Legal Policy in Regulating the Sale of State Houses Class III (Idle State Property) Without Auction to Civil Servants Reviewed from the Perspective of “The Theory of Fairness” From John Rawls

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Abstract
Auction is universally recognized as the most accountable and fair-trading system. This is also recognized by the Republic of Indonesia, as stated in Article 48 of the Law of the Republic of Indonesia Number 1 of 2004 concerning the State Treasury junto Article 61 Government Regulation Article 61 Number 27 of 2014 concerning Management of State Property, where it is stated that all sales of State Property must be done through auction. The problem is, in the same Article there are exceptions in certain matters without going through an auction. This particular matter relates to discrimination against civil servants in the arrangement for the sale of State Houses Class III (Idle State Property) without having to go through an auction and even with a price of 50% of the valuation. Of course, the legal policy that apply these exceptions in addition to causing legal problems, also philosophical, theoretical, and sociological issues. The legal issue that arises is a conflict of norms between what should be (das sollen) in the constitution and the norms written in laws and regulations (das sein). In this case there has been a conflict of norm between Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which contradicts the regulations related to the regulation of State Houses as State Property in the form of land and buildings. From the juridical problems mentioned above. The legal issues mentioned above, then there are relevant questions to be studied. The question is: how is the legal policy that gives exceptions or differential treatment (“discrimination”) to civil servants viewed from the perspective of social justice from John Rawls in accordance with the principles and goals of the Indonesian nation, namely to realize Social Justice for All Indonesian People. The question is the research problem referred in this paper

I. Introduction
Speaking of positive law, laws and regulations are made with specific objectives and reasons, by those who have the authority to do so. The purposes and reasons for forming statutory regulations may vary. The various purposes and reasons for the formation of law or legislation are referred to as legal policy.
Herma

According to Hikmahanto Juwana that there are two dimensions of understanding legal politics. The first dimension is legal politics which is the basic reason for making and enacting a statutory regulation. Legal politics in this dimension is referred to as "basic policy". An example of a basic policy is the reason for the formation of the State Treasury Law with the aim of supporting the implementation of a good administrative system in realizing state rights and obligations in managing state finances. The second dimension of legal politics is the purpose or reason behind the enactment of statutory regulation. In this case, legal politics in this dimension is referred to as "enactment policy".

He further explained that there are two things how important legal politics is in making statutory regulations. First, as a reason why the formation of a statutory regulation needs to be made; Second, to determine what is to be translated into a legal sentence and become an article formulation. The importance of these two things is because the existence of statutory regulations and the formulation of articles is a related relationship between the legal policies that are determined and the implementation of these legal policy in the implementation stage of statutory regulations. In this case, there must be consistency and a close correlation between the implementation of statutory regulations and what is determined as legal policy. The implementation of the law is nothing but a form of achieving what is endeavored in established legal policy.

The existence of enforcement policies really needs to be controlled and criticized, because laws and regulations are often used as political instruments by the authorities (the government), both for positive and negative purposes. This reminds us of the New Order era when at that time in the formation of articles in laws and regulations related to general elections, the government's interest was often inserted by the government's interest in winning the ruling Golkar party at that time.

Realizing just laws and regulations in the Unitary State of the Republic of Indonesia will only be realized through the development of national laws that serve the interests of the people and the nation. Law must be directed at realizing the goal of a legal state which protects all the people and nation, as well as Indonesia's bloodshed, promotes public welfare, educates the nation's life, and participates in carrying out world order based on freedom, eternal peace, and social justice. In accordance with the Preamble of the 1945 Constitution of the Republic of Indonesia, in order to achieve these goals the country must be based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

Auctions are universally recognized as the most accountable, certain, efficient, open, competitive, and fair trading system. This is also recognized by the Republic of Indonesia in administering the state treasury and management of State Property (BMN), where all sales of State Property are carried out through auctions. The problem is, in Article 48 of Law RI No 1 of 2004 concerning the State Treasury there is an exception without having to go through an auction, where the exception is related to certain specific matters, namely the sale of State Poperty in the form of land and buildings sold to residents/civil servants. In this case, there are legal policy with the dimension of enforcement in the regulation of the sale of Class III State Houses (Idle State Propert) to civil servants without having to do an auction (and even with a price of 50%). Of course, the legal policy that apply differential treatment to civil servants besides causing legal problems, are also philosophical, and sociological.

