LAW RESEARCH
Review Quarterly

Law Research Review Quarterly is a **Journal for Law, Justice, and Crime in Indonesia and Southeast Asia**. The Journal is a peer-reviewed journal published by Faculty of Law Universitas Negeri Semarang, Indonesia. The Journal published quarterly on February, May, August, and November. ISSN 2716-3415 (Online)
Online at https://journal.unnes.ac.id/snh

The Development of the concept of unlawful act in a contemporary perspective

Auliah Ambarwati
Universitas Sultan Ageng Tirtayasa, Banten Indonesia
auliah.ambarwati@untirta.ac.id

Berthon Jonathan
Universitas Sultan Ageng Tirtayasa, Banten Indonesia
berthon.jonathan@untirta.ac.id

Aryoko Abdurrachman
Universitas Sultan Ageng Tirtayasa, Banten Indonesia
aryoko.abdurrachman@untirta.ac.id

Abstract

The evolution of the doctrine of Unlawful Acts (Perbuatan Melawan Hukum/PMH) demonstrates increasingly complex dynamics within contemporary legal contexts. Rooted originally in the concept of onrechtmatige daad in Dutch civil law, this doctrine continues to evolve in response to demands for justice and the development of modern society. In Islamic economic law, the concept of PMH is connected to the principles of adl (justice) and maslahah (public interest), whereby an act is deemed unlawful not merely because it violates positive norms, but also because it contravenes moral and Sharia values. In contrast, within the common law system, PMH has its counterpart in the concept of tort, which emphasizes individual responsibility for the violation of others' rights through the principles of duty of care and negligence. Furthermore, the doctrine highlights third-party liability (third-party liability) in PMH, particularly when indirect involvement causes harm to others, such as through aiding and abetting or vicarious liability. Additionally, the doctrine of onrechtmatige overheidsdaad extends the scope of PMH to unlawful acts committed by those in power, affirming that the state too may be held accountable when its administrative actions or policies violate citizens' rights. Thus, contemporary PMH doctrine is no longer merely a civil law instrument, but rather has become a pillar of justice that balances legal accountability among individuals, corporate entities, and the state across various modern legal systems.

KEYWORDS

Unlawful Acts, Vicarious Liability, Islamic Economic Law

Introduction

The concept of Unlawful Acts (Perbuatan Melawan Hukum/PMH) or onrechtmatige daad constitutes one of the foundational bases for the emergence of civil legal relations arising from statutory law. The provisions governing this matter are regulated in Article 1365 of the Civil Code (Kitab Undang-Undang Hukum Perdata/KUHPerdata) or Burgerlijk Wetboek (BW), found in Book III concerning Obligations Arising from Law. This article states that "every unlawful act that causes loss to another person obligates the person whose fault caused the loss to compensate for it."

This formulation demonstrates that any action violating legal provisions, whether written or unwritten, and causing loss to another party, may give rise to civil liability in the form of an obligation to pay damages. The term "act" in this article has a broad meaning, encompassing both active (positive) actions and passive (negative) actions or omissions. In other words, a violation of law can occur not only when someone commits an act that ought not to be committed, but also when they fail to perform an act that ought to be performed according to law or propriety.

In this context, a positive act refers to an actual action taken by a person that causes harm to another. Examples include damaging another's property, spreading defamatory statements, or abusing authority. This type of act is generally regulated in Article 1365 of the Civil Code, which serves as the basis for any claim for damages resulting from unlawful conduct.

Conversely, a negative act refers to negligence or failure to perform an action that ought to be performed based on legal, moral, or professional duty. This is regulated in Article 1366 of the Civil Code, which states that a person is responsible not only for loss caused by their own acts but also for loss arising from their negligence or lack of care. Examples include a doctor negligently failing to provide emergency assistance to a patient, or an official who fails to perform administrative duties resulting in loss to others.[1]

Article 1365 of the Civil Code specifies that an action may be categorized as an unlawful act (onrechtmatige daad) if it satisfies several essential elements: the existence of an act comprising an action or omission performed by a person, whether actively or passively; the act being unlawful in nature because it contravenes statutory provisions, the subjective rights of others, moral norms, or principles of propriety in social life; the presence of fault or culpability on the part of the actor, which may take the form of intentionality (dolus) or negligence (culpa); the occurrence of loss, whether material or immaterial, as a direct consequence of the act; and the existence of a causal relationship (causality) between the action performed and the loss suffered by another party. When all five elements are satisfied, the actor may be held accountable in civil law to compensate for the resulting loss, and these elements serve as the basis for the court in determining whether an act constitutes a violation of law in the civil sphere.

