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The Principle of Legal Benefit in the Element of Returning State Losses

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Abstract. *Legal philosophy explains the principle of utility in every Legal Policy. However, at the level of legal awareness in society, this principle is often neglected. Legal problems that are biased towards utility values conflict with legal certainty carried out by law enforcers. This article aims to analyze the principle of legal utility in efforts to return state losses in the construction of ATCS (Area Traffic Control System) in Tarakan City. The research method used is normative juridical with a conceptual approach, statutory regulations and case studies. The orientation of the analysis is based on the theory of legal philosophy, especially the principle of utility. The results of the study found that there was a phenomenon of attraction of interests of perpetrators of alleged corruption that was concrete, casuistic and particular.*

Keywords: *Benefit; Corruption; Criminal; Legal.*

1. Introduction

Legal philosophy explains several principles contained in legal policy. These principles include justice, legal certainty, and benefit. At the empirical level, these three principles "wait" for their turn to be used by stakeholders according to their perceptions. Policy makers view justice as a priority in covering legal policy in a statutory regulation that they formulate. Law Enforcement Officers (APH) perceive legal regulations as a responsibility that must be carried out. Consequently, legal products must be lex certa or have legal certainty. This is different from the community, the users of legal policies. They view legal products as being beneficial to their lives.

The character or nature of legal products that always move dynamically according to stakeholder actors, is simplified through the perspective of the legal system by Lawrence M. Friedman. He divides the legal system into three interconnected and influencing subsystem domains. The first domain is called legal substance, second: legal structure and third: legal culture. The three influence and are interconnected. If the initial formulation of the legal substance is not quite right, then the legal structure in its law enforcement will also be problematic. Law enforcement problems that originate from internal are also called internal legal culture. This internal legal culture will influence the perspective of society in viewing the law. Thus, an external culture in law was born. This external legal culture is a domain in society. Including in it are the fields of education, legal training. In the language of Prof. Barda Nawawi Arief, legal culture is like its knowledge. So if the function of driving a car, then the metaphor of the three subsystems by Lawrence M. Friedman can be explained as follows. Driving a car requires a driver's license (as a metaphor for legal culture/driving science). Although it is only a certificate or driving license, in essence it is a description of legal science or culture. The legal substance can be likened to a car or its vehicle. The components of the

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car and the rules of use are a depiction of a substance. Finally, the way of driving or enforcing the law/legal structure. This means that the way of driving a car is also influenced by the legal substance. For example, right-hand drive or left-hand drive must be different ways of taking the car's lane on the highway. Indonesia adheres to the right-hand drive school, so the road lane that is passed must be the left lane. This is a depiction of the legal subsystem that is interconnected and influences in the form of a metaphor for driving a car.

The issue of the gap in the principle of legal benefit in the context of criminal acts of corruption can be described through the following studies. Reconstruction of the value of benefit based on international wisdom and Pancasilaist character is a need for implications for law.[1]. This study found that the principle of benefit in law should be placed in driving the pace of the economy based on international wisdom. The second study is about beneficial ownership (the party that benefits) in criminal acts of corruption by corporate actors. The legal issue of the principle of benefit related to this can be formulated as an opportunity in the future to conduct asset tracing of beneficial ownership owners in corporations. This potential can restore state financial losses in the ecosystem of openness and clarity of information on corporate controlling assets including beneficial ownership.[2]Both studies can be described that the principle of benefit in law still has the potential to be an alternative means of returning state losses. Indirectly, it also means that it can move or improve the economy or state finances.

