

A REVIEW ON RAWLS THEORY OF JUSTICE

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Abstract: Justice is an abstract idea and understanding the core concept of various types of justice will help scholars, lawyers and law enforcement to develop and use the theory for legislative drafting, judicial review, case review, in court defense, and legal research and writing. In this paper we discussed the essence of Rawls Justice, the implication and compared it to other theories of justice. Therefore this paper will focused on examining and reviewing John Rawls idea of Justice and how to implement it in society. The method used in this study is doctrinal legal research. The result of this study while we discussed that the three Rawls principles cannot be realized together because one principle collides with another. Rawls prioritizes that the principle of the equal liberty which is lexically maximized precedes the second and third principles. However we believe Justice as Fairness in action should not mean that there is equality but rather emphasizes the concept of balance for the law in providing justice.

Keywords: *Moral Justice; Social Justice; Philosophy; Law; Rawls.*

1. INTRODUCTION

In the present era, there is no voice louder than the call for justice and question where justice lies. If we look at the theory of justice, we will find many kinds of justice, from Islamic law (Asnawi, 2016: 45), Catholicism Canon Law to John Stuart Mill, John Rawls, Robert Nozick, Reinhold Niebuhr and Jose Poforio Miranda (Lebacqcz, 2014: 3). All have their own perspective on justice. While Natural Law from Socrates to Francois Geny still maintain justice as the crown of law that prioritizes "the search for justice" (Friedrich, 2014: 24). Various kinds of theories regarding justice and society ranging from theories of rights and freedoms, power, opportunities, income and prosperity. Among those theories can be called: Aristotle's theory of justice in his book 'Nicomachean Ethics' and John Rawls's theory of social justice in his book 'Theory of Justice' and Hans Kelsen's theory of law and justice in his book 'General Theory of Law and State'.

Justice is an abstract idea and understanding the core concept of various types of justice will help scholars, lawyers and law enforcement to develop and use the theory for legislative drafting, judicial review, case review, in court defense, and legal research and writing. In this paper we discussed the essence of Rawls Justice, the implication and compared it to other theories of justice. Therefore this paper will focused on examining and reviewing John Rawls idea of Justice and how implement it in society.

2. METHODS

Jurisprudence has characteristics as a prescriptive and applied science. In prescriptive, the jurisprudence studies the objectives of the law, the values of justice in law, the good and bad of a rule of law, concepts, and legal norms. Whereas in applied science, legal science establishes a procedure, provisions, and limitations in enforcing a legal rule (Nurhayati, 2020: 9).

Legal research seeks to present legal developments following the needs of legal studies in an integral manner (Nurhayati, 2013: 15). the dichotomy of legal research methods (doctrinal and non-doctrinal) is also influenced by the development of legal philosophers' schools of thought (Nurhayati, Ifrani, Said, 2021: 1-25).

The method used in this study is doctrinal legal research focusing on sources of law. The analysis is performed qualitatively without numbers, statistical formulas, and mathematics. This research focused on multidisciplinary literature considering the literature review as a research method is more relevant than ever. A literature review can broadly be described as a more or less systematic way of collecting and synthesizing previous research (Baumeister & Leary, 1997; Tranfield, Denyer, & Smart, 2003).

An effective and wellconducted review as a research method creates a firm foundation for advancing knowledge and facilitating theory development (Webster & Watson, 2002). By integrating findings and perspectives from many empirical findings, a literature review can address research questions with a power that no single study has. However traditional ways of describing and portraying the literature often lack thoroughness and are not undertaken systematically (Tranfield et al., 2003). This results in a lack of knowledge of what the collection of studies is actually saying or to what it is pointing at. Therefore we formulate the end result of this study as prescriptive analytics to the application and theoretical concept of Rawls Theory of Justice.

3. RESULTS AND DISCUSSION

3.1. A Retrospective on Rawls Justice

When discussing the concept of justice, experts in philosophy, law, economics, and politics will not pass the various theories by John Rawls. Through his works, Rawls is known as one of the leading political and moral philosophers. Based on an in-depth analysis of his interdisciplinary thinking, John Rawls is believed to be one of the

influential scholars on the discourse on the values of justice to this day (Taufik, 2013: 41). Some of the concepts of justice put forward by Rawls, including *A Theory of Justice*, *Political Liberalism*, and *The Law of Peoples*, have a considerable influence on the discourse of justice (Friedrich, 2014: 139). John Rawls, who is seen as a "*liberal-egalitarian of social justice*", argues that justice is the main virtue of the presence of social institutions. However, virtue for the whole of society cannot exclude or challenge the sense of justice of everyone who has obtained a sense of justice especially for weak people (Friedrich, 2014: 139).

