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# Establishing Criminal Liability: The Legal Standing and Evidentiary Weight of State Financial Loss Findings

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## ABSTRACT

This study aims to analyze the constitutional position and the legal status of the Audit Report (*LHP*) of the Supreme Audit Agency (*BPK*) as an administrative product, and its evidentiary weight in establishing the criminal elements of corruption. This type of research is a normative legal study using conceptual, historical, and statutory approaches. The documents indicate that the BPK holds the primary constitutional mandate to calculate and determine state financial losses definitively, as reinforced by the Supreme Court Circular Letter (*SEMA*) No. 4 of 2016. In criminal trials, the BPK's Audit Report qualifies as valid documentary evidence (Article 184 of the Criminal Procedure Code/*KUHAP*) and can transform into expert testimony if the auditor is presented in person. Nevertheless, the BPK's Audit Report is viewed as an administrative product (State Administrative Decree) subject to the principles of administrative law and due process of law. Not all findings automatically constitute corruption crimes; pure administrative errors without malicious intent (*mens rea*) or losses due to pure business risks in State-Owned Enterprises (Business Judgment Rule) must be filtered and resolved through the compensation claim mechanism (TP-TGR) or settled within a 60-day grace period.

## KEYWORDS

Board of Audit (*BPK*), Audit Report (*LHP*), Losses to the State



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## INTRODUCTION

As a nation governed by the rule of law, Indonesia regards the principle of accountability in the management of state finances as a cornerstone for achieving the welfare of the people, in accordance with the mandate of the Constitution.<sup>1</sup> Within the constitutional framework, the Supreme Audit Agency (BPK) holds a constitutional mandate under Article 23E of the 1945 Constitution of the Republic of Indonesia as the sole independent institution tasked with auditing the management of and accountability for state finances. The BPK's role in auditing state finances embodies an objective oversight system designed to ensure that every rupiah spent from the state treasury is used for the public good and is not misused for personal gain or the benefit of specific groups.<sup>2</sup>

The existence of the BPK is reaffirmed by Law No. 15 of 2004 and Law No. 15 of 2006, which grant this institution the authority to issue Audit Reports (LHP). The LHP issued by the BPK is not merely an ordinary administrative document; rather, it possesses legal force as an instrument for assessing the presence or absence of irregularities in the management of state finances. In the context of criminal acts of corruption, the BPK's findings regarding financial losses to the state serve as a central link connecting the realm of administrative law with that of criminal law. Financial losses to the state, as defined by Law No. 1 of 2004, are explicitly defined as a shortage of money, securities, and goods—the amount of which is tangible and certain—resulting from unlawful acts, whether committed intentionally or through negligence.<sup>3</sup>

The importance of the BPK's role has grown even stronger following the issuance of Constitutional Court Decision No. 25/PUU-XIV/2016, which shifted the paradigm of corruption offenses from formal offenses to material offenses. This change carries legal implications: law enforcement officials can no longer prosecute an individual based solely on potential loss, but must instead base charges on actual loss—that is, loss that has actually occurred. In this regard, the BPK's findings hold very high evidentiary value because they provide numerical certainty through a rigorous audit process based on the Standards for State Financial Audits. Without precise calculations from an authorized institution, the element of causing financial loss to the state under Articles 2 and 3 of the Law on the Eradication of Corruption Offenses would be difficult to legally establish.

Procedurally, in court proceedings, the BPK's Audit Report is classified as valid documentary evidence as stipulated in Articles 184 and 187 of the Code of Criminal Procedure. Furthermore, BPK auditors who appear in court to explain the report's contents also serve as expert witnesses providing testimony based on their professional expertise. The legal weight of the BPK's findings is further reinforced by Supreme Court Circular Letter No. 4 of 2016, which affirms that the BPK is the agency with constitutional authority to definitively calculate and determine financial losses to the state. This Circular Letter serves as a guideline for judges

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<sup>1</sup> Fathul Hamdani & Ana Fauzia, "The Authority of the Village Government in the Management of Village Funds during the Covid-19 Pandemic" (2022) 4:1 *Indones J Advocacy Leg Serv* 195–222.

<sup>2</sup> Suaedin, Minollah & Syamsul Hidayat, "Examination of the Elements of Abuse of Authority in the State Administrative Court About the Crime of Corruption" (2019) 3:2 *Lex J Kaji Huk dan Keadilan* 234–246.