As for legal issues, there is a conflict of norms between what should be (das sollen) in the constitution and the norms written in laws and regulations (das sein). There is a normative conflict between Article 27 paragraph (1) of the 1945 Constitution of the
Republic of Indonesia (and also Article 6 letter h. Law of the Republic of Indonesia No. 12 of 2011 concerning the Formation of Legislation) which contradicts Article 48 paragraph (1) of the Republic of Indonesia Law No. 1 of 2004 concerning the State Treasury junto. Government Regulation No. 27 of 2014 concerning Management of State Property (also with Article 1 of RI Law No. 72 of 1957 concerning Stipulation and Amendment of Emergency Law No. 19 of 1955 concerning Sales of State Houses as Law; and Article 16 paragraph (2) PP No. 40 of 2014 1994 which has been amended by PP No. 31 of 2005 concerning State Houses as a rule for implementing RI Law No. 1 of 20011 concerning Housing and Settlement Facilities). From the juridical problems mentioned above, the research "question" is: how is the legal policy that applies "difference in treatment" to civil servants viewed from the perspective of social justice from John Rawls in accordance with the goals of the Indonesian nation, namely Social Justice for All Indonesian People.

II. Research Method

2.1 Types of research

This type of dissertation research is categorized as legal research or normative research. Where this legal research is a series of actions or processes that aim to find the law caused by the problematic conflict of norms. The purpose of this research is directed to find the truth of coherence, namely the conformity between ideal principles or rules (dassollen) which are then used as references with the reality of something to be studied (das sein). Scientific logic in legal research is built on the methods and workings of legal science whose object is law or statutory regulations.

2.2 Research Approach

The research approach in this dissertation research includes the statutory approach and the conceptual approach. The statutory approach is to examine all positive legal regulations related to and related to the regulation of the sale of State Houses. The conceptual approach is carried out by looking for the most suitable concept of social justice to answer the research problem.

2.3 Types of Legal

a. Primary legal Materials

Primary legal materials are legal materials that have established legal authority and have binding force, consisting of statutory regulations relating to the regulation of the sale of State Houses both as residences and as State Property, as well as regulations and other supporting legislation.

b. Secondary legal materials

Secondary legal materials are in the form of publications on laws that are not official documents. This secondary legal material is used as support in this study, namely: textbooks written by legal experts, legal journals, articles, the internet, and sources that have a correlation with studies in research.

c. Tertiary legal materials

Tertiary or non-legal legal materials, namely legal materials that can provide instructions or explanations to strengthen primary and secondary legal materials, such as those from encyclopedias and legal dictionaries.
2.4 Techniques for Tracing Legal Materials
The technique for collecting and tracing legal materials is carried out using the method of studying literature, literature, documents, as well as research results and journals.

2.5 Legal Material Analysis Techniques
Operationally, existing legal materials are then grouped and arranged systematically. After being compiled, it is analyzed by abstracting the existing laws and regulations in order to find various legal issues that are juridical, philosophical, and theoretical related to various aspects of State Houses as State Property (BMN). To understand this, this study uses the methods of "grammatical interpretation" and "systematic interpretation" in an effort to understand the meaning contained in statutory regulations as a manifestation of legal policy with the dimension of enforcement. In terms of analyzing the discussion, the author uses evaluative analysis based on the deductive thinking method, namely by comparing an ideal or considered good or true, generally accepted (major premise) compared with a reality that occurs or can be observed as an existing reality (minor premise).

III. Result and Discussion

Justice can only be understood if it is positioned as a condition that is to be realized by law. Efforts to realize justice in the law is a dynamic process that requires a lot of time. These efforts are often dominated by forces fighting within the general framework of the political order to actualize it.

One can think of justice as an instinctive desire that is supposed to serve one's own good. The reality of absolute justice is assumed to be a universal problem that applies to all humans, nature, and the environment, there should be no domination or monopoly by a few people or a group of people. Likewise, people consider justice as an individual view that upholds the maximum benefit for himself.