More specifically, the term "act" in the context of unlawful acts (onrechtmatige daad) may be understood in three primary forms. First, nonfeasance, which is the failure to perform an action actually required by law. Second, misfeasance, which is the performance of a duty but in a manner that is incorrect or inconsistent with legal requirements. Third,

[1] Titin Apriani, “Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana,” *Ganec Swara* 13, no. 1 (2019): 43–49.

malfeasance, which is the commission of an act entirely outside the authority or right of the perpetrator. From a legal theory perspective, unlawful acts are understood as a form of violation of applicable legal norms, whereby the action causes loss or harm to another party.[2]

According to Soetojo's view, there is one additional element that developed from Dutch judicial practice as a result of jurisprudential development. This element emerged through decisions of the Hoge Raad (Supreme Court of the Netherlands) affirming that the legal norm violated must have the purpose of protecting the interests or rights of the injured party, whether the violation is committed through active action (by commission) or through negligence or passive conduct (by omission). Initially, the provisions in Article 1365 of the Civil Code were intended only to regulate unlawful acts committed with intent, while Article 1366 emphasized liability arising from negligence. However, following the Hoge Raad's decision of January 31, 1919, the interpretation of Article 1365 was expanded to include unlawful acts arising from negligence as contemplated in Article 1366 of the Civil Code.

In cases involving unlawful acts (PMH), the types of loss that may arise are generally divided into two categories: material loss and immaterial loss. Material loss is loss that is tangible and directly experienced by the injured party, and its value can be calculated or assessed economically in monetary terms. Accordingly, when a court approves a claim for compensation for material loss, the determination is made objectively based on evidence and calculations that can be justified. Examples of material loss include medical expenses, damage to property, or vehicle repair costs arising from events such as traffic accidents or other unlawful conduct.

Conversely, immaterial loss in legal terminology is understood as loss that cannot be concretely proven. This type of loss arises from unlawful acts

---

[2] Gisni Halipah et al., "Tinjauan Yuridis Konsep Perbuatan Melawan Hukum Dalam Konteks Hukum Perdata," *Jurnal Penelitian Serambi Hukum* 16, no. 01 (2023): 138–143.

that cause psychological suffering such as temporary loss of enjoyment of life, fear, pain, or shock, which cannot be measured in monetary terms.

Based on the Supreme Court's Review Decision No. 650/PK/Pdt/1994, which refers to Articles 1370, 1371, and 1372 of the Civil Code, it is explained that compensation for immaterial loss may only be granted under certain circumstances. Such compensation is generally limited to cases involving death, serious injury, or acts of defamation, where the resulting loss cannot be measured in material terms but causes psychological suffering or reputational damage to the injured party.[3]

In current Indonesian practice, claims for immaterial loss compensation are entirely left to judicial discretion based on the principle of ex aequo et bono. This situation creates difficulties in determining the amount of immaterial compensation to be awarded, since the valuation depends heavily on the subjectivity of the judge deciding the case. Furthermore, claims for immaterial loss compensation often face various obstacles, as the plaintiff must be able to prove their allegations, which is considerably more difficult than proving material loss.

Generally, a party suffering loss and claiming damages is obligated to prove the extent of the loss incurred. However, if such proof is difficult to establish, the court is empowered to determine the compensation value based on principles of justice. In the Supreme Court's decision dated May 23, 1970, No. 610 K/SIP/1968, it was affirmed that even if the amount of damages claimed is deemed inappropriate and the plaintiff maintains the claim, the court still has the authority to set an amount deemed reasonable. This provision does not conflict with Article 178 paragraph (3) of the Procedural Law, which states that judges are forbidden from deciding matters not requested or awarding more than claimed.

---

3 Rai Mantili, "Ganti Kerugian Immateriil Terhadap Perbuatan Melawan Hukum Dalam Praktik: Perbandingan Indonesia Dan Belanda," *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 4, no. 2 (2019): 298–321.

Methods

This research employs a normative legal research method with doctrinal and comparative analysis approaches. The normative approach was selected because this research focuses on the study of the doctrine of Unlawful Acts (PMH) across various legal systems. As explained by Benuf and Azhar (2020), the normative approach enables the analysis of positive legal norms and mechanisms of actor accountability. This method utilizes the statute approach to analyze statutory provisions and the case approach to test implementation through court decisions.[4]

Normative legal research generally employs three categories of data sources arranged hierarchically: primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are legally binding sources that constitute positive law in force, encompassing statutory regulations, court decisions, and other official legal instruments with binding authority. Conversely, secondary legal materials are scholarly works that analyze, interpret, and comment on primary legal materials, such as scientific journal articles, textbooks, research results, and other academic literature that assist researchers in understanding and interpreting legal norms. Meanwhile, tertiary legal materials include supplementary sources that provide additional information, such as legal dictionaries, encyclopedias, alphabetical indexes, and other general literature that support comprehensive understanding of the research topic.[5]

The collected data is analyzed using qualitative analysis techniques with systematic interpretation patterns toward legal norms and jurisprudence.[6]

---

4 Ahmad Rosidi et al., *Metodologi Penelitian Hukum: Teori, Paradigma, Dan Praktik Kontemporer* (Cv. Edu Akademi, 2026).

5 Yulia Audina Sukmawan and Dwi Damayanti, "Metode Penelitian Hukum Normatif Dan Empiris Sebagai Strategi Penguatan Perspektif Kajian Ilmu Hukum," *Notary Law Journal* 4, no. 3 (2025): 114–128.

6 Ayyub Kadriah, M Amin El Walad Meuraksa, and Yusika Riendy, "Analisis Epistemologi Kritis Terhadap Metode Penelitian Hukum Perdata," *Jurnal Supremasi Hukum* 1, no. 1 (2026): 1–24.

