



## Element of Loss in Qualifying an Act as an Unlawful Act

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**Abstract** - The aim of this research is to determine the criteria for classifying losses as aspects of criminal acts and the factors judges take into account when classifying losses. This study employs a normative research methodology, which is legal research that views the law as a set of norms. The data sources used in this study are secondary sources, namely journals, Supreme Court Decisions RI Number 2638 K/Pdt/2014, and some laws. Research Results According to R. Wirjono Projodikoro: R. Wirjono Projodikoro interprets the word *onrechtmatigedaad* as an unlawful act. According to him, the word "deed" in the series of words "unlawful act" can be interpreted positively but also negatively, that is, it also includes things that people can be said to be in violation of the law by just being silent because according to the law, the person should act. It is the duty of judges, particularly constitutional judges, to investigate, uphold, and comprehend the legal principles and sense of justice that permeate society, according to Law Number 48 of 2009, Article 5, paragraph 1. Qualifying events is much more difficult than constatizing events, because constituting events means seeing concrete events, something that can be seen, while qualification in this case is an abstraction rather than the concrete event.

**Keywords:** Element of Loss, Against the Law

### I. INTRODUCTION

In Dutch, an unlawful act is known as *onrechtmatige daad*. In Indonesian, it is defined as a legal act committed by a legal subject. While *torf* actually means wrong, but in the legal field it is often interpreted as a civil error that does not come from a breach of contract (Projodikoro, *Unlawful Acts*, 2000) The term unlawful act is abbreviated PMH is a translation of the Dutch *On Rechtmatige Daad*. The term unlawful act in question is as stipulated in book III chapter three in Articles 1365 to 1380 of the Code.Civil Law on Covenants born by Law. As for what is meant by unlawful acts, According to Article 1365 of the Civil Code (KUHPerdata), if an illegal act causes injury to another person, the offender must disclose the loss and compensate the victim.

Thus, in elements of the unlawful acts consist of:

1. Acts that are not only against the law but also against the perpetrator's legal obligations, the principle of caution, applicable norms or regulations, and the rights of the individual all breach the law.
2. The act as referred to above contains wrongdoing.
3. Resulting in losses, and
4. A causal connection exists between loss and loss.

In 1919, are Dutch Court (Huge Raad Decision) of January 31, 1919 gave a broader definition of unlawful conduct, which is an action that is not in line with propriety or what is accepted in society. The scope that can be said to be an unlawful act is as follows: (Fuady, 2005)

- a. Actions that violate other people's rights. A person's legally recognized rights are those that are infringed upon; these might include, but are not restricted to, rights that are material, personal, property, honor, and good reputation.
- b. behaviors that go against their own legal requirements. The behavior in question is therefore against the legal obligation of the offender, whereby legal obligation is defined as a responsibility imposed on a person by the law, including both written and unwritten laws that conflict with others' legal rights.
- c. actions that are impermissible. In other words, a transgression of *susila*, which the society has acknowledged as an unwritten law and which allows the party who has incurred a loss to seek compensation (see article 1365 KUH Perdata).
- d. actions in community associations that go against caution or necessity. Even when the behavior is not against written law and hurts other people, it can still be considered a violation or requirement in community associations.

According to Molegraaff, breaking the law is a violation of both the necessity and propriety standards. In the 1919 *Lindenbaum v. Cohen*, Hoge Raad established a broad interpretation of unlawful acts, stating that actions that are contradictory to the following should be construed as unlawful acts:

1) Subjective Rights of others.

Article 1365 of the Civil Code prohibits activities that violate the rights of others, often known as *inbreuk op eens anders recht*. The following, among other legally recognized rights of an individual, are among those allegedly violated:

1. Hak pribadi (Personality right)
2. Property rights (*yermogenrecht*)
3. The right to freedom
4. The right to honor and good name.
5. Legal obligations of the perpetrators.

In addition, it is considered an unlawful act if it violates any legal requirements (*recht split*). This means that an obligation imposed by law on an individual—written or unwritten—violates both written law (*Wederlijk plicht*) and the legal rights of third parties.

2) Methods of decency.

The act of violating morality that the society has acknowledged as an unwritten rule is likewise regarded as illegal, therefore if the act of violating morality has caused losses to other parties, then the party who suffers the loss can claim a line of loss based on the unlawful act.

3) Propriety in society. (Setiawan, Janurai 1987)

The term "*Zorvuldigheid*" refers to an act that is deemed criminal as well as acting counter to caution or necessity in good community association. Thus, even though an individual does not break any written law articles when they carry out a harmful deed, they may still be charged with breaking the law since their actions go against the public relations necessity or caution principle. Community members recognize the imperative, which is undoubtedly not codified in paper.

