



Ratio Legis Regulation of the BPK as the Only One Authorized State Institution Declaring Country Financial Damages in the President of 23 Paragraph (1) Change Constitution of the 1945 Constitution

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Abstract

The BPK regulation as the only state institution authorized to declare state financial losses namely in Article 23 of the 1945 constitution (1) confirms the existence of the 1945 RI constitution. As a free and independent financial audit institution, and (2) to face dualism and / or duplication of audit by BPK and BPKP. However, the ratio legis is not reflected in the formulation of the norms of Law 32/1999 in conjunction with Law 20/2001 specifically the explanation of Article 32 paragraph (1) “the amount of losses that can be calculated based on the findings of the competent agency or the appointed public accountant”, thus opening up space to appoint BPK, BPKP, Inspectorate and Public Accountants in calculating and declaring state financial losses or the results of pre-existing calculations can also be used by investigators.

Keywords: *Ratio Legis; Authorized; Financial*

Introduction

The constitutional court has accepted the petition for judicial review of Article 2 paragraph (1) and Article 3 of Law 31/1999 in conjunction with Law 20/2001 through the decision of the constitutional court Number 25 / PUU – XIV / 2016 dated January 25, 2017. Amar decision of the constitutional court states the phrase “can” in the norms of Article 2 paragraph (1) and Article 3 of Law 31/1999 in conjunction with Law 20/2001 which is unconstitutional with the 1945 constitution of the Republic of Indonesia and has no binding legal force.

Legally the elimination of the phrase “can” in Article 2 paragraph (1) and Article 3 of Law 31/1999 in conjunction with Law 20/2001 has a legal impact on the characteristics of the article offense became material offense by requiring the existence of a result namely the element of loss State finances must be calculated in a real / certain way by the authorized institution. This element is important to

determine whether or not the perpetrators of criminal acts of corruption in the criminal, so that it often depends on the results of audits of state financial losses.

The legal implications of the Constitutional Court 's decision above are that the institutions actually have the authority to confess and not to the financial loss of the country. "The BPK is the only institution that is concerned about the fact that it is not the loss of the country. The regulation on authority states that state financial losses are still debated by legal experts until now whether such authority is only given to BPK as the only state institution based on constitutional financial audit. But on the other hand, the presence of Law 31/1999 in conjunction with Law 20/2001 does not regulate such matters. It's just that in the Elucidation of Article 32 paragraph (1) of Law 31/1999 in conjunction with Law 20/2001, the amount of loss that can be calculated is based on the findings of the authorized agency or appointed public accountant. As a result, law enforcers in corruption cases have used BPK, BPKP, Inspectorate and Public Accountant audit results in calculating state financial losses or the results of pre-existing calculations can be used by investigators. This condition has the potential to cause legal problems (*legal problems*). This juridical issue concerns the "Conflict of Norms" between the Act 31/1999 in conjunction with Law 20/2001 on the elucidation of the 32nd Republic of the Republic of Indonesia Act (1) on the PPA 23 E Paragraph (1) Changes to the Third Law of the Republic of Indonesia 1945 and Act 15/2006.

For this reason, it is necessary to find and analyze the ratio legis of Article 23 E paragraph (1) of the Third Change of the 1945 Constitution of the Republic of Indonesia, so that the reasons and intent of the legislators in formulating the legal norms in Article 23 E paragraph (1) of the Third Amendment to the 1945 Constitution of the Republic of Indonesia The BPK is the only state financial audit institution.

Formulation of the Problem

What is the *legal ratio* of BPK's regulation as the only state institution authorized to declare financial losses in Article 23 E Paragraph (1) Third Amendment to the 1945 RI Constitution or UUDN RI 1945 ?

Research Methodology

This research is a legal research using a statutory, conceptual and historical approach. The legal materials used are primary, secondary and tertiary legal materials which are analyzed using normative / prescriptive analysis.

