



The consequences of using administrative legal instruments by the BPK for the return of state losses by the treasurer

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Abstract

In accordance with institutional competence, the Audit Board of Indonesia (BPK) is mandated by the constitution to audit every use of state finances. This study was conducted to determine and explain the position, basis of authority, implementation, and legal consequences of the BPK in using legal instruments of government administration for the return of state losses by the treasurer in managing and using state finances and budgets originating from public funds. In order to obtain comprehensive information, the study was conducted using a non-doctrinal research method. The results of the study indicate that Article 23E paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Law Number 15 of 2004 concerning Audit of Management and Responsibility of The State Finance, and Law Number 15 of 2006 concerning Audit Board are the basis for the BPK's authority in using legal instruments of government administration for the return of state losses by the treasurer. The BPK uses the freedom to act on its own initiative as a legal instrument of government administration. The use of this instrument's authority for the implementation of state administrative functions and duties by the BPK has legal consequences, namely that a judicial review can be submitted by certain legal subjects for the state administrative legal products issued.

Keywords: Audit board of Indonesia, state losses, use of legal instruments

Introduction

The results of research conducted by ICW (Indonesia Corruption Watch), state losses due to corruption cases in 2020 amounted to IDR 56.7 trillion. The return of state financial losses in corruption cases was still very minimal throughout 2021. Throughout 2021, state losses due to corruption reached IDR 62.9 trillion, but only IDR 1.4 trillion was successfully returned to the state (Kompas, 22 May 2022). At the end of December 2022, the Corruption Eradication Commission (KPK), released an Integrity Assessment Survey (SPI) conducted on 255,010 respondents in 640 central and regional agencies. The survey results showed findings in those agencies that there was corruption in the procurement of goods and services, buying and selling positions in promotions and mutations of human resources, misuse of office facilities as much as 99%, and bribery and gratification practices were found in 98% of agencies (Kompas, 23 March 2022).

Report of BPK to the House of Representatives (DPR) and the latest releases in the mass media in the form of Summary of Examination Results Semester (IHPS) I 2023, recorded 705 Audit Result Reports (LHP). BPK recorded 9,261 findings and 15,689 problems. The most problems were in local governments and Village-Owned Enterprises (BUMD) with 12,909 findings worth Rp3.18 trillion. Problem findings in the Central Government amounted to 2,497 problems with a value 3 times greater, reaching Rp 9 trillion. Problems related to weaknesses in the Internal Control System (SPI) and problems of non-compliance with provisions of laws and regulations reached 8,626 (55.0%) findings with a value of Rp16.92 trillion. Of the value of Rp16.92 trillion, the two classifications of findings with the largest values were potential losses of Rp7.43 trillion and shortfalls in revenue of Rp6.01 trillion. The category of state losses was recorded at Rp3.48 trillion from 4,100 non-compliance problems.

The procurement process of goods and services funded by the state budget by the bureaucracy is one of the loopholes for abuse of authority and financial misappropriation that is detrimental to the state. The state losses that have occurred so far are mostly in the form of corruption. According to Transparency International Indonesia (TII), so far efforts to eradicate and prevent corruption in Indonesia have been focused on bureaucratic reform efforts or internal government improvements. On the other hand, in terms of quantity, other sectors such as political corruption, legal corruption, and business corruption have not been significantly touched (Nugroho, 2017)^[16].

In accordance with the constitutional mandate and institutional competence, the BPK has a major role to examine every use of state finances by government institutions and apparatuses that are authorized to manage and use state finances and budgets originating from public funds. The position of the BPK in accordance with the provisions of Article 23 paragraph (5) of the 1945 Constitution of the Republic of Indonesia has the task and authority to audit state finances in various sectors, government institutions at the central and regional levels, and State-Owned Enterprises. The authority of the BPK is of course integrated with other independent institutions such as the KPK for the purpose of eradicating corruption in Indonesia.