Specifically, Rawls developed the idea of justice by making full use of his creative concepts known as the "*original position*" and the "*veil of ignorance*". Rawls's view positions the existence of an balance and equal situation between each individual in society. There is no distinction between status, position or having a higher position from one another, so that one party can make a balanced agreement, that is Rawls's view as an "original position" which rests on the notion of a *reflective equilibrium* based on the characteristics of rationality, freedom, and equality in order to regulate the basic structure of society.

Meanwhile, the concept of "veil of ignorance" mean that everyone is faced with the closure of all facts and circumstances about himself, including certain social positions and doctrines, thus blinding the developing concept or knowledge of justice. With this concept Rawls leads the public to obtain the principle of fair equality with a theory known as "*Justice as fairness*" (Rawls, 2006: 90). This means that justice according to Rawls is a measure that must be given to achieve a balance between personal and common interests. There are three principles of justice, namely (Rawls, 1997: 61):

- 1) *The greatest equal liberty principle*: In this principle Rawls argues that everyone should have the same rights to the broadest basic freedoms, as wide as the same freedoms for all people. This principle is the most basic right that everyone should have (Human Rights). This means that with the guarantee of equal liberty for all people, justice will be realized (in the context of equal rights). This principle is none other than the principle of equal rights that inversely proportional to the burden of obligations that everyone has. This principle is at the core of Rights and Freedom.
- 2) *The Difference Principle*; Social and economic inequality must be managed so that inequality can be overcome. So it is necessary to pay attention to the different principle and the principle of equal opportunity. This is aimed at providing the greatest benefit to disadvantaged people, and emphasizes that under equal conditions and opportunities, all positions must be open to all.
- 3) *The Equal Opportunity Principle*; This principle is the principle of objective difference, meaning that the second principle guarantees the realization of the proportionality of the exchange of rights and obligations of the parties, so that it is reasonable (objectively) to accept differences in exchange as long as it meets the requirements of *good faith and fairness*.

3.2. Rawls' Theory of Justice in Action

In action, the three Rawls principles cannot be realized together because one principle collides with another. John Rawls prioritizes that the principle of the equal liberty which is lexically maximized precedes the second and third principles. Thus, these principles cannot be separated from one another. In accordance with the principle of proportionality, the Rawls' theory of justice will be realized if these principles are applied comprehensively. Meanwhile Rawls emphasizes the importance of providing equal opportunities for all parties (Third Principle), so that justice is not trapped in rigidity. Rawls said that, if in a conflict situation, *the greatest equal liberty principle* must be prioritized over *the different principle* and *the equal opportunity principle*. Meanwhile, *the equal opportunity principle* must be prioritized rather than the *different principle*.

In John Rawls' view of "*original position*", every person is equal to liberty that is universal, essential and compatible and inequality of social and economic needs to be solved. The first principle applied into freedom *of religion, political liberty*, freedom of opinion and expression, while the second principle is stated as the *difference principle*, which hypothesizes the third principle. Furthermore, Rawls emphasized his view on justice that justice-enforcement programs with a people's dimension must pay attention to two principles of justice, namely, first, giving equal rights and opportunities to the broadest basic freedoms for every person. Second, being able to rearrange socio-economic disparities that occur so that they can provide reciprocal benefits (Kelsen, 2011: 7). Thus, the principle of difference demands that the basic structure of society be regulated in such a way that the gap in the prospect of obtaining the main things of welfare, income, authority is reserved for the benefit of the most disadvantaged. This means that social justice must be fought for two things: *First*, to correct and improve the conditions of inequality experienced by the weak by presenting empowering social, economic and political institutions. *Second*, each regulation must position itself as a guide for developing policies to correct injustices experienced by the weak.

Based on Rawls's thought, we think that Rawls puts forward the concept of *social justice*. This is because John Rawls proposes *Theory of Justice* based on the principle of fairness in a social and economic context. This concept of justice is essentially in line with the fifth principle of Pancasila, namely "*Social Justice for All Indonesians*". Rawls's theory of justice contains the concept of *original contract* and *original position*, which is the foundation that guides thinkers to see justice as an end not only entrance. Rawls put forward his theory in an effort to apply it to politics, law, and economics as something called *ultimate understanding*. This stems from his criticism of classical utilitarianism and intuitionism which in the end became one of the main points in developing a theory of justice. Justice can only be understood if positioned as a condition to be realized by law. Efforts to bring about justice in law are a dynamic process that takes a lot of time, so it cannot be interpreted as a rigid concept such as procedural justice or juridical justice. These attempts are frequent also dominated by

the forces in the political order to make it happen (Friedrich, 2004: 239).