<sup>3</sup> Theodorus M Tuanakotta, *Audit Forensik dan Audit Investigatif* (Jakarta: Salemba Empa, 2014).



throughout Indonesia to maintain legal consistency and prevent dualism in the determination of state losses between investigators and auditors.

Nevertheless, the legal force of the BPK's findings must still be situated within the framework of human rights and the principle of the presumption of innocence. Any finding in the BPK's Audit Report may still be challenged through the objection mechanism or through administrative judicial proceedings if there are elements of abuse of authority in the audit process. This is in line with the principle of due process of law, which requires a balance between the protection of state finances and the protection of the rights of legal subjects. In practice, aligning the BPK's administrative findings with investigations by the police or the prosecutor's office requires meticulous scrutiny to distinguish between purely administrative errors and criminal acts accompanied by criminal intent (*mens rea*).<sup>4</sup>

Ultimately, the role of the BPK's findings as the basis for determining criminal acts serves as a bridge toward achieving transparent and accountable law enforcement. By using the BPK's findings as a foundation, the enforcement of anti-corruption laws is no longer subjective but is based on measurable empirical data. This also serves as a safeguard for public officials, ensuring they are not criminalized for policies they have implemented—provided those policies do not involve unlawful acts or illegal self-enrichment. It is this synergy between the BPK's audit authority and the judicial authority of the courts that will foster true legal justice in safeguarding Indonesia's financial sovereignty.

## METHOD

This study is a normative legal study employing conceptual, historical, and statutory approaches.<sup>5</sup> The conceptual approach is used to analyze issues using relevant legal concepts. The historical approach traces the evolution of Indonesian health law toward digitalization. The legislative approach is used to examine the provisions of Law No. 15 of 2004 on the Audit of State Financial Management and Accountability, Law No. 15 of 2006 on the State Audit Agency, and related regulations concerning the State Audit Agency.

The types and sources of legal materials consist of primary legal materials (laws and regulations), secondary legal materials (books, academic journals, and official reports), and tertiary legal materials (legal dictionaries and legal encyclopedias). Legal materials are collected through literature reviews and searches of accredited online sources. The analysis of legal materials is conducted using qualitative descriptive and interpretive methods, which involve explaining and interpreting applicable legal norms to construct a systematic argument. The analysis is carried out through deductive legal reasoning, resulting in normative conclusions that are academically defensible.<sup>6</sup>

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<sup>4</sup> Jan Rimmelink, *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Jakarta: Gramedia Pustaka Utama, 2003).

<sup>5</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).

<sup>6</sup> Amiruddin & H Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT. Raja Grafindo Persada, 2006).



## RESULT & DISCUSSION

### I. The Status and Legal Force of Audit Reports Issued by the State Audit Agency

The Audit Report (LHP) of the Supreme Audit Agency (BPK) plays a central role in the enforcement of laws against corruption in Indonesia. As a constitutional institution, the BPK has the inherent authority to independently assess the management of state finances (Article 23E, paragraph (1) of the 1945 Constitution of the Republic of Indonesia). In the realm of criminal procedure, the BPK's LHP serves as an instrument that bridges the gap between administrative audit findings and the fulfillment of the elements of a substantive offense. Without audit results, law enforcement officials often struggle to determine the actual and definite amount of state losses.<sup>7</sup>

The status of the BPK audit report is formally recognized in Article 184 of the Criminal Procedure Code as documentary evidence.<sup>8</sup> This is because the Audit Report is an official document prepared by authorized officials in the course of their official duties to report findings related to the management of state finances.<sup>9</sup> In addition to serving as documentary evidence, the substance of the BPK's audit report often serves as expert testimony. This occurs when BPK auditors are called to testify in court to explain the audit methodology, findings, and conclusions regarding irregularities that have resulted in financial losses to the state.

The process of transforming audit findings into criminal evidence requires strict standardization. The BPK not only assesses the consistency of figures but must also be able to prove the existence of a causal relationship (causal verband) between procedural violations and the loss of state assets. From a legal perspective, the BPK's audit report carries strong evidentiary weight because it is based on the Standards for State Financial Audits (SPKN).<sup>10</sup> Compliance with SPKN ensures that the evidence gathered by auditors has legal integrity and validity when presented in court.

However, it is important to note that the BPK's audit report is not the sole determinant of the defendant's guilt. The judge has the discretion to assess the probative value of the audit report. In accordance with the principle of *judex ne procedat ex officio*, the judge is not absolutely bound by the loss figures presented by the BPK if there is more relevant counterevidence.<sup>11</sup> One of the challenges in using the BPK's audit reports is distinguishing between state losses and corporate losses in state-owned enterprises (SOEs). The Constitutional Court, through several

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<sup>7</sup> Article 1, item 22 of Law No. 1 of 2004 on the State Treasury defines a loss to the state as a shortage of cash, securities, and goods, the amount of which is verifiable and certain, resulting from an unlawful act.