As evidenced by the Indonesian translation of Article 1365, Subekti likewise employs the word unlawful act when interpreting BW (Tjitrosudibio, 2002). Using the terminology of unlawful acts, Mariam Darus Badruzaman et al. state, among other things, that: Article 1365 of the Civil Code states that any unlawful conduct that causes injury to an *lain* requires the person who caused the harm to be held accountable for their actions.

It is also stated that Article 1365 of the Civil Code is crucial since it gives unwritten rules legal standing. According to Sudargo Gautama, the term unlawful acts have long bothered legal experts who have to use the law. In Western Law, the definition of unlawful acts is increasingly widespread. More and more acts that were once not included in against the law now include that term (Gautama, 2000).

Then why is loss one of the reasons for unlawful acts. In the Article 1365 KUHPerdata only mention the term loss or *schade* without giving an explanation about the meaning of loss.

This article only mentions that every unlawful act must compensate for damages but the article 1365 KUHPerdata It does not clearly mention how it forms and how to compensate for losses. The definition of loss according to Nieuwenhuis is the reduction of one party's property, which is caused by an act (doing or allowing) that violates the norm by the other party (Nieuwenhuis, 1985). Meanwhile, according to Wirdjono Prodjodikoro, losses ought to be understood broadly, that is, not merely with reference to material wealth but also to a person's other interests, such as their body, soul, and dignity.

Thus, the author of this paper intends to address the legal framework around the concept of loss as one of the components of an unlawful act and also wants to know the judge's considerations in qualifying a loss as an element in a legal act, with the title Element of Loss in Qualifying an Act as an Unlawful Act

## **II. METHOD**

Research law is viewed as a system of norms in this study because it employs normative research methodology. Marzuki, Peter Mahmud The concepts, norms, and rules found in the relevant regulations, court rulings, and articles of association make up the norm system. in the event that the relevant laws and regulations are examined as part of the investigation. In accordance with the provisions of Article 1365 of the Civil Code, which states that "Every unlawful act that causes harm to another person, it is mandatory for the person who is guilty to announce the loss in order to compensate for the loss," the writer will evaluate the illegal act in question.

Journals, RI Supreme Court Decision Number 2638 K/Pdt/2014, and several legislation are examples of secondary sources that provided data for this study. In contrast, secondary data refers to information that was acquired through sources other than the author directly. The material used to compile this information was taken from a variety of directly and indirectly relevant or connected literary works that address illegal conduct as defined by Article 1365 of the Civil Code.

In order to review the gathered data, the author will employ a descriptive analysis approach that gives priority to observations of actual symptoms, events, and conditions at the current moment. In accordance with the ruling of the Republic of Indonesia Supreme Court, Number 2638 K/Pdt/2014, this publication examines illegal activity as defined by Article 1365 of the Civil Code.

As a result, the application of this method is to explain the facts. The initial goal is to attempt to show the symptoms in their entirety in the aspect under investigation, i.e., the study of unlawful acts, in order to make the circumstances or conditions evident. behave in accordance with the provisions of Article 1365 of the Civil Code, in accordance with the ruling of the Supreme Court of the Republic of Indonesia, number 2638 K/Pdt/2014.

## **III. RESULT AND DISCUSSION**

1. Legal regulation of the element of loss as one of the elements in Unlawful Acts.

Hoge Raad provided a formulation in the draft Law of 1913 which had been amended and reviewed the contents of the provisions of Article 1365 in relation to the provisions in Article 1366 of the Civil Code. The term daad (action) was put forward in Article 1365 of the Civil Code. divided into two, namely positive charity and negative charity. Article 1365 of the Civil Code examines unlawful acts, namely: Every unlawful act that harms another person requires the party responsible to disclose the loss and compensate for the loss. Formulation of the provisions of Article

1365 of the Civil Code regulates a person's responsibility for onrechtmatige daad (acts against the law), while Article 1366 of the Civil Code regulates a person's responsibility for onrechtmatige natalen (onrechtmatig negligence).