The construction of ACTS in Tarakan City has the following legal facts, from 4 works or procurement of goods that have been visited, there are items that have been installed properly, there are items that are not found, and there are also items that do not match the procurement made. The estimated price is made and sourced from the internet, the store, and also directly from the sales of goods with an estimated price difference of Rp 675,415,741, - (six hundred seventy-five million four hundred fifteen thousand seven hundred and forty-one). The a quo case is based on Information Report Number: LI/ 199 /IV/2022/Reskrim, dated April 29, 2022. The case of the a quo case position began with the construction of the Tarakan Area Traffic Control System (ATCS) using the 2021 Ministry of Transportation State Budget with a budget ceiling of IDR 4,900,000,000, - with an HPS value of IDR 4,894,834,601, - with the tender winner PT. GAMA TEKNIKA located at Jl. P. Mangkubumi 73A Yogyakarta with a bid value of IDR 4,726,057,626.67 with contract number: KU.107/I/15/BPTD-KALTIMRA/2021, dated May 19, 2021 with a contract value of IDR 4,696,018,000, -. The a quo case is a description of how the principle of utility applies in law enforcement, especially in criminal acts of corruption.

The gap between the value of benefits for the construction of ACTS in Tarakan City and the realization that does not comply with the budget ceiling, is a problem between the objectives of the law that are legal certainty, justice and its benefits. The formulation of the problem in this article starts from the question of how is the principle of legal benefits in the element of returning state losses in the case of the construction of ACTS in Tarakan City?

[1]Juni Gultom (2016) Reconstruction of Public Service Policy for Provision of Passenger Terminals *Based on Utility Value*. Doctoral Dissertation in Law, Unissula Semarang. p.1

[2]Saputro, Lindu Aji (2023) Criminal Law Policy on the Application of the Beneficial Ownership Principle in Money Laundering Crimes Originating from Corruption Crimes in the Future. Masters thesis, Sultan Agung Islamic University Semarang. p.1

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2. Research Methods

The research method used in this article is qualitative research. The approach used is through pNormative legal research, namely legal research that examines laws that are conceptualized as norms or rules that apply in society, and become a reference for each person's behavior.[3]This research is classified as descriptive analytical research, namely this research aims to explain, summarize various conditions, various situations or various variables that arise in the community that is the object of the research based on what happens and seeks relationships between the variables studied.[4]Regulations related to the return of state losses, both conceptual and legal, are studied in such a way that they can be explained through the relevant legal objective theory. Thus, the legal research method in this study is oriented towards conceptual analysis of law and the statutory approach.

3. Results and Discussion

The principle of utility approach is obtained from Prof. Romli Atmasasmita's explanation of the idea of the reconstruction of the principle of no crime without fault. The elements of returning state finances are analyzed in abstracto, conceptually and academically. Meanwhile, based on legal certainty by the Police in enforcing the law in the case of Information Report Number: LI/ 199 /IV/2022/Reskrim, dated April 29, 2022, the case is presented in the in concreto dimension.

3.1. The principle of no crime without error, no error without benefit

The history of the principle of no crime without fault, began on February 14, 1916. At that time, there was a jurisprudential decision of the Hooge Raad (Netherlands) which basically explained that the problem of the principle of criminal law was related to criminal responsibility. The basic assumption underlying this principle is that schuld cannot be understood without being against the law, but on the contrary, being against the law is possible without being wrong.[5]Prof. Moeljatno's opinion on this matter is described below:[6]

"For me, the statement means that a person cannot be held responsible (sentenced to criminal law) if he does not commit a crime. But even if he commits a crime, he cannot always be punished."

In relation to Prof. Moeljatno's opinion, in terms of the disclosure of the main legal issues in Arrest HR 1916 which have not been completed, the basis of his thoughts can be explained. For that reason, Simon argues: "error is the existence of a certain psyche in a person who commits a criminal act and there is a relationship between that condition and the act carried out in such a way that it can be blamed for that act." This opinion seems to emphasize the element of whether the perpetrator's actions can be blamed or not by society. Thus, the element of blame becomes one of the qualification criteria for an act that can be punished.

[3]Muhaimin. (2020). Legal Research Methods. Mataram: Mataram University Pressh. p.29
[4](2006).*Social Research Methodology: Quantitative and Qualitative Formats*. Surabaya:Airlangga University Press. p. 36.
[5]Atmasasmita, Romli. 2017. Reconstruction of the Principle of No Crime Without Fault. Jakarta: Gramedia Pustaka Utama. p. 141
[6]Ibid.

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Simon limits the definition of error as if the lawmaker intended the perpetrator of the crime to be aware of the unlawful act. For that reason, Simon's definition of normative flow categorizes the psychological-based error of the perpetrator of the crime.