The analysis is conducted by identifying the constitutive elements of PMH, comparing the development of the doctrine across various legal systems (civil law, common law, and Islamic law), and examining the relevance of the doctrine in the context of contemporary law.

Result and Discussion

The Doctrine of Unlawful Acts

Unlawful acts (onrechtmatige daad) are fundamentally always connected to the violation of a right possessed by a person. Etymologically, the term "recht" means "right," and in the context of unlawful acts, this right is understood as the authority granted by law to an individual to protect their interests and to restrict the actions of others so they do not cause harm. According to Rosa Agustina, an action may be categorized as an unlawful act if it meets four primary criteria:

1. Violation of another's subjective rights. These subjective rights are divided into two types:
   a. Personal subjective rights, which encompass interests of high value to the individual, direct recognition of authority by statutory regulation, and a strong evidentiary position in a case.
   b. Societal subjective rights, including absolute property rights (such as ownership), personal rights (such as rights to bodily integrity, freedom, honor, and reputation), and special rights such as a tenant's right to occupy rented property.
2. Violation of the actor's legal duty, meaning obligations established by valid statutory provisions that have binding force generally.
3. Violation of propriety, that is, breach of social norms recognized and accepted by society, even if unwritten.

4. Violation of propriety, care, and caution, which encompasses all actions that harm another without just cause, or actions that provide no benefit but create risk or danger to others according to reasonable standards.

According to Hoffman, for an action to be categorized as an unlawful act, four essential elements must be satisfied:

1. *Er moet een daad zijn verricht* : an action must have been performed;
2. *Die daad moet onrechtmatig zijn* : the action must be unlawful in nature;
3. *De daad moet aan een ander schade hebben beroegd* : the action must cause loss to another;
4. *De daad moet aan schuld zijn te wijten* : the action must be attributable to the actor due to fault.

In Islamic economic law, the concept of unlawful acts is known by the term *al-fi'lu al-dharar*. Etymologically, this term comprises two words: al-fi'lu, meaning action or conduct, and *al-dharar*, meaning loss or harm. Accordingly, *al-fi'lu al-dharar* may be understood as any act that causes loss to another. From the perspective of Islamic law, all forms of action causing loss, whether to individuals or to society, fall within the category of unlawful acts. Therefore, an actor committing *al-fi'lu al-dharar* may be held legally accountable for the consequences of their conduct that causes harm to another.[7]

In the context of Islamic economics, the regulation of unlawful acts is not yet explicitly and comprehensively established in statutory law. Nevertheless, Islamic Courts remain obligated to use Article 5 of Law No. 48 of 2009 Concerning Judicial Authority as a reference basis in examining and deciding cases. This article affirms that judges must excavate, understand, and apply the legal values and sense of justice that prevail in

[7] Panji Adam Agus Putra, "Konsep Perbuatan Melawan Hukum Perspektif Hukum Ekonomi Syariah," Gorontalo Law Review, 2021, 57–74.

society. Accordingly, in cases concerning unlawful acts in Islamic economic matters, judges are not bound solely by normative provisions but must also consider principles of justice, public interest, and Sharia values that form the foundation of the Islamic legal system. Article 5 of Law No. 48 of 2009 Concerning Judicial Authority states: "Judges must excavate, understand, and apply the legal values and sense of justice that prevail in society."[8]

In Islamic economic law, the objects of unlawful acts consist of:

1. Ghasab. Etymologically, ghasab means taking something by force and oppression, or seizing another's right openly and hostilely. According to Article 20 No. 15 of the Islamic Economic Law Compilation (KHES), ghasab is defined as taking another's property without permission, but without the intent to own it permanently.
2. Itlaf. According to Muhammad Rawas Qa'ajih, the term al-itlaf linguistically means al-ifsad (destruction), al-ihlak (annihilation), and al-ifna (elimination). The act of itlaf or destruction serves as the basis for the obligation to provide compensation, as it is considered a form of violation causing harm and loss to another.
3. Al-Ta'asuf fi Isti'mal al-Haq. Etymologically, the Arabic term ta'asuf means acting arbitrarily, recklessly, negligently, or oppressively. In Islamic legal terminology, ta'asuf is defined as action that exceeds proper bounds in exercising a right.
4. Wadh' al-Yad According to Wahbah al-Zuhaili, wadh' al-yad is a person's control over an object, treating it as though it were their own or deriving benefit from it. Unlawful wadh' al-yad accompanied by an element of violation (ta'addī) falls within the category of unlawful acts. Amran Suadi illustrates this as, for example, holding goods without a

[8] Muhammad Nurcholis Alhadi, “Perkara Perbuatan Melawan Hukum Dalam Sengketa Ekonomi Syariah,” Veritas 7, no. 2 (2021): 37–58.

valid contract, or controlling another's property with the intent to own it without permission from the true owner.

