CONTROVERSY ON THE ABSOLUTE COMPETENCY OF CIVIL COURTS IN INVESTIGATING UNLAWFUL ACTIONS COMMITTED BY THE GOVERNMENT IN INDONESIA


**ABSTRACT**

**Objective:** This research analyses the laws and regulations that apply to courts in adjudicating unlawful acts (torts) the Government commits.

**Methods:** This research uses a socio-legal approach to prepare a normative juridical study complemented by an analysis of legal sociological theories.

**Conclusions:** The research results show that, as stated in Supreme Court Circular Letter Number 4 of 2016, there has been a paradigm shift. After the enactment of Law Number 30 of 2014 concerning Government Administration, there has been a shift in mindset—authority to adjudicate unlawful acts (torts) committed by the Government against State Administration. However, in practice, citizens cannot fully obtain justice when resolving cases of illegal acts committed by the Government in the State Administrative Court. There are several reasons, such as special administrative requirements for the State Administrative Court, limits on compensation, authority to adjudicate, and limits on the power and implementation of decisions of the State Administrative Court (abbreviated as PTUN). These limitations force justice seekers to seek resolution through civil courts if the Government commits unlawful acts. The problem with resolving unlawful acts committed by the Government is how civil courts have absolute competence in adjudicating illegal acts. Unlawful acts committed by the Government can be actions that impact administrative matters or public affairs. Therefore, this unlawful act is tried in the state administrative court. Meanwhile, an unlawful act, namely a form of action that harms oneself, property, and the wealth of an individual or legal entity, is tried in civil court. Therefore, civil courts have absolute authority to try unlawful acts committed by the Government if the Government's actions impact the victim's civil case, such as personal losses, property, and wealth of citizens.

**Keywords:** tort law, unlawful actions, court competence, civil legal process.
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RESUMO

Objetivo: Esta pesquisa analisa as leis e os regulamentos que se aplicam aos tribunais em julgar atos ilegais (delitos) que o governo comete.

Métodos: Esta pesquisa usa uma abordagem sócio-legal para preparar um estudo jurídico normativo complementado por uma análise de teorias sociológicas legais.

Conclusões: Os resultados da investigação mostram que, tal como indicado na Circular n.º 4 do Supremo Tribunal, de 2016, houve uma mudança de paradigma. Após a promulgação da Lei n.o 30 de 2014 relativa à Administração Pública, houve uma mudança de mentalidade - a autoridade para julgar atos ilegais (delitos) cometidos pelo Governo contra a Administração do Estado. No entanto, na prática, os cidadãos não podem obter plena justiça quando resolvem casos de atos ilegais cometidos pelo Governo no Tribunal Administrativo do Estado. Existem várias razões, tais como requisitos administrativos especiais para o Tribunal Administrativo do Estado, limites de compensação, autoridade para julgar, e limites sobre o poder e implementação de decisões do Tribunal Administrativo do Estado (abreviado como PTUN). Essas limitações forçam os requerentes de justiça a buscar uma resolução através de tribunais civis se o governo cometer atos ilegais. O problema com a resolução de atos ilegais cometidos pelo Governo é a forma como os tribunais civis têm competência absoluta para julgar atos ilegais. Atos ilegais cometidos pelo governo podem ser ações que afetam questões administrativas ou assuntos públicos. Por conseguinte, este ato ilícito é julgado no tribunal administrativo do Estado. Entretanto, um ato ilícito, nomeadamente uma forma de ação que prejudica a si próprio, a propriedade e a riqueza de um indivíduo ou de uma entidade jurídica, é julgado em tribunal civil. Portanto, os tribunais civis têm autoridade absoluta para julgar atos ilegais cometidos pelo governo se as ações do governo impactarem o processo civil da vítima, como perdas pessoais, bens e riqueza dos cidadãos.

Palavras-chave: direito civil, ações ilícitas, competência judicial, processo civil.