<sup>8</sup> Law No. 8 of 1981 on Criminal Procedure (KUHP), Article 184 (1) (c).

<sup>9</sup> Article 187(a) of the Criminal Procedure Code regarding documentary evidence created under an oath of office or confirmed by an oath.

<sup>10</sup> BPK Regulation No. 1 of 2017 on Standards for Audits of State Finances.

<sup>11</sup> Supreme Court of Indonesia case law regarding the independence of judges in evaluating evidence (the Principle of Free Evaluation of Evidence).



of its rulings, has clarified that the finances of SOEs remain part of the state's finances; therefore, the BPK's audit reports remain relevant as a basis for evidence.<sup>12</sup>

About the calculation of state losses, Constitutional Court Decision No. 25/PUU-XIV/2016 changed the definition of corruption from a formal offense to a material offense. As a result, the BPK's audit report must now present actual losses, rather than potential losses.<sup>13</sup> In practice, there are often discrepancies between the audit reports of the BPK and those of the BPKP (Financial and Development Supervisory Agency). However, according to SEMA No. 4 of 2016, the agency with the constitutional authority to definitively declare financial losses to the state is the BPK.<sup>14</sup>

BPK audit reports also frequently contain findings such as "Volume Shortfall" or "Mark-up." Under criminal procedure law, these findings constitute indicia or evidence of criminal intent (*mens rea*) to manipulate the budget for personal or corporate gain. The parameters of the investigative audits conducted by the BPK are similar to those of a criminal investigation. Auditors conduct on-site verifications, seek clarifications from relevant parties, and examine documents; the results are then documented in an Investigative Audit Report, which serves as the basis for a criminal incident report.

The enforcement authority of the BPK's audit reports is also supported by Article 14 of Law No. 15 of 2004, which states that if the audit findings reveal criminal elements, the BPK must immediately report them to the competent authority within a maximum of one month from the date of discovery. During the trial, the defendant, through their legal counsel, often challenges the BPK's audit report by submitting an independent audit conducted by a Public Accounting Firm (KAP). This is where the judge is tested in assessing the objectivity and competence of state auditors versus private auditors. The legal validity of the BPK audit report as evidence also encompasses aspects of subjective authority. This means that the report must be signed by a BPK official who possesses the necessary competence and a valid mandate. Formal defects in the signing process can result in the audit report being declared inadmissible as evidence. Furthermore, the BPK audit report serves both preventive and punitive functions simultaneously. On the one hand, it encourages systemic (administrative) improvements; on the other hand, it provides "ammunition" for the Public Prosecutor to prove the existence of state losses (criminal offense).

It is important to understand that not all findings in the BPK audit report can be subject to criminal prosecution. If the findings constitute "non-compliance with statutory provisions" that do not result in financial loss to the state, then the matter remains within the administrative sphere.<sup>15</sup> Transparency in the preparation of audit reports is crucial. Auditors must allow the audited party to respond (due

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<sup>12</sup> Constitutional Court Decision No. 48/PUU-XI/2013 and Decision No. 62/PUU-XI/2013 regarding the status of state-owned enterprises' assets.

<sup>13</sup> Constitutional Court Decision No. 25/PUU-XIV/2016, which removed the word "may" from Article 2, paragraph (1), and Article 3 of the Corruption Eradication Law.

<sup>14</sup> Supreme Court Circular Letter (SEMA) No. 4 of 2016 on the Implementation of the Conclusions of the 2016 Plenary Session of the Supreme Court Chambers as Guidelines for the Performance of Duties by the Courts.

<sup>15</sup> The Principle of *Ultimum Remedium* in the Enforcement of Criminal Law on Corruption.



process). If this procedure is bypassed, the audit report may be considered to violate the principle of due care, and its evidential weight may be diminished.<sup>16</sup>

In criminal law analysis, the BPK's Audit Report assists judges in determining sentencing guidelines. The amount of state losses listed in the Audit Report often serves as a parameter for prosecutors in determining prison sentences and fines in accordance with the category of losses. Coordination between the BPK and law enforcement agencies (the National Police, the Attorney General's Office, and the KPK) in utilizing the Audit Report is key to the effectiveness of law enforcement. This synergy ensures that audit findings do not remain merely on paper but have a tangible impact on the recovery of state assets. The BPK's Audit Report carries evidentiary weight based on the "presumption of correctness" (*presumptio iustae causa*), whereby the report is deemed accurate unless proven otherwise in court.