The elements of unlawful acts from the perspective of Islamic economic law are as follows:[9]

1. The Element of Action. In unlawful acts, there must exist an action or conduct, whether active or passive, capable of producing legal consequences. Generally, it has become accepted in legal doctrine that any act, whether positive action or omission, may serve as a basis for legal liability if it causes loss to another party. In Islamic legal perspective, the concept of lawful positive action is known as *al-fi'lu al-nafi'*, which literally means action bringing benefit and consistent with principles of propriety and public interest. This signifies that all human conduct should be directed toward generating benefit and preventing harm to others. When a person is in a situation that morally and legally requires them to act for good or prevent loss to others, yet chooses to remain silent and take no action, such passive conduct may be evaluated as negligence violating standards of propriety. In Islamic law's view, the duty to act arises not only from written rules but also from moral and social values prevailing in society. In assessing propriety of action or omission, Islam employs the approach of 'urf (customary practice), meaning customs widely accepted as behavioral guidelines. When custom establishes that a person should or should not act in certain circumstances, that custom possesses binding legal force. The existence of 'urf is recognized as a secondary legal source complementing Sharia provisions, as confirmed by the Islamic legal maxim al-adah muhakkamah, meaning "custom may be established as law." Accordingly, custom not conflicting with Sharia principles may serve as a basis for determining legal obligation, including in assessing whether conduct constitutes an unlawful act by violating applicable propriety.

9 Putra, "Konsep Perbuatan Melawan Hukum Perspektif Hukum Ekonomi Syariah."

2. The Element of Unlawfulness. Actions violating principles of care or norms of propriety in virtuous social conduct also fall within the category of unlawful acts. When a person commits an act causing loss to another, even if not directly violating written legal provisions, they may still be sued for unlawful conduct because their action violates principles of care and prevailing social norms. While these norms or requirements in society are unwritten, they are recognized and accepted as behavioral guidelines by the community concerned.
3. The Element of Fault. In Arabic, the concept of fault in unlawful acts is known as *i'tida' or al-ta'addī*. Etymologically, al-ta'addī means exceeding bounds, while terminologically it is defined as conduct exceeding reasonable limits regarding what should be considered sufficient under law (Sharia) or customary practice. In Islamic law's perspective, fault in unlawful acts does not distinguish between intentional and unintentional conduct. Even acts by both adults and minors entail responsibility for compensating resulting loss. However, the Maliki school provides an exception that a young child who has not yet reached the age of discretion (mumayyiz) is not required to pay compensation if they damage or destroy another's property.
4. The Element of Loss. Loss must have a clear causal relationship (causality) with the unlawful act. This means not all forms of loss can serve as a basis for claiming legal liability. An action may be categorized as an unlawful act only if it actually causes loss to another and there is proven direct connection between the action taken and the resulting harm. According to Amran Suadi, four conditions must be met for loss to serve as a basis for claiming compensation:
    a. The loss must be regarded as property according to custom and Sharia, such that items lacking economic value like a handful of earth do not fall into this category.

b. It must possess value under Sharia law, meaning prohibited items such as khamar (alcoholic beverages) cannot serve as a basis for compensation claims since they lack legitimate value in Islamic law.

c. It must be someone's property, so there is no compensation for something owned by no one, such as water from a public spring.

d. It must be muhtaram (protected by law), so there is no compensation for property of enemies in wartime.

5. Causality. In Islamic law, causality is distinguished into two types: direct causality and indirect causality. In direct causal relationships, the actor bears full responsibility for providing complete compensation for loss directly arising from their conduct. In indirect causality, legal liability may be imposed on the actor only if three elements are satisfied: (1) it is proven that the loss indeed originates from their conduct, although its effect is indirect; (2) the resulting loss is a consequence of intentional or negligent conduct; and (3) no other factor has contributed to the loss. When another party's conduct constitutes the primary cause of loss, that conduct is deemed the direct cause, while the first actor's conduct is categorized only as an indirect cause. As an illustration, someone who cuts a hanging lamp's cord, causing it to fall and break, is the direct cause of the cord's damage but only the indirect cause of the lamp's breakage. Similarly, someone who tears an oil container, causing its contents to spill and be lost, is the direct cause of the container's damage but simultaneously only the indirect cause of the oil's loss itself.[10]

Unlawful acts (PMH), whether in Islamic law or other legal systems, always generate the right of the victim to obtain compensation commensurate with the loss suffered. This principle is affirmed in the Qur'an, Surah Al-Baqarah verse 194, which means: "Whoever assaults you,

[10] Putra.

then assault them in return in kind, in accordance with the assault they commit against you."

The prohibition against causing harm to others is also emphasized in the Hadith of Prophet Muhammad, peace be upon him, transmitted by Imam Ahmad, in which the Messenger of Allah said: "It is not permissible to cause harm to others, nor is it permissible to retaliate with harmful conduct." This Hadith serves as an important foundation in Islamic law that every individual must avoid actions potentially harming others, whether directly or indirectly, and must reject all forms of retaliation that could worsen circumstances. This principle aligns with the principle prohibiting harmful conduct, which serves as the moral and legal foundation in Islamic civil law.

