International Journal of Educational Review, Law & Social Sciences (IJERLAS)
International Journal of Educational Review, Law And Social Sciences (IJERLAS Journal) | ISSN (e): 2808-487X
Volumes 5 No. 3 (2025)

ONRECHTMATIGE OVERHEIDSDAAD: UNLAWFUL ACTS BY THE STATE IN INDONESIAN CONSTITUTIONAL LAW

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Received : 25 February 2025	Published : 30 April 2025
Revised : 16 March 2025	DOI : https://doi.org/10.54443/ijerlas.v5i3.2797
Accepted : 29 March 2025	Link Publish : https://radjapublika.com/index.php/IJERLAS

Abstract

Considering that the government's actions in carrying out its functions by using public and private legal instruments will ultimately intersect with the interests of citizens, a means of legal protection is needed to maintain a balance so that the objectives of the public interest can be achieved without necessarily sacrificing the rights of citizens protected by law. This research is a normative-research that studies legal objectives, values of justice, validity of legal rules, legal concepts, and legal norms. Normative legal research can also be said to be a process for finding legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand. The source materials used in this research are primary legal materials, secondary legal materials and tertiary legal materials. Primary legal material is Indonesian Law. Furthermore, the data collected is analyzed qualitatively. The element of "against the law" in the formulation of administrative disputes referred to in Law Number 30 of 2014 concerning Government Administration is to interfere with the rights of others; second, contrary to the legal obligations of the perpetrator; third, contrary to decency; fourth, contrary to the decency, thoroughness, and careful attitude that a person should have in association with fellow citizens or against other people's objects. If these elements are fulfilled, the party aggrieved by the decision of the State Administrative Officer may file a lawsuit with the State Administrative Court. With the development of the concept of KTUN in Article 87 of Law No. 30/2014, it can be seen that concrete actions are one form of KTUN. Thus, the lawsuit against the existence of real actions which is an onrechtmatige overheidsdaad lawsuit which was previously the absolute competence of the District Court, has changed to the absolute competence of the State Administrative Court.

Keyword: ***State Administration, Unlawful Acts, Constitutional Law.***

A. Introduction

Forms of state action carried out by the government (in the broadest sense) to ensure that government functions can run well if the government's legal actions are in accordance with laws and regulations and general principles of good governance. Public interests and individual or communal interests are always correlated with government actions and functions. Therefore, the government and state administrators must always be precise to ensure that every policy and action does not violate the law and does not harm citizens. In performing legal actions, the government has two domains. These consist of legal actions in the public law field and legal actions in the private law field. In the public law field, acts that are based on special or privileged authority, or in other words those that are only possessed by certain functionaries, are considered legal acts. Restrictions on the criteria for government legal acts are necessary due to the breadth of government functions. (Indroharto, 2019)

Considering that government actions in carrying out its functions using public and private legal instruments will ultimately intersect with the interests of citizens, a means of legal protection is needed to maintain a balance so that the objectives of the public interest can be achieved without necessarily sacrificing the rights of citizens protected by law. There is a judiciary specifically established as a state administrative court to provide legal protection against government actions. The courts serve as a check on the decisions of the executive and other state agencies regarding government administration. (Bagus Oktafian;et.all, 2020)

It is expected that the human rights of citizens harmed by the actions of state administrators will be protected through the means of legal protection provided by the State Administrative judiciary. These means of protection are provided to the public to enable them to enjoy all the rights guaranteed by law. To implement and provide legal protection, means of implementation are required. The independent judicial branch carries out the means of legal

protection to realize the objectives of the rule of law. (Indah Sari, 2020) The government, in exercising its power, must be subject to and in accordance with existing laws. This is based on the notion of the rule of law, namely the notion that all state actions must be in accordance with the law. The concept of the rule of law has historically emerged in various models, such as the rule of law according to the Koran and Sunnah or Islamic nomocracy, the rule of law according to the Continental European concept called "rechtstaat", the Anglo Saxon concept of the rule of law, the concept of socialist legality, and the concept of Pancasila rule of law. Although they have their own historical dynamics and understanding, these views have one thing in common, namely the belief that state power must be limited and subject to the law. (M.A Tanjung & R. Saraswati, 2019)

In general, the government has two positions in carrying out state administration activities, namely the position in private law and the position in public law. the government's position in private law works with an agreement with other parties. On the other hand, actions in public law carried out by the government are characteristically unilateral, namely that the government's decision to carry out a legal action does not depend on the will of other parties and is not required to have an agreement of will (*wilsovereenstemming*) with other parties. In such conditions, it becomes clear that citizens need legal protection from the government's actions. (Hari Sugiharto & Bagus Oktafian A, 2018)

Government legal actions are actions that by their nature give rise to legal consequences. The most important characteristic of legal actions taken by the government is that government decisions are unilateral. It is said to be unilateral because whether or not a government legal action is carried out depends on the unilateral will of the government, not depending on the will of other parties and not required to be in accordance with the will of other parties.

