The rule of law implies that law is the highest source of social control. Under the principle of rule of law, the public believes that the relations among them are limited by the provisions of law and the role of legal institutions.

Under the doctrine of rule of law, the laws that apply in Indonesia is to facilitate and provide room for growth into the era of capitalist economic and free market that manifests itself in a variety of privatization. As a result, policies that favor to poverty alleviation, meeting basic needs and alignments on the rights of local communities, the realization of social justice and the protection of the ecosystems become marginalized.

Therefore, it's not surprising if the various privatization programs in some public sectors, such as enforcement of Intellectual Property Rights protection, and model adjustment of economic management with the support of the IMF, World Bank and WTO intentionally standardized by the rules of law. The problem is rarely arise the critical question , such as : whether the adjustment programs and the rule of law, published later, is able to address problems of poverty and corruption in Indonesia.

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