In common law systems, a similar concept is known as "tort," generally understood as unlawful conduct causing loss to another. The term tort derives from Latin torquere, meaning "wrong" or "deviation," and also stems from the word tortus or twisted in Old English, which figuratively depicts something "crooked" or "not straight," namely conduct deviating from legal norms and propriety.

In English common law tradition, the study of tort law is divided into two main categories: trespass and action on the case. Trespass refers to direct violation of another's rights, such as physical assault, defamation, or violation of property ownership. Action on the case is used to claim damages for conduct whose effects are indirect but still cause loss to another.

Subsequently, tort law development encompassed several forms of modern civil liability, such as negligence, intentional torts, and strict liability, where the actor may still be held accountable even without personal fault. These principles in tort law demonstrate that in both Islamic and common law systems, there exists a shared fundamental value: protection of individual rights and prohibition against causing harm to others, as part of principles of justice and social responsibility in community life.[11]

Overall, torts aim to:[12]

a) Provide compensation to the injured party;

b) Protect individual interests from rights violations;

c) Prevent recurrence of unlawful acts in the future;

d) Serve as a means for victims to claim perpetrator accountability;

e) Restore the victim's honor and dignity;

f) Fairly distribute or allocate the risk of loss experienced by the victim; and

g) Impose sanctions for conduct deemed wrongful.

According to John Cooke, there is a general formula for identifying whether conduct constitutes or may be categorized as a tort:

Act (or omission) + causation + fault + protected interest = liability

Generally, torts may be distinguished into three types:

a) Intentional Torts;

b) Negligence-based Torts; and

c) Strict Liability

According to Winfield, tort forms may be classified into three primary categories. First, torts requiring proof regarding the perpetrator's state of mind, namely conduct for which legal responsibility can only be imposed when intent or a specific purpose is proven. Second, torts arising from

---

[11] Shihaf Ismi Salman Najib, "Sengketa Perbuatan Melawan Hukum Dalam Sistem Civil Law, Common Law, Dan Hukum Islam," *Jurist-Diction* 7, no. 4 (2024): 753–778.

[12] Muhammad Ihsan Abdurrahman, S H Agustina, and Prof MH, "Analisis Perbedaan Prinsip Kesalahan Dan Implikasinya Terhadap Tanggung Jawab Dalam Perbuatan Melawan Hukum: Studi Komparatif Antara Hukum Indonesia Dan Hukum Inggris," *Lex Patrimonium* 3, no. 1 (2024): 5.

negligence, where a person may be held legally liable due to lack of care in conduct causing loss to another. Third, torts applying strict liability, which is liability imposed without regard to whether the perpetrator possessed fault, provided their conduct caused loss.

The standard courts use to determine whether a person has committed Tort of Negligence is assessed objectively, by testing what a "reasonable person" in the defendant's position would have done. The consequence of this test is that courts disregard an individual's personal limitations. Determination of the standard in the negligence element depends on objective measure, by assessing whether the defendant's conduct may be considered reasonable in the circumstances faced. Accordingly, a person may be said to have committed Tort of Negligence in England only if their conduct satisfies certain elements:

a) Duty of care the obligation to exercise care;

b) Breach of duty. violation of that obligation; and

c) Damages caused by the breach of duty. loss resulting from the duty violation.

In Tort Law, two important concepts are recognized: Damnum and Injuria. Damnum means loss or damage experienced by a person, while Injuria refers to loss producing legal consequences. These may occur simultaneously in one event or may appear separately. For example, when A operates a motorcycle and hits B causing serious injury to B, in that case Damnum and Injuria occur simultaneously Damnum because B suffers physical injury, and Injuria because that injury gives B the right to claim compensation for A's conduct.[13]

Unlawful Acts in Various Aspects

[13] Najib, "Sengketa Perbuatan Melawan Hukum Dalam Sistem Civil Law, Common Law, Dan Hukum Islam."

1. Third-Party Liability for Unlawful Acts

In addition to imposing the obligation on a person proven to have committed an unlawful act (PMH) to compensate for resulting loss, the Civil Code also regulates a form of vicarious or substituted liability known as vicarious liability. This liability applies when a person must bear the legal consequences of another's acts under their supervision.

Article 1367 paragraph (1) of the Civil Code states: "A person is not only liable for loss caused by his own act, but also for loss caused by the acts of persons under his responsibility or by things in his custody."[14]

However, this provision is considered too general, particularly the phrase "persons under his responsibility," because there is no further explanation of this phrase's meaning, often creating ambiguity in its interpretation.

In applying the vicarious liability principle, the third party burdened with responsibility is not subject to criminal sanctions but is civilly liable for loss caused by another person within their scope of responsibility or employment relationship. The purpose of applying this principle is to provide legal certainty for the injured party to obtain compensation for resulting loss.

Furthermore, provisions regarding substituted liability are also regulated in Article 1367 paragraph (3) of the Civil Code, which states: "Employers and those who assign others to manage their affairs are responsible for loss caused by their servants or employees in the performance of work assigned to them."

