Asian Perspectives on the Role and Impact of Non-State Actors in International Law:

“From Westphalia to World Community?”

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Introduction: 'Modern' Legal System as a Core Debate

1. Discussing 'Modern' in Modern International Legal System is quite problematic and multi-interpretative. Hence, promoting modern (and modernization of law) could lead to a simplified model of rational legal acceptance. It might be possible such modern becomes a discourse in -- especially -- a (neo)-liberal locked legal reform.

2. 'Modern' (or not modern, old, conventional, etc.) could be seemed as domination or hegemonic idea, which might be brought or injected by powerful political configuration in transplanting and/or transmitting ideas of laws.

3. 'Modern law' (or 'modern legal system') in post-industrial society has been deemed as two perspectives: (1) political imperialism in making law for occupied or colonized countries; and (2) economic imperialism in injecting law for 'third world' countries. In such context, the idea of 'democratization', 'good governance', 'access to justice', or even 'human rights' have been softly and systematically designed in disciplining countries.

4. Galanter (1966: 153, 154-156) defines what makes a legal system 'modern', which is “cluster of features that characterize, to a greater or lesser extent, the
legal systems of the industrial societies of the last century.” Modern legal norms are “uniform and unvarying in their application”, the same rules apply to everyone in society. Modern law is also transactional. And the legal system is hierarchic and bureaucratic.

Modern law and Legality

5. 'Modern law' promotes imagination of certainty, and a set of (legal) justice into a particular legal system. Effectiveness of 'modern law' serves to -- of course -- ideal laws for modern society, which has been characterized by promotion of market friendly legal system. Therefore, the main strategy in transplanting laws is connected to legality for replacing 'old laws', 'plural systems', and 'indigenous governance'.

6. Raz and MacCormick differ with respect to issues of method, and the nature of legality, in non-trivial ways as MacCormick’s view is rooted in an account of of law as an institutional social order, and Raz’s view is rooted in an account of practical reason. Despite these differences, Raz and MacCormick offer similarities. One of them is on the limits of their accounts of legal system. Raz's conception of legal system, when allied with ideas of comprehensiveness, supremacy, and openness, seems to encounter difficulties in characterizing the phenomena well within its self-declared limits of intuitive clear instances of legal system, well prior to encountering (Culver and Giudice 2010: p. 136)

7. MacCormick’s institution based approach does rather better in encountering non-state-based phenomena, but even MacCormick recognizes that “interlocking” of legal systems, never mind non-systemic legal orders, poses “a profound challenge” to not just our understanding of law, but legal system as well.

8. The identification of various forms of legal system in the systemic-law state is ultimately freeing. Once legality is separated from the state as the mark and measure of legality, the way is open to fuller characterization of legal phenomena beyond the state (Culver and Giudice 2010: p. 138).

Modern International Legal System in Plural Societies

9. Indonesian legal system is not merely dealt with state based legal system, but also various forms of plural legal system beyond the state based legal system. The role of Syariah Law in Aceh or “Hukum Rakyat” (adat law, local law)
(Wiratraman et.al 2015) in various places throughout Indonesia, are important legal systems which have been much influencing in society.

10. Hence, debating the impact to legal system must be careful considering particular society, to what extent such legal impact has been becoming a social significance. Without considering social significance, the impact is merely addressing legal system which focusing on legalism perspectives. Law and society perspective teaches us how to connect the law as text (textual norms) and its realities (context, process and its adaptation in society).

11. ’Modern' international legal system, as stipulated by most legal scholars, related to the development of human rights, international environmental law, law of the sea, international organizations, arms control and disarmament, and international dispute settlement. As written by Harold Koh in introducing works of Professor Louis B. Sohn (1914–2006), such legal system is also connected to “... international institutions governed by multilateral treaties that aspired to organize proactive assaults on a vast array of global problems. His (Louis) vision involved the recognition that international law could, and indeed should, move beyond the regulation of state-to-state activities to also govern significant aspects of the complex set of relationships among non-state actors such as individuals, transnational corporations, non-governmental organizations, and intergovernmental organizations (Koh 2007).