Decree as a legal instrument of the government in taking unilateral legal action, can be the cause of legal violations against citizens, especially in a modern legal state that gives broad authority to the government to interfere in the lives of citizens, therefore legal protection is needed for citizens against government legal action. According to Sjachran Basah, protection of citizens is given when the attitude of the state administration's actions causes harm to it, while the protection of the state administration itself is carried out against the attitude of its actions properly and correctly according to both written and unwritten laws. Unwritten State Administrative Law or general principles of good governance, are intended as verhoogde rechtsbescherining or increasing legal protection for the people from deviant state administration actions. (F. Fikri, et.all, 2023)

Unlawful acts committed by the authorities in the form of violating the subjective rights of others are not only limited to acts of a privaatrechtelijk nature, but also acts of a publiekrechtelijk nature. Article 85 paragraph (1) of Law Number 30 of 2014 concerning Government Administration stipulates that the filing of a lawsuit for a Government Administration dispute that has been registered with a public court but has not been examined, with the enactment of this Law, is transferred and resolved by the Court, one of which claims is unlawful acts by the authorities.

B. Discussion

The legal subject as the bearer of rights and obligations (de drager van de rechten en plichten), be it a human being (naturlijke persoon), legal entity (rechtspersoon), or position, can perform legal actions based on the ability (bekwaam) or authority (bevoegdheid) it has. In society, there are many legal relationships that arise as a result of the legal actions of the legal subject. (M. Irham.et.all, 2023)

This legal action is the beginning of the birth of legal relations (rechtsbetrekking), namely interactions between legal subjects that have legal relevance or have legal consequences. In order for legal relations between legal subjects to run harmoniously, balanced and fair, in the sense that each legal subject gets what he is entitled to and carries out the obligations imposed on him, the law appears as a rule of the game in regulating these legal relations. The law was created as a means or instrument to regulate the rights and obligations of legal subjects, so that each legal subject can carry out its obligations properly and get its rights reasonably. In addition, the law also functions as an instrument of protection for legal subjects. A violation of law occurs when a certain legal subject does not carry out the obligations that should be carried out or because it violates the rights of other legal subjects. Legal subjects whose rights are violated must obtain legal protection.

In general, there are three kinds of governmental actions, namely governmental actions in the field of making laws and regulations (regeling), governmental actions in issuing decisions (beschikking), and governmental actions in the civil field (materiele daad). The first two occur in the public sphere, and are therefore subject to and regulated under public law, while the latter is specific to the civil sphere, and is therefore subject to and regulated under civil law. On the basis of this division of governmental actions, Muchsan said that unlawful acts by the government in the form of violating the subjective rights of others are not only limited to privaatrechtelijk actions, but also actions that are publiekrechtelijk. The ruler can be considered to have committed an unlawful act for violating the subjective

rights of others, if: 1) The ruler commits an act that is based on a civil law relationship and violates the provisions of that law; and 2) The ruler commits an act that is based on public law and violates the provisions of these legal principles. (S.A Rasyid, 2024)

The special position of the government, especially because of the special characteristics attached to it, which are not owned by ordinary people, has led to prolonged differences of opinion in the history of legal thought, namely regarding whether the state can be sued or not in front of a judge. The government in carrying out its duties requires freedom of action and has a special position compared to ordinary people. Therefore, the issue of suing the government before a judge cannot be equated with suing ordinary people. The issue of suing the government is considered to be one of the difficult parts of civil law and State Administration Law. (Yokotani, 2019)

Theoretically, Kranenburg provides a chronology of seven concepts regarding the issue of whether the state can be sued before a civil judge, namely: 1) The concept of the state as an institution of power is associated with the concept of law as a decision of the will realized by power, stating that there is no state liability; 2) The concept that distinguishes the state as a ruler and the state as a fiscus. As a ruler, the state cannot be sued and vice versa as a fiscus the state can be sued; 3) The concept that emphasizes the criteria of the nature of rights, namely whether a right is protected by public law or civil law; 4) The concept that emphasizes the criteria of legal interests that are violated; 5) The concept based on unlawful acts (onrechtmatigedaad) as a basis for suing the state. This concept is not concerned with whether the violated regulation is public law or civil law; 6) The concept that separates between functions and the performance of functions. The function cannot be sued, but the implementation that creates harm can be sued; and 7) The concept that puts forward a basic assumption that the state and its instruments are obliged in their actions, regardless of the aspect (public law or civil law) to pay attention to normal human behavior. Seekers of justice can demand that the state and its agents behave normally. Any behavior that alters normal behavior and creates harm can be sued.