According to Hady Purnama Putera, there are several forms of employer responsibility in the employment relationship with workers:

[14] Sekar Ayu Dita and Atik Winanti, "Analisis Asas Vicarious Liability Dalam Pertanggungjawaban Pengganti Atas Perbuatan Melawan Hukum Pegawai Bank," *Jurnal USM Law Review* 6, no. 2 (2023): 526–542.

a. Indirect criminal liability (vicarious liability) may be applied if statutory provisions explicitly regulate it. Accordingly, the basis for applying this liability must derive from positive law provisions legitimizing a person or particular party to be held responsible for another's conduct.

b. Furthermore, courts have developed the "delegation of authority" doctrine in cases relating to licensing. This doctrine provides that a person may be held responsible for another's conduct if they delegate authority held under statutory provisions to that party. Accordingly, the existence of a valid delegation relationship becomes the primary condition in applying such responsibility.

c. Additionally, courts are empowered to interpret statutory provisions such that conduct performed by a worker or employee may be considered the action of an entrepreneur or employer. Through this interpretation, legal liability may be transferred to the party possessing employment relationship or authority over the direct actor.[15]

The development of the vicarious liability principle stems from a concept known as the deep pocket theory. This theory assumes that employers generally possess greater financial capacity than their employees, and therefore are economically more suitable to bear compensation for loss suffered by third parties from unlawful acts committed by their employees in performing work. In other words, this principle aims to ensure fairness and compensation effectiveness, whereby the party with more adequate resources bears responsibility for resulting loss.

Subsequently, the understanding expanded such that unlawful conduct and vicarious liability obligation are not limited to employer-employee relationships. The English Supreme Court in Cox v. Ministry of Justice,

---

[15] Anita Mihardja, Cynthia Kurniawan, and Kevin Anthony, "Vicarious Liability: Perspektif Masa Kini," *Jurnal Education and Development* 8, no. 1 (2020): 73.

which involved a prison inmate who injured a person who subsequently sued for damages, concluded that despite the absence of an employment relationship between the inmate and the prison, the prison itself placed the inmate in a position to commit unlawful acts and possessed "meaningful power of selection" in determining whether the inmate was suitable and prepared for placement in the kitchen or other higher-accident-risk locations. Therefore, the Supreme Court unanimously decided that the Ministry of Justice or prison could be held liable for the plaintiff's loss.[16]

Several theories employed to develop new understanding of third-party liability include:

a. Deep Pocket Theory. This assumes that employers or supervisors generally possess greater financial capacity than their employees, and are therefore better able to bear compensation for loss suffered by victims. Additionally, in many cases, employers have already insured potential loss arising from employee error or negligence. Therefore, application of the vicarious liability doctrine is considered fairer to victims, ensuring the existence of a party economically capable of providing compensation for resulting loss.

b. Control Test Theory. This theory argues that vicarious liability applies only when it can be established that the employer did not provide instructions to employees regarding their work affecting the unlawful conduct committed, or how much control the employer exercised over employee performance.

c. Delegation of Task Theory. This explains that the vicarious liability doctrine applies when unlawful conduct occurs through performance of work that is actually the employer's responsibility but has been delegated or transferred to the employee.

[16] Mihardja, Kurniawan, and Anthony.

However, the English Supreme Court holds that these theories cannot be rigidly applied. Flexibility in judicial consideration of a case-by-case nature is required, though this may potentially create inaccuracy. Additionally, in certain cases, circumstances may arise where a risk can no longer be considered a consequence of the scope of a person's work activities.

2. Unlawful Acts by Those in Power

When a public authority or government official commits conduct constituting an unlawful act, such conduct may serve as a basis for filing a civil suit against them. Three primary reasons may serve as legal foundations for filing a civil suit against a public authority:[17]

a. Violation of a person's rights, namely when a public authority commits conduct prejudicing or obstructing rights legally possessed by individuals or groups of citizens.

b. Conduct violating legal duty, that is, when a public authority acts inconsistently with responsibility or obligations imposed by statutory provisions.

c. Lack of care in acting, whereby the public authority's conduct fails to meet standards of propriety and decency prevailing in social intercourse, causing loss to others.

Accordingly, public authorities remain subject to civil liability if their conduct violates rights, conflicts with legal obligations, or fails to observe the principle of care that ought to be upheld by every public official.

According to Soetojo, although conduct is performed by a public authority in the public sphere, if such conduct causes loss or violates an individual's property right (privaat person), the authority may still be sued on the basis of unlawful conduct (onrechtmatig). However, two reasons may

[17] Syukron Salam, "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa," *Nurani Hukum*, 2018.

excuse a public authority from civil liability: if the conduct is performed based on statutory command, and if the conduct aligns with unwritten law prevailing in society. Nevertheless, in executing statutory commands, the state remains prohibited from exceeding its authority.

Initially, the Dutch Supreme Court (Hoge Raad) held that public authorities or government could not be held civilly liable if they committed conduct conflicting with their legal duty within public law. However, this view changed beginning in 1924, when the Hoge Raad began establishing that government could be held legally liable if proven negligent in performing its legal duties, whether such duties fall within public or private law spheres. Accordingly, if government negligence causes loss to an individual (privaat person), the government may be sued based on the principle of onrechtmatige daad or unlawful conduct, as applicable to other legal subjects in the civil law system.