The relevance of the principle of no crime without fault to the development of the global economic community, in Prof. Romli's opinion, can be formulated as follows:[7]

First, the principle describes the philosophical aspects of the human mind and soul.

Second, the principle is an application of the classical theory of the function of criminal law. The explanation of this theory explains that there is a relationship between punishable acts and criminal responsibility.

Third, this principle is a justification for the imposition of punishment.

Fourth, this principle does not always result in legal certainty, but what occurs is legal certainty in legal uncertainty.

If researchers examine the considerations of Prof. Romli's thoughts, then chronologically the origin of the principle of no crime without fault comes from the philosophical aspect of human thought including its psychological elements. The explanation of the classical theory reaffirms that this principle rests on the principle of balance between criminal acts and criminal responsibility. In the implications of law enforcement, this principle is not always perpendicular to legal certainty. Thus, this principle can be determined to exist, namely in certainty amidst legal uncertainty. In short, the philosophical aspect of this principle can shift according to the development of economic society in its needs with criminal law.

If the context of this principle is applied in relation to the function of the State and citizens, then Prof Romli's claim can be formulated as follows. Does the State have the right to punish? To what extent can the State punish morality if criminal law stillbased on morality and immorality? Citing Dworkin as a reference for his thinking, Prof. Romli then explained the answer to the question through the following syllogism. First, the issue of morality expressed in the phrase hurting others, being destructive (offensive), degrading oneself or the perpetrator himself. Second, the previous description of immorality can give authority to the State in the framework of criminalization of citizens. Third, there is a dividing line in the issue, namely through the question: is it because the basis of the act is wrong or immoral that it can be placed within the jurisdiction of the State? Or because of the subset of morality that plays a role?

One of the answersThe problematic is explained by Stuart Mill (On Liberty) who basically explains that one of the goals of state power can be justified in acting on its citizens for only one reason, namely preventing harm to others. It appears that Prof. Romli agrees with Austin's theory of actions. An evil act is an act that is consciously committed by the perpetrator. In addition, the perpetrator also desires the consequences of his actions. These two conditions occur without any external coercion. The logical consequence of this statement is that an act that is not consciously committed by the perpetrator, and the consequences are not desired by the perpetrator, is qualified as a non-evil act.[8]Thus, whether

[7]Ibid. p. 143
[8]Ibid., p.148

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or not an act of a criminal is evil is attributed to the element of the perpetrator's will towards the awareness of the act and the consequences desired by the perpetrator.

The philosophical approach of the human mind in terms of the reasons for the abolition of criminal law, the main problem issue is whether the concept of intentional (*dolus*) and negligence (culpa) in the implementation of criminal law enforcement are still relevant and accurate to distinguish the two in the context of a person's criminal responsibility. The tendency of legal practice in Indonesia is to use the element of dolus rather than culpa.[9]The implication of criminal law regarding this tendency is that only intent alone is the basis for prohibited actions.

Prof Romli's legal considerations regarding the crime *mistake* and dolus crimes which must be distinguished by the following considerations:

First, in essence, human actions are the result of reason that can distinguish “cost-benefit”, so that humans must be responsible for their actions individually. The context of the law of cause and effect in this case is able to explain the relationship between actions and responsibility.

Second, the teaching of the unlawful nature of material in negative function, describes the development of criminal law in Indonesia in the field of criminal responsibility. The implication is that not every violation of criminal law must always be punished.

Third, the paradigm shift of a complex global society brings consequences on how the role of material and formal criminal law in encouraging the growth of community welfare. The consideration of "cost - benefit" in determining the fault of a corporation's actions or actions is primum remedium. While the physical punishment approach for corporations is ultimum remedium.

The issue of seeking material truth in the context of errors in the actions of perpetrators of criminal acts, the main consideration factors are the factors of victims of criminal acts, the impact on their benefits (for victims and society) including the perpetrators of criminal acts. Proof of error is the gateway to criminal responsibility. Error and criminal responsibility are two different concepts but cannot be separated from each other. The first proposition states that error is the gateway to criminal responsibility, its realization is based on doctrine and jurisprudence, containing exceptions. As regulated in the Criminal Code, namely justification and excuse.