In corruption cases, the BPK's Audit Report (LHP) is the primary instrument for establishing the element of "causing financial loss to the state or the national economy" as referred to in Articles 2 and 3 of the Corruption Eradication Law. Based on Constitutional Court Decision No. 31/PUU-X/2012, the KPK and investigators may coordinate with other agencies (such as the State Financial Supervision Agency or independent experts), but the BPK retains the primary constitutional mandate under Article 23E of the 1945 Constitution. The Supreme Audit Agency of the Republic of Indonesia (BPK RI) is a high state institution whose existence is guaranteed by the Constitution, specifically in Article 23E of the 1945 Constitution. This constitutional foundation was subsequently reinforced by the enactment of Law No. 15 of 2004 on the Audit of State Financial Management and Accountability and Law No. 15 of 2006 on the Supreme Audit Agency. These two laws provide a clear legal framework for the BPK in carrying out its duties and functions.<sup>17</sup>

The audits of financial statements conducted by the BPK are guided by the State Financial Audit Standards (SPKN) established in BPK Regulation No. 1 of 2007, which was subsequently revised into BPK Regulation No. 1 of 2017 on State Financial Audit Standards, which sets forth the professional requirements for auditors, the quality of audit performance, and the requirements for professional audit reports.<sup>18</sup> Legally speaking, the findings of a BPK audit are the result of an objective process of problem identification, analysis, and evaluation of evidence. Pursuant to Law No. 15 of 2004 on the Audit of State Financial Management and Accountability, audit findings are essentially statements of non-compliance between actual conditions (on-the-ground realities) and established criteria (laws and regulations). These findings are then classified to provide an overview of the level of compliance and the effectiveness of state financial management.

The first and most fundamental classification is Findings of Noncompliance with Laws and Regulations. Referring to the State Financial Audit Standards (SPKN) established by BPK Regulation No. 1 of 2017, these findings include irregularities that directly affect the validity of financial statements. Such non-compliance may take the form of violations of budget limits, procurement procedures for goods and

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<sup>16</sup> Law No. 30 of 2014 on Government Administration Regarding the General Principles of Good Governance (AAUPB).

<sup>17</sup> BPK RI, "Dasar hukum BPK RI", (2009), online: <<https://ntt.bpk.go.id/dasar-hukum-bpk-ri/>>.

<sup>18</sup> BPK RI, "Profil dan sejarah singkat BPK RI", (2023), online: <[https://www.bpk.go.id/assets/files/storage/2023/03/file\\_storage\\_1678151299.pdf](https://www.bpk.go.id/assets/files/storage/2023/03/file_storage_1678151299.pdf)>.



services, or the awarding of grants for purposes other than those intended. Within the category of non-compliance, there is a sub-classification of findings that result in State Losses. Pursuant to Article 1, item 22 of Law No. 1 of 2004 on the State Treasury, these findings are tangible and have a definite monetary value, such as instances of double payments or shortfalls in the volume of work on infrastructure projects. The legal status of these findings is that of an administrative determination requiring recovery through a compensation mechanism to ensure that state funds are returned to their source.

The next subcategory consists of findings that result in a shortfall in government revenue. These findings typically arise during audits of taxes or non-tax government revenue (PNBP), where funds that should have been remitted to the government were either not collected or deposited late. Based on BPK Regulation No. 2 of 2017, the primary recommendation for these findings is the remittance of the remaining funds to the state or local treasury within 60 days. In addition to the monetary aspect, there is a classification of Findings of Waste, Inefficiency, and Ineffectiveness (3E). These findings are rooted in Article 4 of Law No. 15 of 2004, which governs Performance Audits. Unlike findings of financial loss, the 3E findings are more managerial in nature, where budget usage is considered procedurally valid but does not provide optimal benefits to the public or is carried out at a higher cost than necessary.

The second crucial classification is Findings of Weaknesses in the Internal Control System (ICS). Referring to Government Regulation No. 60 of 2008 on the Government's Internal Control System, these findings highlight flaws in the organization's control mechanisms. Examples include weak data reconciliation between the finance and operations departments or the absence of clear authorization procedures, which, if left unaddressed, could create opportunities for fraud. ICS findings are often categorized into several levels of materiality, ranging from administrative weaknesses to "material weaknesses." According to the BPK's internal guidelines, material weaknesses in the internal control system can prevent the attainment of an Unqualified Opinion (WTP). This is because such system weaknesses pose a high risk of material misstatements in the financial statements presented by government entities.