The Hoge Raad issued a highly progressive decision, which essentially established that any person violating statutory provisions is deemed to have committed an unlawful act, without distinguishing whether the violation falls within civil or public law. According to the Hoge Raad, both conduct and omission conflicting with legal provisions remain deemed unlawful, regardless of whether the violated right is public or private in nature. Therefore, the perpetrator must provide compensation for resulting loss.[18]

Additionally, public authorities in exercising their functions and powers must comply with applicable legal provisions. If in performance they ignore or fail to observe legal rules, whether public or private in nature, such conduct may be categorized as an unlawful act, as it conflicts with the legal duty that every government official ought to observe.

In the 1953 Kasum case, the Supreme Court stated that a public authority may be deemed to have committed an unlawful act if conduct is

---

[18] Salam.

performed arbitrarily (detournement de pouvoir). However, in that case, government conduct was still considered within the bounds of freies ermessen, namely freedom to act in the interests of national defense and security. The scope of freies ermessen is indeed flexible and heavily dependent on the public authority's interpretation of the need to maintain national security, although it may potentially violate individuals' subjective rights. Provided conduct remains aligned with statutory purpose and consistent with principles of propriety in community life, government conduct is not deemed an unlawful act. Setiawan affirmed that a public authority may be deemed to have committed an unlawful act only if detournement de pouvoir occurs, namely when the authority violates someone's subjective right by performing conduct deviating from the purpose intended by law.

Regarding unlawful acts by government or public authorities, since the Government Administration Law (UUAP), changes occurred in the interpretation of decisions as objects of dispute before State Administrative Courts (PTUN):

a. Article 87 establishes that State Administrative Decisions must be understood as: written determinations also including factual actions;

b. Decisions by State Administrative Bodies and/or Officials within the executive, legislative, judicial, and other state implementing branches;

c. Based on statutory provisions and general administrative law principles;

d. Final in a broader sense;

e. Decisions potentially producing legal consequences; and/or

f. Decisions applying to Citizens.

Through Article 1 No. 7 of the Government Administration Law (UUAP), the State Administrative Court system (Peratun), previously specialized in nature, underwent transformation to a system with broader jurisdiction, namely ability to examine and test all conduct of State Administrative Bodies and/or Officials, whether concrete or factual, abstract-individual, or general-concrete in nature. Consistent with this, the Supreme Court affirmed that the UUAP's advent brought paradigmatic change in Peratun proceedings. Based on Supreme Court policy following UUAP's enactment, Peratun's current jurisdiction includes:

a. Cases in the form of complaints and petitions;
b. Cases of unlawful conduct by government (onrechtmatige overheidsdaad/OOD); and
c. Cases previously examined through administrative appeal processes, now falling under PTUN jurisdiction.[19]

The term "factual action" refers to actual or independent action (realakt/schlichte verwaltungshandeln, called in English "real act" or "simple sovereign action"), namely conduct not directly included in government legal instruments. Nevertheless, such action remains an integral part of government's exercise of public legal authority.

According to Meinhard Schroder, although factual action is classified as non-legal action, its performance must still align with applicable legal principles and provisions. This means government officials or agencies remain bound by legal norms in every factual action they perform. If such action causes loss to others, the resulting legal responsibility in the form of obligation to provide compensation remains applicable, as in formal administrative action.

[19] Enrico Simanjuntak, "Restatement Tentang Yuridiksi Peradilan Mengadili Perbuatan Melawan Hukum Pemerintah (Restatement On Judicial Jurisdiction In Administrative Tort)," Jurnal Masalah-Masalah Hukum, Jilid 48 (2019): 32–48.

In practice, clearly distinguishing between factual and administrative action is not easy. Much administrative law literature affirms that these two action types are interrelated and frequently overlap, such that their assessment must consider the context, purpose, and legal consequences of conduct performed by government officials.[20]

Supreme Court Regulation of the Republic of Indonesia No. 2 of 2019 Concerning Guidelines for Resolving Disputes Over Government Action and Jurisdiction to Adjudicate Unlawful Acts by State Bodies and/or Officials (Onrechtmatige Overheidsdaad) specifically regulates various provisions concerning suits for unlawful conduct performed by government or government officials.[21]

In Article 10, the closing provisions of this regulation affirm that from the regulation's enactment, cases of unlawful conduct performed by State Bodies and/or Officials (Onrechtmatige Overheidsdaad) filed with District Courts but not yet begun examination must be transferred for handling to State Administrative Courts (PTUN).

Subsequently, Article 11 provides that if such a case is already in the examination stage at a District Court, that court must declare itself without jurisdiction to continue examining the case, as jurisdiction falls within PTUN. This provision affirms a jurisdictional shift in handling Onrechtmatige Overheidsdaad cases, from the general civil sphere toward the state administrative court system.

Conclusion

The evolution of the Unlawful Acts (PMH) doctrine in contemporary contexts demonstrates significant transformation from the classical concept

---

[20] Simanjuntak.