Analysis

History of BPK as the State Financial and Management Audit Board

If we look back at the "history shelf" of the formation of this country, the founding fathers have indeed given a solid place for the BPK in managing the country's affairs. This can be observed from the speeches of the children of the people gathered in the Indonesian Independence Investigation Business Preparatory Agency (BPUPKI), which convened on May 28 – June 1, 1945 and July 10-17, 1945 and various speeches from the Indonesian Preparatory committee for the Preparation of Independence (PPKI) 18-22 August 1945. The speeches show how they are statesmen who think seriously about a financial audit institution with inherent independence. They realize the importance of such institutions for the survival of the country with good governance.

The said institution is the Republic of Indonesia Supreme Audit Agency (BPK RI). From the beginning, the founders of the Republic of Indonesia had realized that in order to uphold a responsible government, a Supreme Audit Agency was needed. Therefore, in the 1945 Constitution of the Republic of Indonesia the provisions stipulating the establishment of the BPK as a state institution are tasked with examining the management and financial responsibility of the State. This is stated in Article 23 paragraph (5) of the 1945 Constitution of the Republic of Indonesia, containing the mandate: "To examine the responsibility for state finances, a Supreme Audit Board is held, the regulations of which are determined by law". So that on January 1, 1947 was founded and the BPK was born. Therefore, January 1 is declared as BPK's Birthday.¹

In the historical development of the BPK as a state institution tasked with examining the management and responsibility of state finances experiencing various upheavals and events, so that all forms of upheaval and events experienced by the BPK have created the existence of the BPK as a whole as an independent and independent state institution up to this time. The long history that accompanied the BPK's journey in examining the management and responsibility of state finances based on the author's search results is divided into several periods, which the author can describe in Table 1.

Table 1. History of the BPK overseeing the implementation of state finances and auditing the accountability of state finances

BPK Era Dutch East Indies	BPK After Indonesia Gained It's Independence					
	UUD 1945	RIS Constitution	UUDS 1950	UUD 1945		
				Old Order	New Order	Reform Era
<p><i>Algemene Rekenkamer</i> (BPK):</p> <p>a. Having the highest authority over state financiers;</p> <p>b. Performing government tasks, namely accounting and financial management.</p> <p>Regulations:</p> <p>a. <i>Indische Comptabiliteitswet</i> (ICW);</p> <p>b. <i>Indische Bedrijvenwet</i> (IBW);</p>	<p>a. Period 18 August 1945 – 27 December 1949.</p> <p>b. To examine the responsibility for state finances, a Supreme Audit Board is held (<i>Rekenkamer</i>);</p> <p>c. BPK only has a basis One paragraph from Article 23 of the 1945 Constitution / UUD 1945, namely Paragraph (5) "To examine the responsibility regarding KN held a BPK whose rules are determined by the Act".</p> <p>d. When the BPK was established, it was based on</p>	<p>a. Period 27 December 1949 - 17 August 1950;</p> <p>b. Based on the RIS constitution charter dated December 14, 1949, the Financial Supervisory Board (based in Bogor) was also formed;</p> <p>c. Financial Supervisory Board = RIS state equipment;</p> <p>d. As chairman appointed R.</p>	<p>a. Period 17 August 1950-5 July 1959;</p> <p>b. The RIS Financial Supervisory Board residing in Bogor since 1 October 1950 was merged with the Supreme Audit Board based on the 1945 constitution and is domiciled in Bogor;</p> <p>c. The personnel of the RIS Financial Supervisory Board are drawn from</p>	<p>a. The desire to perfect the BPK according to the President's mandate in the Declaration of the Economy and Ambeg Parama Arta, TAP MPRS No.11/MPRS / 1960 and MPRS resolution No.1/Res/MPRS/1963;</p> <p>b. On 12 Oct 1963, the Government Regulation</p>	<p>a. In 1965, Law No.17 of 1965;</p> <p>b. To stipulate that the President, as the highest authority of examination and research on the preparation and management of KN.</p> <p>c. The chairperson and Deputy chairperson of BPK RI are respectively the coordinating Minister</p>	<p>a. Reforms have been rolling since 1998;</p> <p>b. The MPR has amended the constitution three times;</p> <p>c. BPK is determined as the only free and independent state financial audit institution.</p> <p>d. TAP MPR No.VI/MPR / 2002 confirmed the position of the BPK</p>

¹ Badan Pemeriksa Keuangan RI, *Mengenal Lebih Dekat Badan Pemeriksa Keuangan RI*, (Jakarta: Biro Humas Badan Pemeriksa Keuangan RI), p. 6.