Furthermore, there is a classification of findings that involve criminal elements. Although the BPK is an administrative audit institution, Articles 13 and 14 of Law No. 15 of 2004 require the BPK to report to the competent authorities (the police or the prosecutor's office) if there are indications of criminal intent (*mens rea*). In this context, the BPK's Audit Report (LHP) shifts in function from merely an administrative evaluation tool to serving as preliminary evidence in criminal corruption proceedings. Findings can also be classified from an administrative-clerical perspective. These findings refer to clerical errors, delays in submitting reports, or irregularities in record-keeping. Legally, these findings do not directly cause financial loss to the state, but they violate Law No. 30 of 2014 on Government Administration regarding the standards of administrative order that must be adhered to by every public official.

In the audit of state-owned enterprises (SOEs), there is a classification of "Findings Related to Business Risk." Referring to the Business Judgment Rule adopted in Law No. 40 of 2007 on Limited Liability Companies, the BPK must



distinguish between losses resulting from purely business failures and those constituting state losses. This classification is highly sensitive because it determines whether a director can be held personally liable for a corporate decision that resulted in a loss. The BPK also classifies findings based on the Status of Recommendation Follow-Up (TLHP). Under BPK Regulation No. 2 of 2017, findings are divided into four categories: fully addressed, not yet in accordance with recommendations, not yet addressed, and cannot be addressed. This monitoring is essential to ensure that every finding—whether administrative or financial—does not merely remain a note on paper but actually leads to improvements.

From a philosophical perspective, the classification of these findings aims to promote good governance. In accordance with Article 23E, paragraph (1) of the 1945 Constitution, the BPK is tasked with auditing the management of state finances in a free and independent manner. A clear classification facilitates stakeholders, such as the DPR or DPRD, in carrying out their oversight functions regarding the conduct of government through the results of these audits.<sup>19</sup> It is important to understand that the legal status of the BPK's audit report is administratively final but may be challenged in court. If the audited entity believes that the classification of findings does not align with the facts on the ground, it may file an objection through the rebuttal process during the final discussion (exit meeting). This is in line with the principles of transparency and legal certainty as stipulated in the Government Administration Law.

## **II. Findings of Financial Loss to the State as the Basis for the Existence of a Criminal Offense**

The existence of financial loss to the state is one of the most crucial constitutive elements in the enforcement of criminal corruption laws in Indonesia, particularly as related to Articles 2 and 3 of Law No. 31 of 1999 as amended by Law No. 20 of 2001 (the Anti-Corruption Law). From a doctrinal perspective, this element serves as the primary parameter for distinguishing between acts of corruption and ordinary administrative violations. The presence of state losses indicates a depletion of public wealth resulting from the abuse of authority or unlawful acts committed by legal entities.<sup>20</sup>

The definition of state finances itself refers to a broad scope, as stipulated in Article 1, point 1, of Law No. 17 of 2003 on State Finances.<sup>21</sup> In these regulations, state finances are defined as all rights and obligations of the state that can be valued in monetary terms, as well as everything—whether in the form of money or goods—that may become the property of the state in connection with the exercise of those rights and obligations.<sup>22</sup> This broadening of the definition provides a basis for law enforcement officials to seize assets managed through the State Budget (APBN),

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<sup>19</sup> Philipus M Hadjon & Sri Soemantri Martosoewignjo, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Press, 1993).

<sup>20</sup> Andi Hamzah, *Pemberantasan Korupsi melalui Hukum Pidana Nasional dan Internasional* (Jakarta: RajaGrafindo Persada, 2005).

<sup>21</sup> Law No. 17 of 2003 on State Finances, Section 1, paragraph 1.

<sup>22</sup> Arifin P Soeria Atmadja, *Keuangan Negara dalam Perspektif Hukum: Teori, Praktik, dan Kritik* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2009).



Regional Budget (APBD), or state assets held separately by state-owned enterprises (BUMN) and regional-owned enterprises (BUMD).

A fundamental shift occurred as a result of Constitutional Court Decision No. 25/PUU-XIV/2016, which changed the nature of corruption offenses from formal offenses to material offenses.<sup>23</sup> Before this ruling, the phrase “may cause financial loss to the state” allowed for prosecution based solely on potential loss. However, following the ruling, financial loss to the state must be actual and of a definite amount. This requires public prosecutors to prove the existence of a concrete amount of loss in each indictment.