Formulation of the problem

Based on the description of the problem that has been presented in the research background, the formulation of the research problem is as follows:

1. What is the basis for the BPK's authority in using legal instruments of government administration to return state losses by the treasurer?

2. What are the legal instruments of government administration used by the BPK to return state losses by the treasurer?
3. What are the consequences of the use of legal instruments of government administration by the BPK for the return of state losses by the treasurer?

Research methods

With the background and research problems above, this study uses a non-doctrinal research method to obtain a comprehensive explanation of the basis of the BPK's authority to return state losses by the treasurer and the legal consequences of using legal instruments of state administration.

Discussion

Position and Basis of BPK's Authority in Using Legal Instruments of Government Administration for the Return of State Losses by the Treasurer

Since the Third Amendment to the 1945 Constitution of the Republic of Indonesia, the duties and authorities of the BPK as the only state institution that carries out audits of the management and accountability of state finances, are regulated in a separate chapter, namely Chapter VIIIA Article 23E to Article 23G. Article 23E paragraph (1) of the 1945 Constitution of the Republic of Indonesia, is the legal basis for the BPK as a free and independent state institution. In this article, it is explicitly written that audits of the management and accountability of state finances are carried out by a free and independent BPK. The meaning of free and independent is that the BPK is free from the influence of government power even though its position is not above the government. The independence of the BPK in carrying out its audit duties, including being independent in determining procedures and standards in implementing audits of the management and accountability of state finances (Ariyanto and Jati, 2010)^[17].

Further provisions regarding the BPK, according to Article 23G paragraph (2) of the 1945 Constitution of the Republic of Indonesia, are stipulated by law. To realize the mandate of the 1945 Constitution of the Republic of Indonesia, the authority, functions and duties of the BPK are further regulated by Law Number 15 of 2004 concerning the Audit of State Financial Management and Accountability and Law Number 15 of 2006 concerning the Audit Board (BPK Law). Based on Article 6 paragraph (1) of the BPK Law, the BPK is tasked with auditing the management and accountability of state finances carried out by the Central Government, Regional Governments, other State Institutions, Bank Indonesia, BUMN, Public Service Agencies, BUMD, and other institutions or bodies that manage state finances. It is further written in Article 6 paragraph (2) of the BPK Law that the implementation of the BPK audit as referred to in Article 6 paragraph (1) of the BPK Law is carried out based on the Law concerning the audit of state financial management and accountability.

To carry out the authority and duties of the BPK, the BPK Law, Part Two, Article 9, letters a. to f. states that the BPK has the authority to:

- a. determine the object of the inspection, plan and carry out the inspection, determine the time and method of the inspection, and prepare and present the inspection report;

- b. requesting information and/or documents that must be provided by every person, organizational unit of the Central Government, Regional Government, other State Institutions, Bank Indonesia, BUMN, Public Service Agencies, BUMD, and other institutions or bodies that manage state finances;
- c. conducting inspections at places where state money and property are stored, at places where activities are carried out, bookkeeping and state financial administration, as well as inspections of calculations, letters, evidence, bank statements, accountability and other lists relating to state financial management;
- d. determine the types of documents, data and information regarding the management and accountability of state finances that must be submitted to the BPK;
- e. establish standards for auditing state finances after consultation with the Central Government and/or Regional Government which must be used in auditing the management and accountability of state finances;
- f. establish a code of ethics for auditing state financial management and accountability;
- g. using experts and/or auditors outside the BPK who work for and on behalf of the BPK;
- h. developing the functional position of Inspector;
- i. provide considerations on Government Accounting Standards; and
- j. provide considerations on the design of the Central Government and/or Regional Government internal control system before it is determined by the Central Government and/or Regional Government.