<p>c. <i>Regelen voor het Administratief Beheer</i> (RAB);</p> <p>d. <i>Instructie en verdere bepalingen voor de Algemeene rekenkamer</i> (IAR)</p>	<p>Government Decree dated 28 Dec 1946 No.11/Oem.</p> <p>e. On January 1, 1947, the BPK was located temporarily in the city of Magelang, with 9 employees and the first chairman was R.Soerasno.</p> <p>f. To begin its work, the BPK issued a letter dated 12 April 1947 No.94-1 Jo. AP Article II of the 1945 constitution, the duties, composition and workings of BPK RI are temporarily based on the laws and regulations applicable to the Algemeene Rekenkamer of the Dutch East Indies.</p> <p>g. Law of Implementation KN, including: ICW Stbl. 1925 No. 448 was last amended by Law No. 9/1968, IBW Stbl. 1927 No. 419 jo Stbl 1936 No.445 and RAB Stbl 1933 No. 381.</p> <p>h. UU or KKN Accountability check Act IAR Stbl. 1933 No.320.</p> <p>i. Stipulation of government No. 6/1948 the BPK seat was moved from Magelang to Yogyakarta. The chairman was</p>	<p>Soerasno starting December 31, 1949.</p>	<p>elements of the Supreme Audit Board in Yogyakarta and from <i>Algemene Rekenkamer</i> in Bogor;</p> <p>d. On July 5, 1959 a Presidential Decree was issued stating the re-enactment of the 1945 constitution.</p> <p>e. Thus the DPD based on the 1950 constitution became the BPK based on Article 23 (5) of the 1945 constitution.</p>	<p>No.7 of 1963 (LN No.195 of 1963) which was later replaced by Law (PERPU) No. 6 of 1964 concerning the Supreme Audit Board.</p>	<p>and the Minister.</p> <p>d. Finally, by MPRS with TAP No.X/MPRS/1966 returned the position of BPK RI as a State High Institution.</p> <p>e. RI BPK Law was amended in 1973 with Law No.5 of 1973 concerning BPK.</p> <p>f. During the New Order era the role of the BPK had been trapped by governmental authority, the main cause being authoritarian national leadership.</p> <p>g. BPK space very limited. The government's restriction on the BPK was carried out through various steps.</p>	<p>as the only external inspection agency KN.</p> <p>e. Born 3 UU KN 2003-2004 and strengthen the position of the BPK, Law No. 17/2003 concerning KN, Law No. 1/2004 concerning the State Treasury, and Law No. 15/2004 concerning the Audit of Management and Responsibility of State Finances.</p> <p>f. In 2006 Law No.15 of 2006 concerning BPK, independence and independence was really emphasized.</p>
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	represented by R. Kasirman (based on the Decree of the President of the Republic of Indonesia on January 31, 1950 No.13/A/1950 starting from August 1, 1949.					
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Ratio Legis of BPK Regulation in Article 23 E Paragraph (1) Third Amendment

Black's Law Dictionary² defines ratio legis as "the reason or occasion of law; the occasion of making a law; the reason of law is the soul of law." In line with this, Verena Klappstein stated that ratio legis means "real intention of law or judge (reason provided or implied); consideration that caused a law to act certain legislative acts or judge to impose a certain sentence; objective aim of a statute (or sentence) ...".³

Based on the research of the minutes of the discussion session of the Third Amendment to the 1945 Constitution of the Republic of Indonesia, the ratio legis in Article 23 E paragraph (1) in general is twofold, namely: (a) To confirm the existence of the BPK as the only state institution that is "free and independent" financial auditors. (b) To face the dualism of audit by BPK and BPKP. The two ratio legis are described as follows:

Affirming the Existence of BPK as the Only Free and Independent State Financial Auditor

The provisions of Article 23 E paragraph (1) of the Third Amendment to the 1945 Constitution of the Republic of Indonesia affirm that the constitution has mandated and provided a legal basis to make BPK the sole Supreme Audit Institution (the highest authority in the field of state financial audit) that is free and independent. That is, the authority of the BPK is sourced from the constitution or is obtained by attribution. Distribution is an authority granted to the administration and by an independent legislative body. This authority was genuine, which was not taken from the authority that had previously existed. And the legislature creates authority and is independent of the previous authority and gives it to those who are competent.