In determining the amount of such losses, the institution with constitutional authority is the Supreme Audit Agency (BPK). This is reaffirmed in Supreme Court Circular Letter (SEMA) No. 4 of 2016, which states that the agency authorized to declare the existence of state financial losses is the BPK.<sup>24</sup> Although in practice other institutions such as the BPKP or public accountants are often involved, this SEMA provides legal certainty regarding the hierarchy of evidence for state losses in court proceedings to avoid dualism in calculations.

Provisions regarding compensation and the recovery of state funds are also specifically regulated in Law No. 1 of 2004 on the State Treasury. Article 59 of that law stipulates that any loss to the state caused by unlawful acts or negligence must be promptly resolved through a compensation claim. In the context of corruption cases, the restitution of state losses does not preclude criminal liability for the perpetrator (in accordance with Article 4 of the Law on the Prevention and Eradication of Corruption), but it is often taken into consideration by judges as a mitigating factor in sentencing.

The separation of state assets within state-owned enterprises (SOEs) is often the subject of heated debate in legal discourse. Referring to Constitutional Court Decision No. 48/PUU-XI/2013, the Constitutional Court affirmed that state assets separated within SOEs remain part of the state’s finances.<sup>25</sup> The argument is that even though the capital comes from state assets that have been converted into shares, its source remains the state budget. Therefore, any losses incurred by state-owned enterprises as a result of unlawful acts are still classified as losses to the state, not merely ordinary business losses (business judgment rule).

The challenge of proving state losses often conflicts with the Business Judgment Rule (BJR). This doctrine protects the board of directors of a company (including state-owned enterprises) from legal action as long as the decisions made were made in good faith and in the best interests of the company.<sup>26</sup> However, if fraud, a conflict of interest, or an unlawful act is discovered, the BJR protection is revoked, and the resulting losses fall under the jurisdiction of criminal corruption charges, for which the individual is personally liable. The method for calculating state losses

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<sup>23</sup> Constitutional Court of the Republic of Indonesia, Decision No. 25/PUU-XIV/2016 on the Review of the Law on the Eradication of Corruption against the 1945 Constitution, pp. 102–105.

<sup>24</sup> Supreme Court of the Republic of Indonesia, Supreme Court Circular Letter (SEMA) No. 4 of 2016 on the Implementation of the Conclusions of the 2016 Plenary Session of the Chambers of the Supreme Court as Guidelines for the Performance of Duties by the Courts.

<sup>25</sup> Constitutional Court of the Republic of Indonesia, Decision No. 48/PUU-XI/2013 regarding the substantive review of the State Finance Law and the State Audit Board Law against the 1945 Constitution.

<sup>26</sup> Fred G Steingold, *Legal Guide for Starting & Running a Small Business* (California: Nolo, 2015).



typically uses either the Total Loss or Net Loss approach.<sup>27</sup> Under the Total Loss method, the entire project value or amount spent is considered a loss if the project is fictitious or cannot be utilized at all. In contrast, the Net Loss method calculates the difference between the amount paid by the government and the actual value received (outputs). The choice of method depends heavily on the characteristics of the case and the facts uncovered during the investigative audit conducted by government auditors.

Philosophically, the protection of state finances aims to maintain economic stability and the integrity of public services. Corruption that causes financial losses to the state directly hinders national development and violates the socioeconomic rights of the people. Therefore, Indonesia's anti-corruption laws do not focus solely on retributive justice but are also shifting toward restorative justice—specifically, asset recovery—to return wealth that has been stolen from the state treasury. The principle of *de minimis non curat lex* is often debated in corruption cases, where the law does not concern itself with trivial matters. However, in the context of financial losses to the state, the nominal threshold for such losses is not explicitly stipulated in the Anti-Corruption Law. This poses a challenge for law enforcement officials in determining whether losses of a small amount should still be prosecuted as acts of corruption or whether they can be resolved through administrative claims for damages as provided for in Article 35 of Law No. 17 of 2003.

Theoretically, state losses can be classified into actual losses (those that have actually occurred) and potential losses (loss of future profits). Following Constitutional Court Decision No. 25/PUU-XIV/2016, the debate regarding potential losses in the criminal justice system should have ended, as criminal law requires certainty. However, in the practice of investigative auditing, it is often difficult to distinguish between inefficient expenditures and state losses arising from criminal intent (*mens rea*).