If so, what is the view of justice according to generally accepted rules or regulations governing human relations in a society such as in Indonesia. Concretely, the law is a set of principles and rules governing relations between humans in society, whether constituting kinship or kinship within a country's territory. And the legal community regulates its life according to the same values in the community itself (shared values) or both have certain goals.

The view of justice in national law is rooted in the basis of the state. Pancasila as the basis of the state or state philosophy (philosophical grondslag) has been maintained until now and is still considered important for the identity of the Indonesian nation. Axiologically, the Indonesian nation is a supporter of Pancasila values. The Indonesian nation adheres to the principles of a state that has God, is humane, is united, has a people, and is socially just.

As bearers of values, it is the Indonesian nation that appreciates, recognizes, animates, and accepts Pancasila as something of value. Recognition, appreciation, inspiration, and acceptance of Pancasila as something of value will appear to reflect in the attitudes, behavior, and actions of the Indonesian people. If the acknowledgment, acceptance, inspiration, or appreciation, is reflected in the attitudes, behavior, and actions of the Indonesian people and the nation, in this case, it is also the bearer of the attitudes, behavior, and actions of the Indonesian people. Therefore, Pancasila as a source of the highest law is a source of national law for the Indonesian nation.
The view of justice in the national law of the Indonesian nation is focused on the basis of the state, namely Pancasila, of which the fifth precept reads: "Social justice for all Indonesian people". What is at issue now is whether what is called fair according to the conception of national law which originates from Pancasila.

National law regulates justice for all parties, therefore justice in the perspective of national law is justice that harmonizes or harmonizes general justices among some of the individual justices. In this case, justice is more focused on the balance between the individual rights of society with shared rights. The balance described above is another meaning of the 5th Precept of Pancasila, namely "Social Justice for All Indonesian People".

In Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it is stated that "All citizens have the same position in law and government, and uphold law and government without exception." This article indicates that all citizens must be treated equally before the law. However, the meaning does not mean that every citizen is the same in all respects. In fact, all citizens are born in unequal conditions. In this case, the 1945 Constitution of the Republic of Indonesia teaches us that there is a difference in treatment for citizens who have different conditions. An example of the existence of legal norms is Article 28H paragraph (2) of the 1945 Constitution of the Republic of Indonesia, applying "difference in treatment" to citizens, where it is stated that "Every person has the right to receive convenience and special treatment to obtain equal opportunities and benefits in order to achieve equality and justice". If we explore the meaning contained in the Article, we will find that there is an element of "providing convenience and special treatment" (difference in treatment) to citizens of certain countries. Special treatment in order to achieve equality and justice will be fought for by the state if there are citizens who do not have the resources for themselves to obtain opportunities and benefits in the form of rights that they should receive. So it can be concluded that the state will apply "difference in treatment" to citizens whose position is in a "different" position. So, the next question is What is justice?

As has been discussed above, the arrangement for the sale of State Houses Class III without an auction to occupants/civil servants is a legal policy that provides differential treatment to civil servants. This policy should be suspected as unfair policy. Policies that should be suspected of being unfair are very relevant to study using the theory of "justice of fairness" from John Rawls.

In his book entitled A Theory of Justice, John Rawls begins his discussion by revealing that justice is the main virtue in social institutions (including the State). as is true in a system of thought. According to him, no matter how the law is made with good intentions, it still has to be reformed or abolished if it is not fair. All people have honor which is based on justice, so the whole society cannot set it aside. It is not justice if the loss of freedom of some people can be justified by the greater gain of others. Justice does not allow the sacrifices imposed on the few to be compounded by the great proportion of the benefits enjoyed by the many. Therefore, in a just society, the following things must be guaranteed: the freedom of citizens is considered secure; rights guaranteed by justice are not subject to political bargaining or to calculations of social interests. As the main virtues of mankind, justice and truth are inviolable. According to him, by analogy, injustice can be tolerated only when he needs to avoid greater injustice.

Justice is Honesty (Justice as Fairness). Society is a collection of individuals who, on the one hand, want to unite because of ties to fulfill a group of individuals – but on the other hand – each individual has different traits and rights, all of which cannot be merged into social life. Therefore, Rawls tries to provide an answer to the question, of how to
bring together different rights and traits on the one hand with the desire to be together for the sake of fulfilling common needs.