The authority of the BPK is also stipulated in the BPK Law, Article 10 paragraph (1), which states that the BPK has the authority to assess and/or determine the amount of state losses caused by unlawful acts, whether intentional or negligent, committed by treasurers, managers of BUMN or BUMD, and other institutions or bodies that manage state finances. In Article 10 paragraph (2) of the BPK Law, it is stated that the assessment of state financial losses and/or determination of the party obliged to pay compensation is determined by a BPK decision. Furthermore, it is stated in Article 10 paragraph (3) of the BPK Law, to guarantee the implementation of compensation payments, the BPK has the authority to monitor:

- a. Settlement of state/regional compensation determined by the Government for non-treasurer civil servants and other officials;
- b. Implementation of the imposition of state/regional compensation on treasurers, BUMN/BUMD managers, and other institutions or bodies that manage state finances as determined by the BPK; and
- c. Implementation of the imposition of state/regional compensation determined based on a court decision that has permanent legal force.

All of the BPK's authorities and duties are obtained based on attribution authority, namely authority obtained directly based on the stipulation of law. BPK has the authority to audit the management and accountability of state finances based on Article 23E paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

On the other hand, the use of the word management in Article 23E paragraph (1) of the 1945 NRI Constitution has consequences for the legal standing of the BPK, namely that

it is not merely a state organ in the original sense, but a state organ with a meaning from a very broad government administration perspective (Ridwan, 2021) [18], the scope of which includes the scope of state finances as stated in Article 2 of Law No. 17 of 2003 concerning State Finances and is as broad as the meaning of state financial management, namely all activities of state financial management officials in accordance with their position and authority, which includes planning, implementation, supervision and accountability.

Legal Instruments of Government Administration used by the BPK for the Return of State Losses by the Treasurers

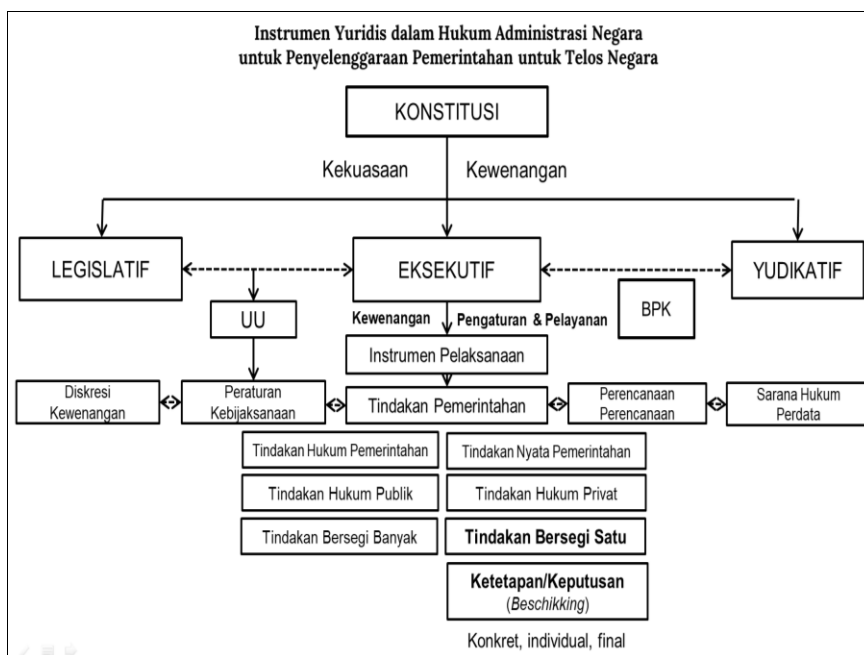
The BPK's duties, which are based on attributive authority, are carried out by all agencies or institutions that manage state finances, both at the central level and at regional representative levels, based on the principle/basis of decentralization. This is another legal consequence of the BPK as a state institution whose authority is distributed in a hierarchical manner, namely the occurrence of vertical distribution of authority with the establishment of BPK representatives in each province. In Constitutional Law and Administrative Law, it has never happened that a state institution has representatives in the regions (Atmadja and Arifin, 2010) [2].