The unlawful act committed by the government refers to a provision that also applies to individuals, namely Article 1365 of the Civil Code, which reads "Every unlawful act, which causes damage to another person, obliges the person who through his fault causes the damage, to compensate for the loss". The provisions of Article 1365 have undergone a shift in interpretation, as evident from several jurisprudences. Broadly speaking, the emergence of this shift in interpretation is divided into two periods, namely the period before 1919 and after 1919. In the period before 1919, the provisions of Article 1365 were interpreted narrowly, with the elements of: first, unlawful act; second, loss; third, causal relationship between unlawful act and loss; fourth, fault on the perpetrator. (Awaliah, 2021)

Based on this interpretation, it appears that unlawful acts are the same as acts contrary to the law (onrechtmatigedaad is onwetmatigedaad). The interpretation of unlawful acts as being the same as acts contrary to the law is due to the school of legism, which was dominant at the time. This school considers that the law is only what is stated in the law, outside the law there is no law. 17 This narrow interpretation of the elements of unlawful acts results in the narrow legal protection that can be given to citizens. The Government Administration Regulation in Law Number 30 of 2014 guarantees that decisions and/or actions of government bodies and/or officials against citizens cannot be carried out arbitrarily. Citizens will not easily become objects of state power, with the existence of Law Number 30 of 2014, citizens will not easily become objects of state power. In addition, this Law contains the transformation of the General Principles of Good Governance (AUPB) that have been practiced for decades in government administration, and concretized into binding legal norms.

Government administration must be based on the principle of legality, the principle of protection of human rights and AUPB, especially in this case the principle of not abusing authority. The principle of not abusing one's own authority is regulated in Law Number 30 of 2014, namely Article 10 paragraph (1) letter e and its explanation. This principle requires every government body and/or official not to use their authority for personal interests or other interests and not in accordance with the purpose of granting such authority, not to exceed, not to abuse, and/or not to mix authorities. According to the provisions of Article 17 of Law Number 30 of 2014, government agencies and/or officials are prohibited from abusing authority, the prohibition includes a prohibition on exceeding authority, a prohibition on mixing authority, and/or a prohibition on acting arbitrarily. Government agencies and/or officials are categorized as exceeding authority if the decision and/or action taken exceeds the term of office or time limit for the validity of the authority, exceeds the boundaries of the area where the authority is valid; and/or contradicts the provisions of laws and regulations. (Kusnadi Umar, 2020)

Government agencies and/or officials are categorized as conflicting authority if the decisions and/or actions taken are outside the scope of the authority granted, and/or contrary to the purpose of the authority granted. Government agencies and/or officials are categorized as acting arbitrarily if the decision and/or action taken is without the basis of authority, and/or contrary to a court decision with permanent legal force. The element of "against

the law" in the formulation of administrative disputes is based/inspired after 1919 the criteria for unlawful acts as stipulated in Article 1365 of the Civil Code underwent a shift in interpretation, namely as follows: first, interfering with the rights of others; second, contrary to the legal obligations of the perpetrator; third, contrary to decency; fourth, contrary to decency, accuracy, and caution that a person should have in association with fellow citizens or against other people's property. (Asmayandi, 2021)

The expansion of this interpretation means that the legal protection that can be given to citizens is also broader. This broadening of interpretation has created difficulties in judicial practice. According to Indroharto, this difficulty arises because the way the government participates in public relations is carried out according to very specific ways, while the measure of propriety that wants to be applied can actually only be 100% applicable to relations between citizens and it is difficult to say that norms of behavior have grown and developed in relations between citizens and the government. (R. Syafril. Et.all, 2023)

The concept of onrechtmatige overheidsdaad in Indonesia has actually been around for a long time, even since the colonial era. This is due to the principle of concordance, so that the development of existing law at that time was strongly influenced by the development of doctrine that developed in the Netherlands. Adhering to the principle of concordance, the general courts in the colonial era declared their authority in handling lawsuits against the government based on Article 2 of the Wet op de Rechterlijke Organisatie. Seeing this, unlawful acts by the authorities are basically an extension of the concept of unlawful acts (onrechtmatige daad). Therefore, the provisions governing onrechtmatige overheidsdaad are still using Article 1365 BW. There are several elements in the formulation of the article on unlawful acts regulated in Article 1365 BW, including: 1) there must be an act; 2) the act is unlawful; 3) the perpetrator must have fault; 4) the act causes harm; and 5) there is a causal relationship between the act and the loss.