From the explanation above, it can be concluded that the position of the BPK is as the sole free and independent state financial examiner. The meaning of the word "one" is tantamount to "one", meaning there is nothing else or only that. Therefore, the use of the word "one" or "only" will give the same meaning. The meanings of the words "free" and "independent" namely: (a) Free is intended as independent of influence and power but does not stand alone above the government and other state institutions. (b) Mandiri is intended to be free from dependence of other parties in terms of inspection and reporting, institutional, staffing, and budget.

² Henry Campbell Balck, *Black's Law Dictionary*, 4^{ed} (St. Paul, Minn: West Publishing Co, 1968), p. 977.

³ Verena Klappstein & Maciej Dybowski (Editor), *Ratio Legis: Philosophical and Theoretical Perspective*, (Switzerland: Springer, 2018), p. 9.

A free and independent BPK institution is needed to meet professional audit standards, namely: independence in the institution, independence in carrying out audit tasks and the budget. In carrying out its duties freely and independently, the BPK prepares State Financial Audit Standards. This standard becomes the legal basis for BPK and the Examiner in carrying out the examination. The word "free and independent" does not mean apart from examination. Therefore, the BPK's finance under Law 15/2006 was examined by a public accountant.

Article 23 E (1) Third Amendment to the 1945 RI Constitution is then normalized to in Law 15/2006. According to Paragraph 1 (1) of Law 15/2006, "the BPK is a state institution which is intended to examine management in the Republic of Indonesia in 1945". Then this statement was reaffirmed in the 6th article of the First (1) of Law 15/2006: "The BPK is tasked with examining the management and responsibilities of state finances carried out by the central government, regional governments, other state institutions, Bank Indonesia, State-Owned Enterprises, Public Service Agencies, Regional-Owned Enterprises, and other institutions or institutions that manage state finances ". Furthermore, Article 10 paragraph (1) of the BPK Law: "BPK has the authority to assess and / or determine the amount of state losses caused by acts of intentionally or negligently carried out by treasurers, managers of BUMN / BUMD, and other institutions or bodies that carry out management state finances".

To Deal with Dualism and / or Duplication of Checks by BPK and BPKP

Ratio legis Article 23 E paragraph (1) The Third Amendment to the 1945 1945 Constitution one of which is to face dualism and / or duplication of checks by the BPK and BPKP. According to Jimly Asshiddiqie, argued that: "to face the dualism of audits by the BPK and BPKP, Article 23E paragraph (1) emphasizes that" to examine the management and responsibilities of state finances, a free and independent Audit Board of Finance is held". Here it is firmly said that only one body is free and independent. Therefore, the BPKP must be liquidated and its function replaced by the BPK which, according to Article 23 G paragraph (1)"... is domiciled in the capital of the country and has representation in each Province".⁴ However, the ratio legis is not reflected in the formulation of the norms of Law 31/1999 in conjunction with Law 20/2001 specifically the explanation of Article 32 paragraph (1) "the amount of losses that can be calculated is based on the findings of the competent agency or the appointed public accountant", so that in a number of times Proof of acts of corruption, law enforcement is only coordinated with the BPK, and can also coordinate with other agencies, such as APIP (BPKP, Inspectorate) and public accountants. In fact, the BPK was constitutionally determined as the only state financial audit institution including counting and declaring State financial losses in corruption cases.

Theoretically there must be synchronization and harmonization between one legislation with another, both vertical synchronization and horizontal harmonization.⁵ A legislation that is vertically one must not conflict with other laws and regulations which in the hierarchy of laws and regulations are in a lower position. Likewise, one horizontal regulation must not conflict with other laws and regulations in the hierarchy of the order of the laws and regulations that are equal. On the contrary, the things that are regulated in a statutory regulation must show the relevance or relationship between one another.