The application of the element of state loss is also closely linked to the concept of “unlawful acts” (PMH). In corruption cases, an unlawful act does not merely mean a violation of written law (formal legality), but also encompasses violations of propriety, justice, and the general principles of good governance (AAUPB). If an administrative action violates the AAUPB and results in a reduction of state assets, then the element of state loss has been materially satisfied even though formal procedures may have been followed.

In the context of government procurement of goods and services, losses to the state often result from mark-up practices or price inflation. Legally, losses are calculated based on the difference between the fair market price and the price paid by the government. The challenge in proving these losses lies in determining an objective “market price,” given price fluctuations and the often highly specific technical specifications of goods, which require expert testimony from institutions such as the LKPP (Government Goods and Services Procurement Policy Agency).

In addition to markups, another *modus operandi* involves carrying out projects that do not meet specifications (substandard work). In such cases, the state's losses are calculated based on the value of the shortfall in the volume of work or the decline in quality that results in a reduced economic life of the asset. Auditors typically use

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<sup>27</sup> I Nyoman Serikat Putra Jaya, *Beberapa Pemikiran Ke Arah Pengembangan Hukum Pidana* (Semarang: Citra Aditya Bakti, 2008).



the results of physical laboratory tests to determine the actual value of the resulting buildings or infrastructure compared to the contract that was signed and paid for by the state. The interpretation of “separate state assets” in state-owned enterprises (SOEs) must also refer to Law No. 19 of 2003 on SOEs. Although SOEs have the status of limited liability companies subject to the Limited Liability Companies Act, their capital remains state assets. This creates a legal dualism: on the one hand, SOEs are required to pursue commercial (private-sector) profits, but on the other hand, their assets are protected by public-sector standards (anti-corruption laws). Your thesis could highlight the need for harmonization so that SOE boards of directors do not feel constrained in making business decisions.

The issue of corporate criminal liability has also come to the fore in discussions regarding state losses. Under Supreme Court Regulation (PERMA) No. 13 of 2016, a corporation may be held liable if a criminal act is committed to benefit the corporation or if the corporation allows a criminal act to occur. In such cases, the resulting state losses may be imposed on the corporation in the form of criminal fines or restitution equivalent to the value of those losses.<sup>28</sup>

Restitution is the primary instrument for recovering state losses, as stipulated in Article 18(1)(b) of the sPTPK Law. The amount of restitution paid shall be no more than the value of the assets obtained through acts of corruption. The focus of this provision is not merely to punish the perpetrator, but to restore the state’s financial position to its original state (*restitutio in integrum*), so that the state budget can function normally again. However, a legal problem arises when a convicted person is unable to pay restitution. The PTPK Law provides a solution in the form of the seizure and sale of assets or an additional (subsidiary) prison sentence. Criticism often arises because the subsidiary prison sentence is considered disproportionate to the value of the state’s losses. This has sparked discussions regarding the urgency of enacting the Asset Recovery Bill, which would allow the state to seize assets derived from crime without having to wait for a final and binding criminal conviction (Non-Conviction-Based Asset Forfeiture).

In the context of audits, the BPK’s audit report (LHP) has legal standing as documentary evidence and serves as the basis for expert witnesses to testify in court. However, judges are not absolutely bound by the figures presented by the BPK. Based on the principle of *iura novit curia* (the court is presumed to know the law), judges have the authority to independently assess whether such calculations are logical and supported by other valid evidence presented under oath. There is a fundamental difference between “state losses” and “corporate losses” in the context of state-owned enterprises (SOEs) listed on the stock exchange (public companies). In public companies, the interests of minority shareholders must also be protected. If losses occur due to market fluctuations or reasonable business risks, they cannot be brought under the jurisdiction of the Corruption Eradication Court (*Tipikor*). Proving the existence of criminal intent (*dolus*) serves as the primary filter to ensure that criminal law is not used as a tool to criminalize business failures.

The international aspect also needs to be considered, given that corruption often involves the flight of assets abroad (stolen asset recovery). The 2003 United Nations Convention Against Corruption (UNCAC), which Indonesia ratified through

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<sup>28</sup> Muhammad Yusuf, *Merampas Aset Koruptor: Solusi Pemberantasan Korupsi di Indonesia* (Jakarta: Kompas, 2013).