12. This article approaches 'modern' in modern international legal system by not straightly believing to narrative laws, but dissecting discourses which are injected to discipline laws in particular legal system, especially in Indonesia’s post Soeharto.

Good Governance and Human Rights: New Discourses

13. After the demise of Soeharto in 1998, good governance and human rights are two of many ideas which considered to be necessarily inserted as the most important to replace New Order’s corrupt system, centralized and authoritarian governance, and human rights violations. No objection, and these new discourses are easily accepted!

14. By looking at World Bank’s projects, which has been one of the most influential institution in promoting good governance (including promoting the idea of justice and human rights at the same time), the discourse offered not merely loan, but also a set of legal reform package for Indonesia’s new governance,
namely 'legal framework for development'. International legal scholars (also Indonesian) have been hand in hand designing such legal reform.

15. The World Bank projects on good governance systematically hegemonized and softly hijacked state and non-state institutions in Indonesia, particularly through bridge institutions which mystified the power asymmetry. These institutions have reproduced ‘truth’ and ‘imperatives projects’ under loan conditionalities, especially under a legal framework for development and its doctrine of rule of law. By analyzing three waves of labor legal reform in Indonesia post crisis (1997-2006), the World Bank has dominated the discourse of good governance and its legal reform (Wiratraman 2007).

16. The absence of this discourse is the issue of state obligation under a human rights framework which is shifted to good governance. Good governance favors a ‘market friendly governance system’ as its strategy, or in the case of labor, so called ‘labor market flexibility’. Labor market flexibility hugely impacts the deprivation of labor rights, especially on the issue of outsourcing, liberal minimum wage, long-term contract workers, and restraining the role of the state in labor dispute mechanism. In the legisprudence perspective, legal reforms are found as tools to legitimize systematic human rights violations through legislation projects. This merely teaches us about a ‘market friendly human rights paradigm’ under the flag of good governance and legal reform (Wiratraman 2007).

Discourses in Modern International Legal System, Neo-Liberal Agenda and Human Rights Impacts

17. Pieterse (2004: 36) captures the essence of what globalization is through equations: “capitalism = imperialism, and capitalism = globalization, therefore globalization = imperialism.” Discussing globalization is indeed inseparable from imperialism as well as capitalism. Globalization is the latest stage in a long process of technological advancement which has given human beings the ability to conduct their affairs around the world without reference to nationality, government authority, time of day or physical environment. These activities may be commercial, financial, religious, cultural, social or political -- nothing is excluded (Longhorne, 2001: 2). One of the most negative consequences of globalization is enlarging impoverishment or the deprivation of socio-economic rights. Especially in terms of the economy, economic globalization constitutes an integration of national economies into the international economy through trade, foreign direct investment (of corporations and multinationals), shortterm
capital flows, international flows of workers and humanity in general, and flows of technology. These phenomena are defined and treated more fully below (Bhagwati, 2004: 3).

18. The relevant question is how does globalization impact on human rights. For example, most transnational corporations (TNC) can achieve their objectives escaping sovereign control, through the economic influence of the type provided by the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO) regulations, along with lobbying and sponsoring political actors. Projects, such as water privatization, deregulation, and cheap labour wage policy or labour flexibility, have caused poverty in rural and urban communities, especially for small farmers and unskilled labour. Exploitation of natural resources and human life, monopoly of public utilities, and deprivation of rights can be seen clearly in the context of globalization. Impoverishment could easily result from the capital accumulation facilitated by a globalized system. In the context of labour law reform, the situation is also inseparable from the ways in which the main or dominant institutions, such as the World Bank (Wiratraman 2014).