The vertical distribution of authority only applies to the government (executive) in a unitary state that adheres to decentralization, which bring forth to tiered government organs; Central Government – Provincial Government –

Regency/City Government – Village Government. The establishment of BPK representatives in each province seems to adjust the flow of state financial management which is the authority of the government and is implemented in tiers.

Based on the legal position and authority held by the BPK as stated in above mentioned paragraph, the BPK is not only subject to and bases its authority and legal actions on constitutional law norms, but also on administrative law norms, especially in making and issuing decisions along with their legal consequences. BPK as a State Institution, which subject to and base its authority and legal actions on constitutional law norms and administrative law norms, requires means for the implementation/realization of authority to carry out administrative functions and tasks in conducting audits of state financial management and accountability. The means for the implementation or realization of this administrative authority in State Administrative Law are known as administrative legal instruments, namely tools or means used to carry out administrative tasks or those of an administrative nature.

Legal instruments of government administration are tools or means used by the government and/or government organs or state administration in carrying out tasks assigned by law. Legal instruments of government are part of the instruments of state administration in general (government in the broad sense). Each state organ, including the BPK, in carrying out the tasks of government/state administration, is authorized by law to issue/create legal instruments (Susanto, 2020) [12].



Data source: processed from various literature studies

Similar to the Government as an Executive Institution, the BPK requires administrative legal instruments in the form of a set of state administrative decisions for the implementation or execution of authority required in carrying out administrative tasks and functions, which include: regulations, decisions for the public and decisions for individuals, discretionary authority, policy regulations, government legal actions, detailed norms (concrete norms), plans (Belifante, 1985; de Haan, 1986) [5], and means of civil legal actions/actions (Huisman, 1986) [7].

Consequences of the Use of Legal Instruments of Government Administration by the BPK for the Return of State Losses by the Treasurer

The BPK in its position as a state administrative body/office carries out special state duties, namely to examine the management and accountability of state finances. This public service task brings the BPK as a state administrative body/official to a special consequence, namely requiring freedom of action to act on its own initiative (Koesoemahatmadja, et al., 1990) [10]. This happens

especially in solving important problems, which arise and grow suddenly.

Another consequence of the freedom of action that the BPK has as a state administrative body/position is that, in carrying out public service tasks, it issues many policy regulations that are expressed in various forms such as policy lines, policies, regulations, guidelines, instructions, circulaires, resolutions, instructions, policy notes, ministerial regulations, decisions, and announcements (van Kreveld, 1983)^[14].

In practice, the discretionary authority of state administrative bodies/officials, which then bring forth to policy regulations, contains two main aspects. First, the freedom to interpret the scope of authority formulated in the basic regulations of its authority. This first aspect is commonly known as the freedom to assess which is objective. Second, the freedom to determine for oneself how and when the authority held by the state administration is implemented. This second aspect is known as the freedom to assess which is subjective. This free authority to determine and interpret independently from the government is what bring forth to policy regulations (Indroharto, 1992)^[8].

According to Philipus M. Hadjon, *et al* (2006)^[6] policy regulations are essentially a product of state administrative actions which aim to appear as a written policy. Policy regulations only function as part of the operational implementation of government tasks, therefore they cannot change or deviate from laws and regulations. Policy regulations have characteristics like shadow laws of statutes or laws. Therefore, these regulations are also called pseudo legislation or shadow/mirror law (Tak, 1991)^[13].

The use of the BPK state administrative function and task implementation instrument in the form of regulations based on attributive authority, has legal consequences that can be submitted for judicial review by legal subjects who have interests or feel disadvantaged by the regulatory legal products made by the BPK. In practice, there are three types of legal norms that can be tested based on the legal norm testing mechanism (norm control mechanism) made by state administrative institutions and/or organs and/or agencies and/or positions. The three types of legal norm testing are the result of the legal decision-making process, namely: a) normative decisions that contain and are regulatory in nature; b) normative decisions that contain and are administrative in nature; and c) normative decisions that contain and are judgmental in nature (judgment) which are commonly referred to as verdicts (Termorhuizen, 1998)^[15]. These three forms of legal norms can be tested for their truth and legality through judicial mechanisms or non-judicial mechanisms. Testing of legal norms carried out by institutions is called judicial review. A legal norm test conducted outside the court cannot be called a judicial review (Assiddiqie, 2005)^[11].