Rawls's view is that there is an equal and equal situation for every individual in society. There is no distinction of status, position, or having a higher position between one another so that one party with another can make a balanced agreement, that is Rawls's view as an “original position” which rests on the notion of reflective equilibrium based on the characteristics of rationality, freedom (freedom), and equality (equality) in order to regulate the basic structure of society (basic structure of society).

While the concept of the "veil of ignorance" is translated by John Rawls that everyone is faced with closing all facts and circumstances about himself, including certain social positions and doctrines, thus blinding any concept or knowledge about justice that is currently developing in society. With that concept, Rawls led the public to gain an understanding of the principle of fair equality with his theory known as "Justice as fairness".

Rawls explains that the parties in their respective original positions will adopt two main principles of justice. First, everyone has the same right to the most extensive and compatible basic liberties with similar liberties for other people. Second, social and economic inequalities are regulated in such a way as to (a) obtain the maximum benefit for the most disadvantaged members of society, and (b) positions and positions must be open to everyone in conditions where there is fair equality of opportunity.

The first principle is known as the "equal liberty principle", such as political freedom, freedom of opinion and expression, and freedom of religion. While the second principle of part 2(a) is called the "principle of difference" (the difference principle) and part 2(b) is called the "principle of equal opportunity" (equal opportunity principle).

The principle of difference in section 2(a) departs from the principle of inequality which can be justified through controlled policies as long as it benefits weak groups of people. Meanwhile, the principle of equality of opportunity contained in section 2(b) does not only require the mere principle of ability quality, but also the existence of a basic will and need for that quality. So, in other words, inequality of opportunities due to differences
in the quality of ability, will, and needs can be seen as a fair value based on Rawls's perspective. Apart from that, the first principle requires equality of basic rights and obligations, while the second principal rests on the presence of conditions of social and economic inequality which then in achieving the values of justice can be permitted if it provides benefits for everyone, especially for disadvantaged groups of people (the least advantage).

In relation to these principles, Rawls confirms the existence of priority rules when one principle confronts another. If there is a conflict between the principles, the first principle must take precedence over the second principle, while the second principle of the part (b) must take precedence over the second principle of part (a). Thus, to create a just society, Rawls seeks to position freedom of basic rights as the highest value and must be followed by guarantees of equal opportunity for everyone to occupy certain positions or positions. In the end, Rawls also emphasized that certain distinctions are also acceptable as long as they increase or bring the greatest benefits to the most disadvantaged people.

John Rawls further emphasized his views on justice that programs for upholding "justice with a populist dimension" must pay attention to two principles of justice, namely: first, giving equal rights and opportunities to the broadest basic freedoms covering the same freedoms for everyone; second, being able to rearrange the socio-economic disparities that occur so as to provide reciprocal benefits.

Thus, the principle of difference requires that the basic structure of society (including the state) be regulated in such a way that the gap in prospects for obtaining welfare, income, and authority is for the benefit of the most disadvantaged people. This means that social justice must be fought for two things: First, to correct and improve the condition 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 or marginalized.

John Rawls also emphasized that justice enforcement programs with a populist dimension must pay attention to two principles of justice, namely: first, giving equal rights and opportunities to the broadest basic freedoms of equal freedom for everyone; secondly, being able to rearrange existing socio-economic disparities so that they can provide reciprocal benefits for everyone, both those from fortunate and disadvantaged groups. In John Rawl's view of the concept of "original position" there are the main principles of justice, including the principle of equality, that is, everyone is equal to freedom that is universal, essential, and incompatible with the social and economic needs of each individual.