[21] Halomoan Benarivo, Putri Purbasari Raharningtyas, and Febiana Rima Kainama, "Kritisi Sistem Pertanggung Jawaban Negara Atas Perbuatan Melawan Hukum Studi Perbandingan Actio Popularis Di Hungaria," Gloria Justitia 1, no. 2 (2021): 192–209.

originally emphasizing merely violation of statutory law toward a broader and more contextual understanding. In its development, PMH encompasses not only violation of written norms but also breach of principles of propriety, justice, and social morality. In Islamic economic law, the concept of PMH is understood through the values of adl (justice) and ihsan (beneficence), whereby an act is deemed unlawful if it creates gharar (uncertainty), zulm (oppression), or damages public interest, even if not explicitly regulated in positive law. In common law systems, the PMH counterpart manifests in tort law doctrine emphasizing responsibility for rights violations and negligence causing harm to others. The principle of duty of care provides the foundation for expanding responsibility, including in corporate and third-party contexts. Third-party liability in PMH develops through the concept of vicarious liability, affirming that even indirect involvement may create legal responsibility if contributing to loss. Meanwhile, recognition of onrechtmatige overheidsdaad extends PMH's scope to encompass unlawful acts by those in power, affirming that the state is not above law. When administrative actions or government policies violate citizens' rights, legal accountability may be demanded. Accordingly, contemporary PMH doctrine demonstrates a universal character: oriented toward substantive justice, strengthening legal accountability for individuals, corporations, and the state alike, while affirming the importance of integrating moral, social, and religious values in modern legal systems.

References

Abdurrahman, Muhammad Ihsan, S H Agustina, and Prof MH. "Analisis Perbedaan Prinsip Kesalahan Dan Implikasinya Terhadap Tanggung Jawab Dalam Perbuatan Melawan Hukum: Studi Komparatif Antara Hukum Indonesia Dan Hukum Inggris." *Lex Patrimonium* 3, no. 1 (2024): 5.

Alhadi, Muhammad Nurcholis. "Perkara Perbuatan Melawan Hukum Dalam Sengketa Ekonomi Syariah." *Veritas* 7, no. 2 (2021): 37–58.

Apriani, Titin. "Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana." *Ganec Swara* 13, no. 1 (2019): 43–49.

Benarivo, Halomoan, Putri Purbasari Raharningtyas, and Febiana Rima Kainama. "Kritisi Sistem Pertanggung Jawaban Negara Atas Perbuatan Melawan Hukum Studi Perbandingan Actio Popularis Di Hungaria." *Gloria Justitia* 1, no. 2 (2021): 192–209.

Dita, Sekar Ayu, and Atik Winanti. "Analisis Asas Vicarious Liability Dalam Pertanggungjawaban Pengganti Atas Perbuatan Melawan Hukum Pegawai Bank." *Jurnal USM Law Review* 6, no. 2 (2023): 526–542.

Halipah, Gisni, Dani Fajar Purnama, Bintang Timur Pratama, Budi Suryadi, and Fauzi Hidayat. "Tinjauan Yuridis Konsep Perbuatan Melawan Hukum Dalam Konteks Hukum Perdata." *Jurnal Penelitian Serambi Hukum* 16, no. 01 (2023): 138–143.

Kadriah, Ayyub, M Amin El Walad Meuraksa, and Yusika Riendy. "Analisis Epistemologi Kritis Terhadap Metode Penelitian Hukum Perdata." *Jurnal Supremasi Hukum* 1, no. 1 (2026): 1–24.

Mantili, Rai. "Ganti Kerugian Immateriil Terhadap Perbuatan Melawan Hukum Dalam Praktik: Perbandingan Indonesia Dan Belanda." *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 4, no. 2 (2019): 298–321.

Mihardja, Anita, Cynthia Kurniawan, and Kevin Anthony. "Vicarious Liability: Perspektif Masa Kini." *Jurnal Education and Development* 8, no. 1 (2020): 73.

Najib, Shihaf Ismi Salman. "Sengketa Perbuatan Melawan Hukum Dalam Sistem Civil Law, Common Law, Dan Hukum Islam." *Jurist-Diction* 7, no. 4 (2024): 753–778.

Putra, Panji Adam Agus. "Konsep Perbuatan Melawan Hukum Perspektif Hukum Ekonomi Syariah." *Gorontalo Law Review*, 2021, 57–74.

Rosidi, Ahmad, Citranu Citranu, Riswandha Imawan, Husni Mubarak, Nuzulluddin Farna, and Rohani Rohani. *Metodologi Penelitian Hukum: Teori, Paradigma, Dan Praktik Kontemporer*. Cv. Edu Akademi, 2026.

Salam, Syukron. "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa." *Nurani Hukum*, 2018.

Simanjuntak, Enrico. "Restatement Tentang Yuridiksi Peradilan Mengadili Perbuatan Melawan Hukum Pemerintah (Restatement On Judicial Jurisdiction In Administrative Tort)." *Jurnal Masalah-Masalah Hukum, Jilid* 48 (2019): 32–48.

Sukmawan, Yulia Audina, and Dwi Damayanti. "Metode Penelitian Hukum Normatif Dan Empiris Sebagai Strategi Penguatan Perspektif Kajian Ilmu Hukum." *Notary Law Journal* 4, no. 3 (2025): 114–128.