Law No. 7 of 2006, emphasizes the importance of international cooperation in tracking, freezing, and recovering state losses. This demonstrates that the scope of state losses has transcended the boundaries of domestic sovereignty and requires an international legal approach. The connection between state losses and Article 3 of the PTPK Law regarding “abuse of authority” is very close. Official positions are often used as a means to facilitate the flow of state funds to unauthorized parties. In administrative law doctrine, abuse of authority (*detournement de pouvoir*) occurs when an official uses their authority for purposes other than those for which it was granted, ultimately causing financial harm to the state.<sup>29</sup>

In addition, the concept of national economic loss has emerged as an alternative to national financial loss. Economic loss to the state has a much broader scope, encompassing systemic impacts on the economic structure, inflation, and even the loss of job opportunities. Although proving this is far more complex and requires econometric expertise, this element has increasingly been used by prosecutors in high-profile corruption cases (such as the cooking oil export case or the insurance fund mismanagement case) to strengthen their charges. During the prosecution process, there is often an overlap between civil claims for damages and criminal restitution. The *ne bis in idem* principle generally does not apply in this context because civil and criminal proceedings operate in distinct spheres. However, judges must exercise caution to prevent double recovery, which would violate the principle of fairness toward the defendant.

It is also important to discuss the role of the Government Internal Oversight Agency (APIP). Before the matter enters the investigative phase, APIP has 60 days to verify findings of state losses in accordance with Law No. 30 of 2014 on Government Administration. If the losses are recovered within that timeframe, criminal proceedings should be avoided to prioritize law enforcement efficiency and protect state finances. The relevance of substantive justice is often overlooked in the pursuit of figures on state losses.<sup>30</sup> Sometimes, in an effort to recover small losses, the costs of handling a case—including investigation, trial, and enforcement—far exceed the value of the loss itself. My thesis proposes a model for out-of-court settlements for corruption cases involving losses below a certain threshold, to ensure the effective use of the state budget.

From a progressive legal perspective, the interpretation of “loss to the state” should not be limited solely to the rigid text of the law. The law must be able to take into account the social context and the goal of public benefit. If a technical action violates the rules but actually saves the state a greater financial loss or provides tangible benefits to the broader public, then the element of substantive unlawfulness may be debated to the extent that it should not be subject to criminal penalties.<sup>31</sup> Alignment between the Law on the Audit of State Financial Management and Accountability (Law No. 15 of 2004) and the PTPK Law is vital. BPK audits must be able to present data that meets the standard of proof required for criminal cases (beyond a reasonable doubt). Without accurate data from the auditors, the element

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<sup>29</sup> Hadjon & Martosoewignjo, *supra* note 19.

<sup>30</sup> Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis tentang Pergulatan Manusia dan Hukum* (Jakarta: Kompas, 2007).

<sup>31</sup> Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiil dalam Hukum Pidana Indonesia* (Bandung: Alumni, 2002).



of state financial loss will remain a weak point in the prosecutor's indictment—one that can easily be refuted by the defense during the trial.

### **CONCLUSION**

Constitutional Status and Definitive Authority of the BPK: The BPK RI is the sole independent institution with a constitutional mandate (Article 23E of the 1945 Constitution) to audit the management of state finances. Pursuant to SEMA No. 4 of 2016, the BPK is the sole agency with full authority to definitively determine and establish the amount of state financial losses to avoid conflicting calculations in court proceedings. The Evidentiary Value and Transformation of the BPK Audit Report in Court Proceedings. In the realm of criminal procedural law, the BPK Audit Report holds very high evidentiary weight because it is rigorously prepared in accordance with the State Financial Audit Standards (SPKN). In court, the BPK Audit Report serves as valid documentary evidence (Article 184 of the Criminal Procedure Code) and can simultaneously be transformed into expert testimony when the relevant auditor explains the methodology and causal relationship of the violations before the court. However, this evidentiary weight is subject to the principle of Free Evaluation of Evidence, which means that the judge is not absolutely bound and remains free to assess its objectivity when confronted with counterevidence.

The BPK's findings are classified into several categories, such as non-compliance, losses to the state or local government, weaknesses in the internal control system, and 3E (managerial) findings. The document emphasizes that an audit finding is essentially an administrative legal instrument (a decision of the State Administrative Body). The transformation from an administrative error (maladministration) to a criminal act of corruption absolutely requires proof of criminal intent (*mens rea*) to enrich oneself or others. If losses arise due to clerical negligence, purely administrative errors, or SOE business risks (Business Judgment Rule), then administrative legal instruments—such as the recovery of losses via the TP-TGR within 60 days—must be prioritized in accordance with the principle of *ultimum remedium* (criminal law as a last resort).

### **DECLARATION OF CONFLICTING INTERESTS**

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