In principle, all forms of legal norms formulated in the form of legislative regulations and made by legislative institutions (legislative acts), as well as regulations originating from the authority granted by law, in the form of regulatory regulations and made by executive bodies (executive acts) are subject to supervision by the legislators, namely the DPR as regulatory bodies. All regulatory products as the implementation of the Law or its position under the law, made by executive bodies or other state institutions, can be tested by the Supreme Court. Likewise, every legal product

in the form of a Law made by the DPR together with the Government, whose touchstone is the 1945 Constitution of the Republic of Indonesia, the authority for material testing lies with the Constitutional Court (MK) (Assiddiqie, 2005)^[11].

In the event of a dispute/conflict between state administrative organs and/or agencies and/or positions with legal subjects of individuals and/or with legal entities, Sjahran Basah (1992)^[3] emphasized that the essence of State Administrative Law (HAN) is essentially: a) a means that enables state administration to carry out its functions; b) protect from state administrative action on the one hand and protect citizens on the other hand; and c) aims to provide legal certainty for all state administration action in realizing its duties and functions without violating the limits of provisions of laws and human rights. In a state of law, every citizen has the right to obtain guaranteed legal protection from the actions of state administrative bodies and/or positions that violate the law, are not in accordance with the law or are contrary to the law.

Closing Conclusion

Based on the results and analysis of the research, the conclusions of this research are as follows:

- a. The basis of the BPK's authority in using the legal instruments of government administration for the return of state losses by the treasurer is the 1945 NRI Constitution, Chapter VIII A, Articles 23E to 23G and Law Number 15 of 2006 concerning the Audit Board (BPK Law). As an independent High State Institution (auxiliary state organ), the BPK has the authority to audit the management and accountability of state finances attributively, namely the authority obtained directly based on the stipulation of the law, based on the 1945 NRI Constitution, Article 23E paragraph (1).
- b. The legal instruments of government administration used by the BPK are based on the characteristics of State Administrative Law, including: freedom of action to act on its own initiative. Thus, the consequence of the freedom of action held by the BPK as a state administrative body and/or position in carrying out public service tasks is the authority to use various means/instruments of State Administrative Law, such as government actions, government legal actions, or in the form of state administrative decrees and/or decisions, and issuing many policy regulations with various forms of derivatives.
- c. The legal consequences of the BPK in using the legal instrument of government administration in the form of regulations for the return of state losses by the treasurer are that a judicial review will be submitted to the general court by legal subjects who have an interest or feel disadvantaged by the legal product of the regulations made by the BPK.

Recommendation

- a. Bearing in mind that Article 23E paragraph (1) of the 1945 NRI Constitution uses the term state financial management which gives rise to legal consequences for the position of the BPK as an independent State Institution, namely not only as a state organ in the original sense, but a state organ with a very broad sense of government administration (Ridwan, 2021)^[18], the

scope of which includes state finances as stated in Article 2 of Law No. 17 of 2003 concerning State Finances, then the DPR together with the Government need to consider and further emphasize the use of the term management of state finances, considering that the meaning of state financial management is the entire activities of state financial management officials whose authority includes planning, implementation, supervision, and accountability for the management and use of state finances.

- b. The consequence of the freedom of action that the BPK has as a state administrative body/position in carrying out public service tasks is that it issues many policy regulations that are outlined in various forms of state administrative legal actions, so that every state administrative legal action carried out must consider the general principles of good governance and the principle of legality.