19. Legal reform under the World Bank projects is also emphasized in loan conditionality. The ‘reform agenda’ focused on institutional reforms, such as in the bureaucracy and judiciary, and in strengthening parliamentary, electoral, civil society participation in government as well as legal reforms. World Bank’s conditionality in the context of legal reform are injected through the legal framework for development. Within such a framework, the law and its implementation are seen as important factors to strengthen economic growth and development. In supporting economic growth and the free market system, one of the principal elements of good governance is legal framework for development (World Bank 1992).

20. The legal framework for development entails supporting the development of a set of rules securing property rights, governing civil and commercial behavior, and limiting the power of state. The rule of law is deemed the primary concept which is instrumentally and substantially important, because it concentrates on justice, fairness and liberty. The World Bank emphasizes a ‘fair’ legal system which tries to be conducive to balanced development (World Bank 1992: 29-30). The bank’s concern is with the law’s procedural and institutional aspects (World Bank 1992: 51). The World Bank encourages borrowers to make new laws and regulations. In Indonesia, the Bank supports the promotion of: trade and investment law, labour law, anti-corruption law, and institutional reforms to
support the effectiveness of debt disbursement. The idea of legal reform in this context is to minimize risk or uncertain property rights and to strengthen market processes, all of which can be immediately facilitated by designing a legal framework with substantial means. Such reform underpins the principle of market liberalization, particularly in ensuring market efficiency. In legal thought, there are assumptions behind the market. First, everyone participates with an initial set of property rights. They cannot trade if they are uncertain about what they own. Second, each of them is an idiosyncratic individual, each having different tastes and preferences. Third, each is capable of consenting to voluntary transfers that will transplant their property rights to others (Fletcher 1996: 157). This legal thought illustrates how the market and the legal system interact, or in other words, without a legal regime or legal authority that ensures a functioning legal system, the market cannot operate easily.

21. During the first two years after the crisis, 1998-2000, a lot of progress was made in the reform of Indonesia’s legal system: (i) A new bankruptcy law was enacted; (ii) a new commercial court was established – with its first order of business being application of the Bankruptcy Law; (iii) a pro-competition law was passed and an institutional framework for administering the law was in the works; (iv) a new banking law was issued and the central bank was made legally independent of the government; and (v) a secured transactions law was being prepared and the company law was under formal review (Baird 2000). In a statement by Graeme Wheeler, the then vice president and treasurer of the World Bank, he said that in the context of government debt management, governance refers to the legal and managerial structure that shapes and directs the operation of government debt managers. It includes the broad legal apparatus (statutory legislation, ministerial decrees and so on) that defines goals, authorities and accountabilities. It also embodies the management framework, covering issues such as the formulation and implementation of strategy, operational procedures, quality assurance practices, and reporting responsibilities (Wheeler 2004: 49).

22. Government debt management legislation, along with laws covering the operation of fiscal and monetary policy and the government’s auditing functions, is a central element of the governance framework aimed at generating sound financial policies and clear accountabilities (Wheeler 2004: 50). If such a legal framework is not an encouraging legal framework for ‘development’, but corroborates the idea of a legal framework for ‘debt management’, then, the primary goal of a legal framework stresses the importance of economic growth (macro-economic reform) through performing
market liberalization rather than empowering the poor or reducing poverty.

23. Tshuma (1999: 93) also argues that the World Bank designs a legal framework for development which revolves around a procedural and institutional version of the rule of law and this version emphasizes formal equality in the market place which is appropriate for liberal capitalism. Legal reform in this framework has a negative impact or a disempowering impact on the livelihoods of large sections of society in developing countries. In addition, this manner of law enforcement and legal reform could not address the fundamental problems of systemic corruption, a culture of lacking in legal obedience, the failure to deliver justice, and the lack of independence and just laws. These are the weaknesses of legal reform after 1998, and it shows that the problem of predatory corruption could not be solved through a neo-institutionalist approach which merely changes institutions. They do not deconstruct the power relations behind these institutions that maintain and secure the strong oligarchic network. In short, the post-Suharto Indonesian legislation program has been primarily focused on the policy of neo-liberalism and of disciplining social-politics (Susanti et al 2003a, 2003b: 13-15, 2006: 63-64; Hadiz and Robison 2003: 1-2).