The disruption of the global economy due to the era of globalization is the background for the development of the principle of no crime without fault. Law enforcement should be directed to strengthen the achievement of community welfare. One way to achieve this welfare is through the economic side. Therefore, in the context of criminal acts of corruption, its eradication aims to prevent greater state losses. Thus, the procedures and legal mechanisms related to the eradication of corruption should be utilized in such a way that they are able to close any gaps, no matter how small, of state financial leaks.[10]Important efforts to achieve this goal need to consider the “cost and benefit ratio” (CBR). The basis for implementing CBR in corruption crimes is intended as an effort to increase the efficiency of the criminal law system. So that the success of eradicating corruption does not only look at the output side

[9]Ibid., p.153
[10]Ibid., p.199

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but also the outcome side. The measure of the outcome side is the impact of benefits that are greater than the state costs that have been incurred throughout the year in the scope of eradicating corruption.

Based on the idea of the goal of legal politics based on Pancasila, the goal of criminal law should be peace based on deliberation and consensus. Such a goal of legal politics opens up new alternatives and changes in the paradigm of the principles of criminal law. the adage of the principle of no punishment without fault, no fault without benefit is a summary of the initial explanation of the classical theory of the principle of fault in criminal law. The first principle of criminal law "no punishment without fault" is complemented by "no fault without benefit". So that the alternative development of the legal principle applies the complementary principle.

How these two complementary principles work can explained below. First, if the principle of "no punishment without fault" is considered ineffective and inefficient in eradicating corruption, then the principle of "no fault without benefit" can complement the first principle. Second, if legal certainty alone is unable to deter perpetrators of corruption and crimes and is even counterproductive, then benefit and efficiency can be applied. Third, if there is a mismatch between the objectives of legal certainty and benefit, then the priority is on the benefit objective.[11]Thus, through three alternative stages of work mechanisms that mutually encompass the principles of "no crime without fault" and "no fault without benefit" can become a driving factor for the return or loss of state finances in criminal acts of corruption.

The role of law enforcement officers in the two complementary principles can be described as follows: first, if the application of the principle of "no crime without fault" then the law enforcement officers have the status of investigator, prosecutor, legal advisor accompanying the accused and suspect. Second, if the work is "the principle of no fault without benefit" then the law enforcement officers become mediators andlegal counsel becomes a facilitator for the disputing parties. This different status ultimately leads to the same end, namely a fair assessment by the parties based on agreement.

3.2. Case Study Information Report Number: LI/ 199 /IV/2022/Reskrim Date April 29, 2022

Case position information report Number: LI/ 199 /IV/2022/Reskrim dated April 29, 2022 is a report about construction of the Tarakan Area Traffic Control System (ATCS) using the 2021 Ministry of Transportation State Budget. The work was carried out for 150 Calendar Days from May 19, 2021 to October 15, 2021. The legal basis for the work is the Letter of Agreement (Contract) between the Commitment Making Officer of the East Kalimantan and North Kalimantan Provincial BPTD with the Director of PT. Gama Teknika number: KU.107/I/15/BPTD-KALTIMRA/2021, dated May 19, 2021.

The issue of finding non-conformities in these activities can be explained as follows:following:

First, based on the results of quality and quantity assessments by IT experts from PPKIA Tarakan University. The results can be concluded that:

a) Aspects of the work or procurement of goods that have been visited include items that have been installed properly, items that were not found, and items that do not match the procurement documents.

[11]Ibid., p.200

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b) Estimated prices of goods are based on or sourced from the internet, stores, and also directly from sales of goods.

c) Estimated price difference of Rp. 558,315,945.80 (Five Hundred Fifty Eight Million Three Hundred Fifteen Thousand Nine Hundred Forty Five Rupiah Eighty Cents)

Second, the Investigation Audit from the BPKP Representative Office for North Kalimantan Province found legal facts that:

a) The determination of HPS details by the commitment making officer (PPK) is obtained from PT Qumicon Indonesia which is affiliated with PT Gama Teknika as the service provider. Based on the audit results, the source of price information used by the PPK to determine HPS details is obtained from PT Qumicon Indonesia which is affiliated with PT Gama Teknika.

b) The Experts proposed by PT Gama Teknika in the Tender Document did not work according to their responsibilities, but only to fulfill the formal requirements for participating in the tender.