References

1. Assiddiqie Jimly. *Hukum Acara Pengujian Undang-Undang*, Penerbit Yarsif Watampone, Jakarta, 2005.
2. Atmadja Soeria, Arifin P. *Keuangan Publik dalam Perspektif Hukum*, Rajawali Press, Jakarta, Edisi Ketiga, 2010.
3. Basah Sjachran. *Perlindungan Hukum atas Sikap Tindak Administrasi Negara*, Penerbit Alumni, Bandung, 1992.
4. Belinfante AD. *Kort Begrip van Het Administratief Recht*, Samson Uitgeverij, Alpena an den Rijn, 1985.
5. de Haan Paul, *et al.* *Bestuurrecht in de Sociale Rechtsstaat*, Deel 1, Deventer Kluwer, Den Haag, 1986.
6. Hadjon Philipus M, *et al.* *Pengantar Hukum Administrasi Indonesia*, Gadjahmada University Press, Yogyakarta, 2006.
7. Huisman RJHM. *Algemeen Bestuurrecht, een Inleiding*, Kobra, Amsterdam, 1986.
8. Indroharto. *Perbuatan Pemerintah Menurut Hukum Publik dan Hukum Perdata*, Bahan Kuliah pada Program Pendidikan Lanjutan Ilmu Hukum Bidang Peradilan Tata Usaha Negara, Universitas Indonesia, Jakarta, 1992.
9. *Usaha Memahami Undang-Undang Tata Usaha Negara*, Jilid I, Penerbit Sinar Harapan, Jakarta, 1999.
10. Koesoemahatmadja, Hoesen, Djenal. *Pokok-pokok Hukum Tata Usaha Negara*, Citra Aditya Bhakti, Bandung, 1990.
11. Ridwan HR. *Hukum Administrasi Negara*, Penerbit UII Press, Yogyakarta, 2002.
12. Susanto, Sri Nurhari. *Buku Ajar Hukum Administrasi Negara*, Penerbit Yogapratama, Semarang, 2020.
13. Tak PJP. *Rechtsvorming in Nederland*, Samsom H.D. Tjeenk Willink, 1991.
14. van Kreveld JH. *Beleidsregel in het Recht*, Kluwer – Deventer, Neatherland, 1983.
15. Termorhuizen, Marjanne. *Kamus Hukum Belanda – Indonesia*, Penerbit Djambatan, Jakarta, 1998.
16. Age Nugroho. *Agenda Open Government: Memerangi Korupsi Melalui Inisiatif Open Data*, *Jurnal Integritas*, 2017, 3(2).
17. Ariyanto D, Jati AM. *Pengaruh Independensi, Kompetensi, dan Sensitivitas Etika Profesi Terhadap Produktivitas Kerja Auditor Eksternal: Studi Kasus pada Auditor Perwakilan BPK RI Provinsi Bali*, *Jurnal Ilmiah Akuntansi dan Bisnis*, 2010, 5(2).
18. Ridwan HR. *Membedah Anatomi Penggunaan Instrumen Yuridis Keputusan BPK dan Majelis Tuntutan Perbendaharaan (MTP) Penyelesaian Pengembalian Ganti Kerugian Negara/Daerah terhadap Bendahara*, Makalah disampaikan pada Focus Group Discussion (FGD): “Kajian Yuridis Penguatan Kewenangan BPK dalam Menetapkan Ganti Kerugian Negara/Daerah terhadap Bendahara”, FH Undip Semarang, 8, 2021.
19. <https://www.kompas.id/baca/polhuk/2022/05/22/icw-sebut-hanya-22-persen-kerugian-negara-berhasil-dikembalikan>
20. <https://www.kompas.id/baca/polhuk/2022/03/23/risiko-korupsi-tinggi-alarm-bagi-perbaikan-tata-kelola-pemerintahan>
21. Law Nr. 17 on State Finance, 2003.
22. Law Nr. 15 on Audit of State Financial Management and Accountability, 2004.
23. Law Nr. 15 concerning Audit Board, 2006
24. Law Nr. 30 on Government Administration, 2014.
25. Regulation of the Republic of Indonesia Audit Board Number 1 Concerning State Financial Audit Standards, 2007.