According to R. Wirjono Projodikoro: R. Wirjono Projodikoro interprets the word onrechtmatigedaad as an act against the law. According to him, the word deed in the series of words against the law can be interpreted positively but also negatively, that is, it also

includes things that allow people to be said to be breaking the law just by remaining silent because of their actions. obey the law. , the person must act. Negative actions that are meant by active are people who remain silent, only then can they be said to have committed a legal action, if they are aware that they are secretly committing a violation of the law. So what moves is not the person's body, but their thoughts and feelings. So, the elements that encourage feelings of action are now also present. The word violation in the series of words for unlawful acts in question is active, so according to him the most appropriate word to translate *onrechtmatigedaad* is unlawful acts because according to Wirjono Prodjodikoro the term unlawful acts refers to laws that apply generally in Indonesia and most countries. it is customary law. (Prodjodikoro, Unlawful Acts, 2000)

Based on the formulation of the Article 1365 and Article 1370 KUH Perdata, It can be concluded that, in order to achieve a good result in filing In order to file a lawsuit alleging an Unlawful Act, the following conditions must be satisfied:

- 1) An act is defined as an unlawful act that starts with the perpetrator's action. It's widely acknowledged that the act in question is meant to mean either doing something (in an active sense) or not doing something (in a passive sense), such as not acting even though he has a legal obligation to assist it—because there are obligations arising from contracts as well. Accordingly, there is no element of permitted *causa* as stated in the contract, nor is there an element of consent or agreement for unlawful activities, according to Indah (Sari, 2020).
- 2) Any action that violates the private rights of another individual or that goes against the creator's own legal obligations as outlined in the law; in other words, everything that is illegal is illegal.
- 3) There must be an Error This error can be measured by:
  - a. Objective, that is, by proving that in such circumstances a normal human being can predict the possibility of consequences and this possibility will prevent a good human being from doing or not doing.
  - b. Subjective is by proving whether the maker based on the expertise he has can predict the consequences of his actions. In addition, people who commit illegal acts must be held accountable for their actions, because people who do not know what they are doing are not obliged to pay compensation.

In connection with this error there are two possibilities, namely:

1. The person who feels wronged is also at fault for the loss suffered. That is to say, unless the illegal act was done on purpose, the aggrieved party bears some of the loss if he is also responsible for it happening.
2. Losses caused by several makers, if the losses are caused by if multiple persons were involved in the act, then each of them might be held liable for the entire incident. Losses Have to Be Accrued In the sense that damages brought about by illegal activity may manifest as:
  3. Material loss: This category includes both actual losses and earnings that were not realized but should have been. Therefore, it is widely acknowledged that the person who committed the illegal act should only be compensated for the losses that are actually suffered, as well as the benefits that should be obtained.
  4. Immaterial losses, where illegal acts can also cause losses of a nominal nature. To determine the extent of the loss that must be compensated, it must generally be done by assessing the loss, for that in principle, the aggrieved must be placed as much as possible in the same circumstances as in the event of an unlawful act. the losses that have been suffered at the time of filing the claim however, what he will endure in the future.
1. Losses and actions have a causal relationship. There are two ideas that attempt to explain the relationship between illegal acts and losses:
  - a. Condition *sine qua non*, where according to this theory the person who commits an unlawful act is always responsible if his or her act is a condition *sine qua non* that

causes harm (which is considered as the cause of a change are all the conditions that must exist for the effect to arise).

- b. Adequate veroorzaking, whereby according to this theory the maker is only responsible for the losses that can be expected as a result of an unlawful act, (Purba, 2013).

In life, humans have rights and obligations that are interconnected and even clash with each other. The existence of differences in human wants and needs also creates differences in terms of rights and obligations. On the one hand, rights are faced with obligations, and obligations are something that must be carried out, or carried out but not as agreed (agreed), or carried out late, or not carried out at all. These things eventually trigger disputes which then give rise to a "lawsuit" from people/parties who feel their rights are harmed.

The Supreme Court of the Republic of Indonesia's Jurisprudence, Number: 3191/K/Pdt/1984, dated February 8, 1986, defines unlawful conduct in Indonesian judicial practice. According to this body of legal precedent, an action meets four requirements in order to be considered unlawful, specifically: The interpretation of unlawful acts is that they involve actions or inactions that are in violation of the legal duties of the perpetrators, and the method of morality. and propriety, thoroughness and prudence in society, (Markus Suryoutomo, 2022).

The forms of compensation for unlawful acts known in law are as follows:

- a) Nominal damages: Nominal compensation is the amount awarded to the victim in accordance with the sense of justice, without taking into account the actual amount of loss, in the event of a serious unlawful act (e.g., acts that contain elements of intentionality) that does not cause real losses to the victim.
- b) Damages for compensation: Compensation is the amount paid to the victim to make up for the actual loss they suffered as a result of an illegal act. As such, remuneration of this kind is often known as actual compensation. Compensation could include, but is not limited to, reimbursement for any costs borne by the victim, loss of earnings or salary, disease and suffering, including psychological distress like stress, humiliation, and reputational damage.
- c) Punitive damages are awarded where the actual amount of loss is less than a substantial sum of money. The compensation amount is meant to be applied in circumstances where there are severe or malevolent intents. It is used, for instance, to describe extreme persecution of someone who lacks empathy. As for the compensation system in KUHPerdata is In the article 1365 KUHPerdata provide the possibility of several types of prosecution, including : (Djojodirdjo, 1982)
  - a. Compensation for losses in the form of money;
  - b. compensation in the form of in-kind or restoration of the state to its original state;
  - c. a statement that the act committed is unlawful;
  - d. prohibition of doing an act;
  - e. negate something that is held illegally;
  - f. announcement from a result or from something that has been improved.