The justice offered by Rawls must be understood as *fairness*, which means that the right to enjoy *social benefits* is not only for those who are lucky but these benefits must also open up opportunities for those who are less fortunate to improve their quality of life. That, it is a moral responsibility for those who are lucky to place the benefits they receive for those who are less fortunate (McGill, 1990: 679). However, it should be noted that actually *The different the principle* does not demand *equal benefits* for everyone, but *reciprocal benefits*. In this case, for example, when someone who works hard and is skilled in his field, he should definitely be more appreciated than someone who is lazy and unskilled. So it can be seen that in the end justice as *fairness* emphasizes the principle of reciprocity (balanced and mutually beneficial). Thus, we believe, that *Justice as Fairness* in action should not mean that there is equality but rather emphasizes the concept of balance for the law in providing justice.

3.3. Theoretical Comparison to Moral Justice

Law as the bearer of the value of justice, according to Radbruch, is a measure for the just and unfairness of the legal system. Not only that, the value of justice is also the basis of law as the law. Thus, justice has a normative and constitutive character for law. Justice becomes the basis for every dignified positive law. It is the moral foundation of the law as well as the benchmark for a legal system. So, in law enforcement there must be a balance between the three values of justice, legal certainty, and utility (Mangesti & Tanya, 2014: 74).

Justice is constitutive because justice must be an absolute element of law, without justice, a rule does not deserve to be law (Tanya, 2013: 117). This also takes into account the priority principle put forward by Gustav Radbruch that in order to apply the law appropriately and fairly to fulfill legal objectives, what is prioritized is justice, then benefit after that legal certainty (Rahardjo, 2012: 20).

Radbruch himself does not say much about what justice is. However, he once explained that "*rechct ist wille zur gerechtigkeit*" (Law is the will for the sake of justice). This sentence means that justice is the main goal of other legal purposes. As for certainty and utility, it is a means to achieve he justice. So it can be drawn that for Radbruch, justice is a virtue compared to other legal values while still paying attention to the balance of values. Furthermore, to understand what Justice is meant by Radbruch, it is important to note that Radbruch's legal philosophy is heavily influenced by Neo-Kantian School of Thoughts, that law is formed and rests on moral values (Tikkanen & Young, 2020). In this system there is nothing that has an absolute meaning, so the concept of justice is interpreted relatively depending on the time, place, and circumstances in which justice will be given (Chroust, 1994: 23). This means that in law, Radbruch's concept of justice cannot be separated from the aspect of morality. So in the end, Radbruch's Theory of Justice refers to Immanuel Kant's theory of moral-based justice.

Whereas further Radbruch and Dabin explain "*Justice forms the substance of the law, but his heterogeneous substance is composed of three elements: an individual element: the *sum cuique tribuere* (individual justice); a social element: the changing foundation of prejudgments upon which civilization reposes at any given moment (social justice), and a political element, which is based upon the reason of the strongest, represented in the particular case by the state (justice of the state).*" So that the link between moral justice and law is that law is created based on values or just moral rules, that is existed before and who have lived in society, it is the duty of the legislators only formulating what already exists (Radbruch & Dabin, 1950: 432).

Meanwhile, on the other hand, there is a possibility that the formulation of the law itself only provides interpretations, or provides new norms including norms of justice. In this case, justice includes two things, namely those concerning the essence of justice and those concerning norms, to act concretely in certain circumstances.

The concept of moral justice, believes that in humans, there is a natural feeling of justice that leads people to an assessment of the factors that play a role in law enforcement. This is in accordance with the teachings of Immanuel Kant, who say that justice starts from human dignity. Thus the formation of laws must reflect a sense of justice and aim to protect human dignity. So the criteria of justice in this teaching play a fundamental role as stated by Radbruch, Stammler, and Kelsen which emphasize justice as the main objective of law (Nasution, 2014: 127).

Thus it can be concluded that Gustav Radbruch's concept of justice was heavily influenced by Neo-Kantian teachings, which later saw justice as a form of morality in order to uphold human dignity. This contrasts with Rawls's view of social justice. In Neo-Kantian teachings, justice is the embodiment of moral values so that its form tends to be abstract and dynamic, even though the human conscience has an effect as a guide in understanding justice itself.

4. CONCLUSIONS

Rawls developed the idea of justice by making full use of his creative concepts known as the "original position" and the "veil of ignorance" in order to regulate the basic structure of society. In summary there are three main principle in Rawls Social Justice value namely the greatest equal liberty principle, the difference principle, the equal opportunity principle. In action, the three Rawls principles cannot be realized together because one principle collides with another. John Rawls prioritizes that the principle of the equal liberty which is lexically maximized precedes the second and third principles. However we believe Justice as Fairness in action should not mean that there is equality but rather emphasizes the concept of balance for the law in providing justice.

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