Based on the complexity of the main idea of justice as fairness, it can be temporarily concluded that: The principle of justice as fairness consists of 2 parts:

a. Interpretation of the initial situation/original position on the issue of choice. The original position is the initial status quo which asserts that the fundamental agreement reached is fair. In this case, there is no discrimination against the basic rights of individuals in society;

b. There is a set of principles to be agreed upon. Justice as fairness is a deontological moral theory that does not interpret rights as maximizing benefits, but as how to most effectively achieve goals. In this case, it is not a goal that justifies any means, as is the view of morality according to utilitarianism. There are similarities and differences between the principles of justice and fairness and the principles of intuitionism about morals. Intuitionism accepts the pluralism of the various principles of justice. On the other hand, justice is fairness without considering intuitionism, the various principles of justice are already plural, it's just that each principle of justice emphasizes certain
priorities. In Rawls's thought, justice as fairness emphasizes the recognition of rights in the original position of the individual while still holding to the principles of deontological moral theory based on the results of mutual agreement in social cooperation relations (social contract), while intuitionism there is no certainty of the method of making decisions, but only based on intuition.

If we adopt the two main principles of justice as explained above to dissect the issue of discrimination against civil servants in the regulation of selling State Houses Class III (BMN Idle) without an auction at a price of 50%, then we can take the second principle of justice, namely the principle the second "inequality" (see figure 1. Description of John Rawls's Theory). In this case, rationally applying different treatment to people or groups of people can be understood as a policy that remains fair if it fulfills certain requirements. In this case, in line with Rawls's thought, the difference in treatment is an effort aimed at (a) obtaining the maximum benefit for the most disadvantaged members of society, and (b) positions and positions must be opened to everyone in a situation where there is fair equality of opportunity.

In terms of obtaining housing, as previously stated, civil servants have also received priority from the state. There are many programs to get decent housing for civil servants through various programs related to down payment assistance, and special interest loans for civil servants, to a special salary/income component to support civil servant housing problems. These housing programs are made every year in the form of a Law on APBN/D.

So, if civil servants in general belong to a group that is not restricted and instead has great opportunities in obtaining opportunities and access to economic-socio-political resources, then it becomes "unfair" if special rights are given in the arrangement for selling State Houses. So, it can be concluded that the laws and regulations that apply differential treatment to civil servants in the sale of Class III State Houses are policies that fall into the category of "negative discrimination". which in this case is not in line with the principle of "merit".

In contrast to the granting of privileges without an auction to civil servants in the case of selling Class III State Houses, the provision of differential treatment to civil servants in regulations concerning the prohibition of "absentee" land, can rationally be said to be a policy positive discrimination (at least at the time the policy was issued). In this case, the socio-economic position of civil servants is a fair consideration, because the position of civil servants does not allow them to work on their own land because there is already a burden of work assigned to them as supporting workers for the implementation of state and government tasks. In addition, civil servants do not always work permanently in a certain place. In this case, civil servants are given the same opportunity to acquire agricultural land which they might cultivate themselves when they retire. However, with the issuance of Law no. 5 of 2014 concerning State Civil Apparatus, exceptions to civil servants regarding the prohibition of owning absentee land also need to be reviewed because they need to be adjusted to the development of people's lives today.

In order to dig deeper into the main ideas of John Rawls's theory of social justice regarding "Justice of Fairness", below we will be able to describe their relevance to be used as a broader assessment of Indonesia's condition. The application of the principle of justice as fairness" can be analyzed more or less as follows:

1. Justice in the basic structure of society is the result of agreement/deliberation (social contract) which is the goal and principle of Pancasila democracy. It does not apply here that the principle governing human association (living together) is an extension of the principle of choice for one person;
2. Based on the first idea, then, in this case, justice is also not intended as is the case in the
communist socialist system which applies the principles of justice equally and lacks respect for individual rights. Therefore, in the history of the Old Order government, the communist movement that wanted such justice was certainly not in line with the principles of justice in Pancasila democracy. Our democracy continues to guarantee and respect individual and social rights. Although in this case, social interests must take precedence, they do not eliminate individual "freedom" and "rationality" in social life. In this idea the meaning of justice as "fairness" is closer to the original meaning of the words "fair" which means "free", but John Rawls interprets justice as "fairness" metaphorically, not justice in the freest sense, but also within certain limits;