The next guidelines regarding compensation in Unlawful Acts can be seen in Article 1372 ayat (2) KUHPerdata which reads: In assessing one or the other, the Judge must pay attention to the severity of the insult, as well as the rank, position and ability of both parties, and the circumstances.

## **2. The judge's consideration in qualifying a loss as an element in an unlawful act.**

According to Prof. Dr. Sudikno Mertokusumo, S.H., To qualify means to assess what or what legal relationship the event that has been considered to have actually occurred includes which, in other words: to find the law for the event that has been constituted. While Prof. Dr. Achmad Ali, S.H., M.H., emphasized that the discovery process by the judge begins at the qualification stage and ends at the kosituir stage, . The practice of locating legal norms in laws, rules, and social standards is known as legal discovery, or rechtsvinding. Judges, as the law's implementers, are required to investigate, observe, and comprehend the legal principles and sense of justice that exist in society because the law, as a positive legal norm that must be

applied, is ambiguous, if not completely nonexistent. Digging is prohibited not only by regulations that have not yet been passed but also by rules that are still ambiguous and challenging to implement in specific situations. Law Number 48 of 2009, Article 5, paragraph 1, makes this very clear:

"Judges and constitutional judges are obliged to explore, follow, and understand the values of law and the sense of justice that live in society"

Qualifying an event is much more difficult than constituting an event, because concatenating an event means looking at a concrete event, something that can be seen, whereas qualification in this case is an abstraction rather than that concrete event. Qualifying is essentially nothing but judging, and judging is a consideration that is not purely logical in nature as in terms of constituting events. Qualifying events contains creative elements as stated above and this also means complementing the law.

In this case, the author refers to the decision of the Supreme Court of the Republic of Indonesia Number 2638 K/Pdt/2014.

Sitting Case:

This case rolled out at the Bukittinggi District Court when Defendant I as the Head of the City Sector Police ordered Defendant II, Defendant III, Defendant IV, Defendant V, Defendant VI and VII (each member of the National Police) to arrest the Victim [EA] for allegedly stealing a motorcycle. After being arrested, the victim [EA] was examined accompanied by persecution by the Defendants II to Defendant VII which resulted in the death of the Victim [EA]. Due to the negligence of Defendant I as the superior to the Defendants who did not supervise the Defendants during the examination of the Victim [EA], the parents of the Victim [EA] as the Plaintiff filed a lawsuit for unlawful acts that resulted in the death of the Victim [EA] against the Defendants. The plaintiff in his petition requests the panel of judges to issue a verdict as follows:

- 1) Accept and grant the Plaintiff's lawsuit in its entirety;
- 2) Declaring that the Plaintiff is the biological parent of [EA], the victim of persecution committed by Defendant II to Defendant VII as per the criminal verdict Number 75/Pid.B/2012/PN. BT which has permanent legal force;
- 3) Declaring that the act of Defendant I not carrying out his duties and authority as a superior to supervise and guide his members (Defendant II to Defendant VII) in carrying out his duties as a member of the Indonesian National Police is an unlawful act as intended in Article 1367 paragraph (1) KUHPperdata;
- 4) Declaring the acts of Defendant II to Defendant VII who persecuted the victim [EA] is an unlawful act as referred to in Article 1365 of the Civil Code;
- 5) Punishing Defendants I to d. Defendant VII pays compensation for both material and the Plaintiff's insignificant losses in the amount of Rp 2,407,510,000,- with details of material losses of Rp 1,407,510,000,- and immaterial losses of Rp 1,000,000,000,-;
- 6) Sentence Defendants I to Defendant VII to pay compulsory money (dawangsom) in the amount of Rp 100,000,000 per day of delay since this decision has permanent legal force on a severally and severally liable basis;
- 7) Declare that this decision can be carried out first (uitvoerbaar bij voorraad) even if there is resistance, appeal and cassation
- 8) Punish Defendants I to Defendants VII to pay the costs of this case;

If the Bukittinggi District Court has a different opinion, please give a fair decision.