1 INTRODUCTION

"The King Can Do Wrong" is a famous legal maxim in medieval England, a maxim that is at the core of the appearance of the English monarchy and the principles that apply to the English Government. This proverb symbolizes that the King never makes mistakes and that all his orders are valid. In other words, the government is never wrong and cannot be held responsible if its actions harm its people. This saying later developed into the doctrine of Sovereign Immunity, known in countries that adhere to the Anglo-Saxon legal system, which provides certain immunities to a sovereign government (Farooq & Yousufi, 2020). In the Indonesian context, this does not apply. We must obey government regulations as good citizens, but not because the government's actions are always right and we cannot make mistakes. There must be mistakes, and there must be a way to fix them and then take responsibility for the mistake.
As stated in the Explanation to Law Number 30 of 2014 concerning Government Administration based on the provisions of Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, sovereignty is in the hands of the people. It is implemented based on the State Constitution of the Republic of Indonesia. Furthermore, according to Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the State of Indonesia is a State of Law (Simanjuntak, 2019). This means that the government system of the Republic of Indonesia must be based on the principle of popular sovereignty and the principle of supremacy of law. Based on this principle, all government action must be based on the people's sovereignty and laws that reflect Pancasila as the state ideology. Therefore,

The use of state power against citizens is not without conditions. Citizens cannot be treated carelessly as objects. Government actions towards citizens must be based on the provisions of laws and regulations and general principles of good governance (Maksum, 2020). Supervision of government actions tests the treatment of people treated under the law. It considers the principles of legal protection that can be effectively implemented by free and independent state and judicial institutions (Asimah et al., 2020). Therefore, systems and procedures for implementing government and development tasks must be implemented based on applicable laws and regulations.

However, there could be government action that demands losses from the people in its implementation. For this reason, society must have a guarantee of legal protection against this matter. The above can close citizens' access to justice because no attempt exists to resolve events that harm society's sense of justice. This situation makes citizens lose access to justice. Apart from that, it also results in a situation where there is no equality before the law.

On the other hand, we often hear of arbitrary actions by both the Central Government and Regional Governments, which are packaged in government actions or government actions as a result of the reluctance of the private sector or business actors to follow the wishes of the government or officials (Chandera & Indrianto, 2022). These actions often harm citizens, threaten their security, or are associated with a decrease in the citizens' wealth. Therefore, there must be efforts to prevent or arrest so as not to carry out "revenge" against government officials in the form of government authority that can harm citizens (Kesuma, 2020).
As stated in the Explanation section, to provide guaranteed protection to every citizen, Law Number 30 of 2014 concerning Government Administration allows citizens to submit objections and appeals against a decision or action to Government Agencies or Officials or High Officials concerned (Fauzani & Rohman, 2020). Apart from that, citizens can also file lawsuits against decisions or actions of government agencies or officials to the State Administrative Court because Law Number 30 of 2014 concerning Government Administration is the material law of the State Administrative Court system.

Thus, there is a paradigm shift after the promulgation of Law Number 30 of 2014 concerning Government Administration. There has been a shift in the authority to adjudicate unlawful acts (torts) committed by the Government to the State Administrative Court, which previously existed. Previously, it was the authority of the General Court. The impression of a change in paradigm as stated in the Supreme Court Circular Letter Number 4 of 2016, which in Dictum E of the State Administrative Chamber Section number 1 states a change in the paradigm of speaking at the State Administrative Court after the enactment of Law Number 30 of 2014 concerning Government Administration (Government Administration Law) (Abrianto et al., 2020). The competence of the State Administrative Court is: a) Has the authority to adjudicate cases in the form of lawsuits and petitions; b) Has the authority to adjudicate unlawful acts (torts) committed by the Government, namely unlawful acts committed by government power holders (Government Agencies or Officials) which are usually called onrechmatige overheidsdaad (OOD).

Furthermore, based on Article 2 of the Supreme Court Regulation no. 2 of 2019 dated 9 August 2019 concerning Guidelines for Settlement of Disputes on Government Actions and the Authority to Adjudicate Unlawful Acts committed by Government Agencies or Officials (Onrechtmatige Overheidsdaad) (Supreme Court Regulation Number 2 of 2019), cases of unlawful acts committed by Agencies or Government Officials (Onrechtmatige Overheidsdaad) are the authority of the State Administrative Court.