Based on the audit results related to the work implementation process in the field, it was found that the Experts submitted by PT Gama Teknika in the Bidding Document did not work according to their responsibilities, but only to fulfill the formal requirements for participating in the tender for the Tarakan City Traffic Control System Area Development Activity.

c) The realization of the work carried out by PT Gama Teknika did not comply with the specifications as stated in the contract.

Based on the audit results related to the realization of the work, it was found that the realization of the work carried out by PT Gama Teknika did not comply with the specifications as stated in the contract.

d) The Commitment Making Officer (PPK) and PT Gama Teknika did not carry out the Final Hand Over (FHO) stage when the maintenance period had ended.

Based on the audit results, until the maintenance period ended on April 26, 2022, PPK and PT Gama Teknika did not carry out the FHO stages.

e) The preparation of the Work Reference Framework (TOR) for Supervision Activities carried out by the Commitment Making Officer (PPK) is limited to fulfilling the formal requirements for direct procurement, not substantial fulfillment.

Based on the audit results related to the KAK document for the Supervision Activity for the Development of the Area Traffic Control System (ATCS) for Tarakan City for the 2021 Fiscal Year which was prepared and determined by the PPK, it did not take into account the qualifications or competencies of the Provider related to the Supervision work for the Development of the Area Traffic Control System.

f) The Commitment Making Officer (PPK) directed the Procurement Officer to select CV Borneo Engineering Consultant, which does not have expertise in the field of Information Technology, as the Supervisory Consultant.

Based on the audit results related to the direct procurement process for the Supervision Consultant for the Development of the Area Traffic Control System (ATCS) for Tarakan City for the 2021 Fiscal Year, it was found that the PPK directed the Procurement Officer to appoint CV Borneo Engineering Consultant as the Supervision Consultant for the Development of the Area Traffic Control System for Tarakan City for the 2021 Fiscal Year, which is known to have

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no expertise in the field of Information Technology.

g) The Technical Team is not fully able to carry out the tasks that are its responsibility.

Based on the audit results, the Technical Team formed by the Budget User Authority (KPA), was not fully able to carry out the tasks for which it was responsible.

h) The deviations above resulted in state financial losses amounting to Rp. 558,315,945.80 (Five Hundred Fifty Eight Million Three Hundred Fifteen Thousand Nine Hundred Forty Five Rupiah and Eighty Cents)

In the a quo case, the elements of error in the alleged criminal act of corruption can be identified through the analysis of the Problem of Location of Reference Object (PLOR) as follows:

First, Problem. Non-compliance with regulations includes competence, technical specifications, product pricing and conflict of interest between actors in the development of ACTS. The issue of this gap is identified as a legal fact through several pieces of evidence in the implementation of the ATCS development contract. The non-compliance of the competence of the ATCS development contract implementers can be described as follows:

1) The experts employed by the tender holder of the contract are incompetent. This is in accordance with the evidence: "The Experts submitted by PT Gama Teknika in the Offer Document did not work in accordance with their responsibilities." It seems that the formality element of the work contract is more important in the a quo case, the impact of which is that the responsibility for the expertise of an ATCS construction implementer cannot be confirmed.

2) In addition, the same problem can be identified through the following fact: "The Technical Team formed by the Budget User Authority (KPA), was not fully able to carry out the tasks that were its responsibility". This statement confirms that in the a quo case there are two dimensions, both internal and external, in the construction of ATCS. The internal dimension explains that the technical team formed by the Budget User Authority is qualified as incompetent in carrying out its duties. The external dimension can be identified from the lack of expertise owned by the tender holder for the construction of ACTS.