24. The neo-liberalist character has been strongly influencing the legal reform processes. This means that much of the legislation has been aimed at a flourishing market liberalization. The target of legal reform in this context proposes a grand design of governance which is imposed by the World Bank and other donor institutions. Thus, it is very clear that without prioritizing legal reform based on people’s needs, then such legal reform contributes to the deficiency of rights (Wiratraman 2014).

25. In this context, this paper emphasize the latest statement of UN, especially UN Report of the Special Rapporteur on extreme poverty and human rights (Seventieth session: Item 73 (b) of the provisional agenda, 4 August 2015). This report is an analysis of the confusing approaches to human rights taken by the World Bank in its legal policy, public relations, policy analysis, operations and safeguards. The Special Rapporteur then seeks to explain why the Bank has historically been averse to acknowledging and taking account of human rights, argues that the Bank needs a new approach and explores what differences that might make. The Special Rapporteur concludes that the existing approach taken by the Bank to human rights is incoherent, counterproductive and unsustainable. For most purposes, the World Bank is a human rights-free zone. In its operational policies, in particular, it treats human rights more like an infectious disease than
universal values and obligations. The biggest single obstacle to moving towards an appropriate approach is the anachronistic and inconsistent interpretation of the “political prohibition” contained in its Articles of Agreement. As a result, the Bank is unable to engage meaningfully with the international human rights framework, or to assist its member countries in complying with their own human rights obligations.

Concluding Remarks

26. The idea of legality has been dominantly believed to promote 'modern'. The most serious concern of that is connected to, to what extent such modern has been recognizing (or even protecting) rights of people, especially collective rights.

27. Learning from the World Bank projects in Indonesia, it asserts that good governance promotes rule of law and legal reform, but in effect it weakens and subverts state obligation in the promotion, protection and fulfillment of human rights. There is a systematic structure and function in the legal reform process involving not only the state, but also various actors: non-state actors, universities, multi-stakeholder bodies and international agencies, which consciously or unconsciously underpin the deprivation of rights through ‘legislation based human rights violation’ or ‘legalized human rights violation’.

28. The universal values of human rights have been challenged by political economy, either characterized by capitalism and law in the age of market friendly paradigm, which transplants 'modern' international legal system through its discourses, or strong oligarchic-predatory actors/networks which both have been systematically shaping laws in Indonesia's legal system.

29. It might be possible, since 'modern' and 'international law' contains discourses, encountering means disciplining, which is accepted and welcomed by an alliance of legal technocrats (academia and non-governmental organizations) and oligarchic-predatory actors.
Reference


UN Report of the Special Rapporteur on extreme poverty and human rights (Seventieth session: Item 73 (b) of the provisional agenda, 4 August 2015).


Profile: Mr. Wiratraman graduated as bachelor of law from the Airlangga University. He took his MA. Degree in the Faculty of Graduate Studies of the Mahidol University, Thailand with focus on Human Rights and Social Development. By the 2014, he attained his Doctorate at the Faculteit Rechtgeleerdheid, Universiteit Leiden, the Netherlands. He is known as the founder and member of the Southeast Asian Human Rights Studies Network (SEAHRN), the chairperson of Indonesian Lecturer Association for Human Rights and the Chairperson of Indonesian Association for Philosophy of Law. He is currently teaches at the Faculty of Law, Airlangga University, while at the same time appointed as Secretary at the Center for Human Rights Law Studies in the University.

Presentation: Indonesia’s Encounter with ‘Modern’ International Legal System and its Impact toward the Indonesian Legal System.