Bukittinggi District Court in case Number 07/Pdt.G/2013/PN. BT dated 07 November 2013 issued a verdict with the following complete statement:

In Execution:

Declaring that the exclusion of Defendant I is rejected in its entirety; In the Subject of the Matter:

- 1) Granting the Plaintiff's claim in part;
- 2) Declaring that the Plaintiff is the biological parent of (Alm) EA, a victim of persecution committed by Defendant II s.d. Defendant VII as per the decision Number 75/Pid.B/2012/PN. BT which has permanent legal force;

- 3) Declaring that the act of Defendant I not carrying out his duties and authority as a superior to supervise and guide his members (Defendant II to Defendant VII) in carrying out his duties as a member of the Indonesian National Police is an unlawful act as intended in Article 1367 paragraph (1) KUHPperdata;
- 4) Declaring the acts of Defendant II to Defendant VII who has persecuted the victim [EA] is an unlawful act as referred to in Article 1365 paragraph (1) KUHPperdata;
- 5) Punishing Defendants I to d. Defendant VII to pay to the Plaintiff on a severally and severally liable basis, including: a. Material losses amounting to Rp 700,000 (seven hundred thousand rupiah); b. Immaterial losses of 100,000,000 (one hundred million rupiah);
- 6) Punish the Defendants to pay the cost of the case jointly and severally in the amount of Rp 581,000 (five hundred thousand rupiah);
- 7) Reject the Plaintiff's lawsuit for other and remaining benefits;

At the appellate level, the Padang High Court in case Number 36/Pdt/2014/PT. PDG dated May 6, 2014 affirmed the decision that upheld the Bukittinggi District Court Number 07/Pdt.G/2013/PN. BT. At the cassation level at the Supreme Court, this case is numbered 2638 K/Pdt/2014.

Legal Considerations:

The Cassation Panel consisting of Prof. Dr. Gani Abdullah, S.H. and Dr. H. Zahrul Rabain, S.H., M.H. and Dr. H. Habiburrahman, M.Hum. on April 7, 2015 issued a decision whose full conclusion is as follows:

- a) Rejecting the appeal from the Cassation Petitioner: Government of the Republic of Indonesia Cq. President of the Republic of Indonesia Cq. Chief of the National Police of the Republic of Indonesia Cq. Chief of the West Sumatra Regional Police Cq. Chief of the Bukittinggi Resort Police Cq. Chief of the Bukittinggi City Sector Police;
- b) Sentence the Cassation Petitioner/Defendant I/Appellant to pay the case fee in this cassation level in the amount of Rp 500,000 (five hundred thousand rupiah), with the following legal considerations:

That the *judex facti* (the court of first instance and the court of appeal) has correctly and correctly applied the law that in a *quo case* it is a civil lawsuit because of the existence of civil losses caused by criminal acts and the Plaintiff can prove the postulate of the lawsuit and cannot be refuted by the Defendant, and the *judex facti* of the District Court grants its lawsuit which is corroborated by the *judex facti* of the High Court;

Legal Rules:

Persecution by members of the police against a suspect resulting in death is an unlawful act as stipulated in Article 1365 KUHPperdata.

For members of the police, the provisions of Article 10 paragraph (1) of Law Number 2 of 2002 concerning the Indonesian National Police and Regulation of the National Police Chief Number 14 of 2012 concerning the Management of Criminal Investigations also apply, which basically states that the investigating superior is responsible for supervising and controlling the process carried out by its members, therefore members who commit persecution that results in the death of the suspect, is also a civil responsibility over it.

Based on the above decision, it can be said that in qualifying a case is not as easy as imagined. In order to find the law or the law to be applied to the concrete event, the concrete event must be directed to the law, otherwise the law must be adjusted to the concrete event.

#### **IV. CONCLUSION**

Legal regulations regarding the element of loss as one of the elements in an unlawful act. It can be concluded that Article 1365 of the Civil Code. Explaining the Article 1365 KUHPperdata examines unlawful acts, namely Every unlawful act, which causes harm to another person, obliges the person who due to his fault to publish the loss, to compensate for the loss. In the Article 1365 KUHPperdata only mention the term loss or *schade* without giving an explanation about the meaning of loss. This article only mentions that every unlawful act must compensate for damages" but the article 1365 KUHPperdata It does not clearly mention how it forms and how to compensate for losses. Then regarding the judge's consideration in

qualifying a loss as an element in an unlawful act. In qualifying a matter is not as easy as imagined. In order to find the law or the law to be applied to the concrete event, the concrete event must be directed to the law, otherwise the law must be adjusted to the concrete event.

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