Regarding the form of compensation for damages due to unlawful acts, it is not descriptively regulated in BW. Therefore, the rules used for this compensation analogously use the rules for compensation for damages due to default which are regulated in Articles 1243-1252 BW. Moegni Djodjodirjo argues that Article 1365 BW provides the possibility of several types of prosecution, namely, among others, compensation for losses in the form of: 1) money; 2) compensation for losses in the form of equivalent or return of the situation to its original state; 3) a statement that the act committed is unlawful; 4) prohibition to perform an act; 5) nullification of something unlawfully done; and 6) announcement of the decision on the corrected matter.

The term "deed "as referred to in the onrechtmatige overheidsdaad can be meaningfully equated with the terms" Government Act"," State Administration Act "and"Government Act". Furthermore, the term "Government Act" will be used to refer to the element of "act" as referred to in the concept of onrechtmatige overheidsdaad just to facilitate writing. What is meant as an act of government (Bestuurshandelingen) must be distinguished from the actions of officials (office holders) individually (outside the function of office) in community traffic. This is because the determination of the location of legal responsibility for claims of compensation burden incurred by government action is based on the theory of responsibility, namely the responsibility of the position (faute de service) and personal responsibility (faute de personille). (F. Himawan, 2024)

If an act is carried out within the competence and capacity as a government official, then the responsibility is borne by the government. Muchsan mentioned the elements that must be met in order for an act to be categorized as an act or act of government, namely: 1. The act is carried out by government officials in their position as rulers or as government equipment (bestuursorganen) on their own initiative and responsibility. 2. The act is carried out in order to carry out government functions. 3. The act is intended as a means of giving rise to legal consequences in the field of administrative law. 4. The act in question is carried out in the framework of preserving the interests of the state and the people.

In theory, government actions can be divided into two, namely real actions (Feitelijke Handelingen), can also be called material actions, ordinary actions, or factual actions, and also legal actions (Rechtshandelingen). Concrete actions are government actions that are intended not to cause legal consequences, while legal actions are government actions that are intended to cause legal consequences. Legal actions carried out by the government as a public legal entity have two dimensions, namely private law actions (privaatrechtelijke rechtshandelingen) and actions in public law (publiekrechtelijke rechtshandelingen). (M. R. Baihaki, 2023) A private law action is a government legal action based on civil law or private law. Public law acts are government legal acts that are based on public law. It should be noted that even when carrying out legal acts of a private nature, the purpose of the government remains in the public interest and the benefit of society. The concept of onrechtmatige overheidsdaad contains the substance that a Government Act that violates the law will give rise to liability for any harm caused by the act. (F. Fikri, et.all, 2023) The development of onrechtmatige overheidsdaad in Indonesia itself can be said to be quite dynamic, where there are several jurisprudences that provide different criteria regarding when a Government Act is said to have violated

the law. There are at least two jurisprudences that can illustrate this shift in Criteria. The first is the decision of MA in the case of Kasum (Decision No. 66K / SIP / 1952), which basically affirms that an unlawful act occurs when there is an arbitrary act of the government or is an action that lacks elements of public interest. Then, the second is the decision of the Supreme Court on the Jasopandojo case (Decision No. 838K/SIP/1970), which in this case MA argued that the criteria onrechtmatige overheidsdaad are formal laws and regulations in force, propriety of society that must be complied with by the authorities. (N. Asyikin & A. Selawan, 2020)

C. Conclusion

The element of "against the law" in the formulation of administrative disputes referred to in Law Number 30 of 2014 concerning government administration is to interfere with the rights of others; second, contrary to the legal obligations of the perpetrator; third, contrary to decency; fourth, contrary to propriety, accuracy, and careful attitude that should be owned by a person in association with fellow citizens or against other people's objects. The fulfillment of these elements, the injured party on the decision of the Administrative Officer can file a lawsuit with the Administrative Court. With the development of the concept of KTUN in Article 87 of law no. 30 year 2014, it can be seen that real action is one form of KTUN. Thus, the lawsuit against the existence of concrete action which is a lawsuit onrechtmatige overheidsdaad formerly an absolute competence of the District Court, turned into the absolute competence of the Administrative Court. With the change in the absolute competence of the onrechtmatige overheidsdaad lawsuit, there are various juridical consequences, namely changes in terms of procedural law. In addition to changes to the procedural law, there are changes to the petitum that can be requested in the onrechtmatige overheidsdaad lawsuit when filed with the District Court when filed with the Administrative Court. In addition, the most important is the change related to the execution of the decision or execution, where it used to be when onrechtmatige overheidsdaad lawsuit is the absolute competence of the district court, depending on the good faith (good will) of the government. However, after switching to the absolute competence of the administrative court, there are various efforts so that the decision can be executed by the relevant government institution (defendant). In fact, when the relevant government institution (defendant) does not execute the decision of the Administrative Court, criminal sanctions may be imposed.

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