In a hierarchical position the 1945 Constitution of the Republic of Indonesia is higher than the law.⁶ Provisions for the Explanation of Article 32 (1) of Law 31/1999 in conjunction with Law 20/2001, are vertically contradictory to statutory regulations which have a higher position, namely Article 23 E, (1) Third Amendment to the 1945 Constitution of the Republic of Indonesia. Ayat (1) Law 31/1999 jo Law

⁴ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006), p. 30.

⁵ H. Zainuddin, *Metode Penelitian Hukum*, (Jakarta: Sinar Grafika, 2013), p. 27-28.

⁶ H. Mucshin, *Ikhtisar Ilmu Hukum*, (Jakarta: Badan Penerbit Iblam, 2006), p. 66-67.

20/2001 horizontally also contradicts Article 1 number (1) and Article 10 of Law 15/2006. This condition raises legal issues, namely conflicting norms or legal antinomy⁷, reflecting the lack of relevance between the rules that apply to institutions authorized to declare state financial losses in corrupt acts.

Based on the theory, in dealing with conflicts between legal norms (legal antinomy), the principles of conflict resolution (the principle of preference) apply, namely:⁸

1. *Lex superiori derogat legi inferiori*, i.e. higher legislation will knock out lower legislation;
2. *Lex specialis derogat legi generali*, i.e. special rules that will override general regulations or specific rules that must take precedence;
3. *Lex posteriori derogat legi priori*, which is a new regulation that defeats or paralyzes the old rule.

The issue of conflict in the explanation of the Civil Service 32 (1) Law 31/1999 in conjunction with Law 20/2001 is vertically contradictory to the 23rd PPA (1) Third Amendment to the 1945 Republic of Indonesia 1945 Constitution applies the principle of *Lex superiori derogat legi inferiori*. Meanwhile, horizontally contrary to Article 1 number (1) and Article 10 of Law 15/2006, the *Lex specialis derogat legi generali* principle applies. This means that law enforcement officials are obliged to use an investigative audit from the competent institution namely BPK, not APIP (BPKP and Inspectorate) or public accountants. Whereas, law enforcers still use the results of investigative audits other than BPK, thus creating conditions of abuse of the power of law enforcement officials in handling corruption, thus raising the issue of validity in governmental acts carried out by law enforcement officials in investigating criminal acts of corruption.

Judging from the aspects of State Administrative Law, the government is the subject of law, as a draggervan de rechten en plichten or supporter of rights and obligations. As a legal subject, the government, like other legal subjects, performs a variety of concrete actions (*feitelijkhandelingen*) and legal actions (*rechtshandelingen*). However, both of these actions must be based on the applicable laws and regulations, so that they do not deviate or conflict with the relevant regulations that can cause legal consequences that appear to be canceled (*neitig*) or can be canceled (*neitigbaar*).⁹

Conclusion

By looking at the philosophical approach and the authority of the constitutional attributions and legislation mentioned above, interpretatively the law, from the aspect of the contextualism principle "Rechmatig bestuur or the principle of government which rests on the principle of the rule of law, namely the principle of legality, the calculation authority states aspects of state financial losses as part of the material offense in corruption, must be carried out with the approach of "auditing or auditing state finances", and the authority to determine state financial losses with financial audit procedures can only be carried out by "BPK", as an institution that is given attributive authority by the constitution of the Indonesian Constitution 1945 and normalized through Law 15/2006. Legislative ratios forming the law give the authority to the BPK, namely: (1) affirming the existence of the BPK as the only free and independent state financial examiner, and (2) to deal with dualism and / or duplication of audit by BPK

⁷ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2007), p. 57.

⁸ Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, Cetakan Ketiga, (Yogyakarta: Liberty, 2002), p. 85-87.

⁹ Ridwan HR., *Hukum Administrasi Negara*, (Jakarta: PT. RajaGrafinso Persada, 2006), p. 111.

and BPKP. However, the ratio legis is not reflected in the formulation of the norms of Law 31/1999 in conjunction with Law 20/2001 specifically the explanation of Article 32 paragraph (1) "the amount of losses that can be calculated is based on the findings of the competent agency or the appointed public accountant", so that in a number of times Proof of acts of corruption, law enforcement is only coordinated with the BPK, and can also coordinate with other agencies, such as APIP (BPKP, Inspectorate) and public accountants.

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