The description can be understood that human resources that are the key or director of the implementation of ATCS development have problems in fulfilling their competencies. Two sides of the dimensions, both internal and external, contribute to the problem.

Second, Location. Identification of the source of ATCS development problems originating from criminogenic factors of a particular location or cluster in the activity. It appears that the location of the identified problem is based on the BPKP audit, so it can be explained as follows:

1) Determination of HPS details by the commitment making officer (PPK)
2) Realization of work by vendors
3) Supervision Activities
4) Discretion of Commitment Making Officer

These criminogenic factors are interconnected so that deviations in the ATCS development stage gain momentum and confirmed evidence. Synopsis of the source of the location of the discrepancy between regulation and realization can be understood as a weak point of power

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in this case is the Commitment Making Officer. Weak leadership in making ATCS development policies by the PPK, becomes a critical point for further deviations. The PPK's discretion has an impact on deviations and snowballs of ATCS development problems. The details can be formulated as follows: starting from the appointment of officials who are not competent in certain fields, the supervision function and implementation techniques become deviant. Discretion is an identification of factors in criminal acts of corruption which academically cause criminal acts of corruption.

The authority of officials who have the power to decide on policies in the development of ATCS, if the scope is not limited, then the decisions of these officials can result in irregularities in state finances.

Third, the object. The focus of the deviation in the ATCS development which is detrimental to state finances is worthRp558,315,945.80 (Five Hundred Fifty Eight Million Three Hundred Fifteen Thousand Nine Hundred Forty Five Rupiah Eighty Cents) can be summarized in the following explanation. The discretion of the commitment-making official has implications for the decision on the ATCS procurement and construction policy. The stages of corrupt decisions have implications for the appointment of incompetent supervisory teams and technical teams. Supervision outside the regulator/local government system in ATCS construction, due to the negative effects of the conflict of interest of the holder or implementer of the ATCS construction contract (Vendor) becomes the next domino effect. The analysis of this deviation system can be summarized that the excess or excessive power of the PPK's discretion has a significant impact on other problem objects in a snowball manner. Thus, the deviation structure of ATCS construction is identified from the cassus belli of the Commitment-Making Official's discretion.

Fourth, references or referrals. Deviations in the development of ATCS in Tarakan City can be determined that the reference sources traced in the context of criminal acts of corruption include contract agreements.Number: KU.107/I/15/BPTD-KALTIMRA/2021, Ministry of Transportation State Budget for 2021, Technical Specifications for work, Product Price Specifications.

The formulation of findings based on PLOR analysis can be summarized as deviations in ATCS development with APBN funds for FY 21 which have cost the state more than half a billion rupiah. The researcher proposes several main points in the return of state financial losses as follows:

First, the approach of the principle of “no crime without fault” which complements the “principle of no fault without benefit”. In the context of the a quo case, the element of fault has been formulated in the investigation process of the a quo case. The primum remedium stage is “the principle of no fault without benefit”. The value of the state's financial loss has been identified. So the primum remedium approach is to return it to the state.

Second, what about the perpetrators of state financial irregularities. Administrative law in criminal law enforcement is commonly used as an alternative to the deterrent process. If the basis of pragmatism legal economic thinking as primum remedium then the return of state financial losses is the main entry point. Furthermore, in the application of discipline to problematic public officials, it is resolved with administrative law which is commonly applied in law enforcement.

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4. Conclusion

The legal incident of ATCS development in Tarakan City can be explained as the attraction of interests of the alleged perpetrators of corruption which are concrete, casuistic and particular. Concrete because it was identified that the state financial loss was more than half a billion Rupiah. A specific case described from the trigger of the criminogenic factor is the discretionary interest of the Commitment Making Official. The particular location of the problem is identified as an incompetent HR actor, problematic supervision and ineffective supervision. The a quo case is a concrete example of the return of state financial losses which can be applied through the development of the principle of benefit "no crime without error, no error without benefit."

The author's proposal related to the a quo case, primum remedium the principle of benefit as an approach to state financial losses in the form of returning losses due to corrupt behavior. It is necessary to compile a criminal report that quickly and accurately accommodates this new alternative.

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