3. In the third idea, it can be explained that the original position is related to natural conditions in the traditional social contract theory, namely a hypothetical situation that leads to a certain conception of justice. In this original position, it is assumed that every individual has the same basic rights in the distribution of assets and natural forces, regardless of socio-economic background, as well as their potential/intelligence. This John Rawls is based on human rights in which every individual has the same rights to obtain the results of the distribution of natural assets and forces. In the Indonesian context, the meaning of the original position relates to a certain conception of justice, meaning that the justice in question is "social justice for all Indonesian people". In this sense of justice, every Indonesian people has the right to obtain/enjoy the prosperity of the country's wealth originating from the distribution of Indonesia's assets and natural forces. In this case, the economic system that creates a monopoly on Indonesia's natural assets and forces is contrary to this principle. This can also be applied to legal politics that apply a 50% price in sales without an auction to civil servants, where civil servants get cheap prices

4. (which is rational and equally neutral). This idea contains the meaning and implication that Indonesian social justice is the result of the implementation of Pancasila democracy which should treat every individual in society without discrimination, including in policies and public services. In this case, special rights (both to individuals and groups) in the public service system should not apply, which often appear in the form of collusion and nepotism. Privileges and differential treatment can only be carried out in accordance with what has been determined by the 1945 Constitution of the Republic of Indonesia. If this is related to the differential treatment of civil servants in the sale of state houses, this shows injustice.

5. The fifth notion of justice as "fairness" can be emphasized that justice as fairness rejects the principle of utility which accepts the basic structure only because it maximizes profits regardless of its permanent effects on its basic interests and rights. This is because the utility principle is a teleological moral view, in which moral goodness is only based on good intentions, but the nature of its actions sacrifices individual human values, so its application is inconsistent with the conception of social cooperation for mutual benefit. While John Rawls's moral view is to follow a deontological ethical view that sees moral goodness from the nature of the act itself. Thus the principle of social justice in Indonesia must still be in accordance with the principle of "just and civilized humanity". If it is related to the sale of country houses, then the auction principle reflects the values of openness; certainty; competition; efficiency; which can be accounted for; and fairness is the basic principle in accordance with the concept of fairness. In this case, the auction principle provides equal opportunity for everyone. For this reason, if the arrangement for the sale of Class III State Houses (BMN Idle) without an auction is associated with the concept of fairness which is deontological in nature and sees moral goodness from the nature of the act itself, then this clearly shows that in
essence there has been no benefit from the function of law which there is.
6. In the fifth idea above, it can be explained that social cooperation must be able
to guarantee life satisfaction, including in terms of profit sharing for the most
disadvantaged groups/groups of society. In relation to the political economic system, in
this case, government policies in the country's economy must pay attention to the most
disadvantaged groups of people by providing a decent minimum standard of living to
obtain social welfare. In this case, an example can be taken, the auction method in
Indonesia requires the auction winner to provide money to the poor, which is withdrawn
simultaneously with the execution of the auction winner in accordance with the
principle of fairness initiated by John Rawls. So that if there are legal politics applying
the method of selling state houses without an auction process it can reflect efforts to
hinder achieving social justice. In addition, the sale of Class III State Houses without
auction to residents/civil servants at a price of 50% is clearly the application of legal
policy by the legislators who agree that the difference in state income is quite
significant, which can rationally harm state finances. On the other hand, if the state sells
it through an auction, then the state can benefit from greater revenue. That way, these
profits can be used for the benefit of many people. Likewise, in the context of equality
in law as a manifestation of a just and civilized human essence, the sale of The Clas III
State House which only provides opportunities for residents without regard for non-
residents (other civil servants) or other citizens can be said to be an injustice.

IV. Conclusion

So, from all the description above, it can be concluded that from the perspective of
social justice, the application of differential treatment (discrimination) to civil servants in
the regulation of selling The Class III State Houses (Idle State Property) without auction,
does not fulfill the principle of Justice of Fairness as meant by John Rawals. This is said
because: first, the difference in treatment is not intended/aimed at empowering or seeking
to benefit the weak and marginalized. Thus, the legal policy that apply differential
treatment to residents/civil servants can be categorized as "negative discrimination". In this
case, the method used in differential treatment is not like the principle of "affirmative
action" which is in line with the meaning of social justice: secondly, the legal policy that
applies differential treatment to civil servants is not intended to support everyone getting
the same opportunity to obtain resources. socio-economic-political resources, because civil
servants are not one of the groups in society who are having difficulty obtaining access to
these resources. This is also not an attempt to reward an achievement made by civil
servants as referred to in the priniple of "merit"

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