However, in practice, justice seekers are not fully able to obtain justice when resolving cases of unlawful acts committed by the Government in the State Administrative Court due to several things, such as the existence of special administrative requirements in the State Administrative Court, limitations on compensation, the authority to adjudicate and limitations on power. as well as the implementation of state
administrative court decisions (Faga et al., 2020). These limitations force justice seekers to seek resolution through general justice if unlawful acts are committed by the Government (Nail, 2022).

However, ironically, citizens' opportunities to obtain justice often create loopholes that citizens or government officials can misuse as an excuse to find reasons for improvement or a way to stall for time, thereby violating the principle of legal certainty. Based on the problems found, this is how people seeking justice can obtain a resolution for government actions not based on the law to be examined in civil courts to fulfill justice while maintaining legal certainty. However, resolving the problem of unlawful acts, ensuring a sense of justice, and achieving legal certainty can also be carried out quickly and easily. This research will discuss two research objectives, namely analyzing the applicable laws and regulations in adjudicating unlawful acts committed by the Government and why civil courts have the authority to try cases of unlawful acts committed by the Government.

2 THEORETICAL FRAMEWORK
2.1 THEORY OF UNLAWFUL ACTIONS BY THE GOVERNMENT

The rules for unlawful acts are contained in Article 1365 of the Civil Code, which reads as follows: Every unlawful act that brings loss to another person requires that the person, because of his fault in causing the loss, compensate for the loss. Based on the rules in Article 1365 of the Civil Code, the following elements of Unlawful Acts can be drawn: 1) The existence of an act (against the law/onrechtmatig); 2) There is a loss (Schadel) between the action and the loss there must be a causal relationship (causaliteit verband); 3) Losses caused by errors (schuld) (Asimah et al., 2020).

The jurisprudence of the Supreme Court of the Republic of Indonesia No. 2831 K/Pdt/1996 dated 7 July 1996, stipulates that the plaintiff must prove the existence of the elements of an Unlawful Act according to the provisions of Article 1365 of the Civil Code, namely as follows: 1) An Unlawful Act. The defendant's actions are unlawful; 2) Losses. There are losses caused to the plaintiff; 3) Errors or Omissions. There was an error or negligence on the part of the defendant; 4) Causal Relationship. There is a causal or causal relationship between the victim's losses and the mistakes or actions committed by the perpetrator.
Acts against the law can be carried out by authorities or, in this case, the government. In the teachings of *onrechmatige overheidsdaad*, or unlawful acts by the government, the view is focused on the perpetrator of the violation. In other words, this teaching will review whether the government's actions or actions, both explicit and non-assertive, which cause harm to individuals, are unlawful.

Unlawful acts by the government have a different meaning from abuse of authority. According to the provisions of Article 17 of Law Number 30 of 2014 concerning Government Administration, government agencies or officials are prohibited from abusing their authority. This prohibition includes a prohibition on exceeding authority, a prohibition on mixing authority, or a prohibition on acting arbitrarily.

Government bodies or officials are categorized as exceeding authority if decisions or actions taken exceed the term of office or the time limit for the authority to apply, beyond the area where the authority applies, or contrary to the provisions of laws and regulations. Government bodies or officials are categorized as mixing authority if the decisions or actions taken are outside the scope of the field or material of the authority given or conflict with the objectives of the authority given. Government bodies or officials are categorized as acting arbitrarily if decisions or actions are taken without any basis of authority or conflict with court decisions that have permanent legal force (Chandera & Indrianto, 2022).

### 2.2 THEORY OF JUDICIAL INDEPENDENCE

What is meant by independent judicial power is the freedom of the courts to carry out their judicial duties. Before explaining further regarding the authority to judge, we will first explain the meaning of judiciary and court. In Law Number 48 of 2009 concerning Judicial Power (Judicial Power Law), there is no specific explanation regarding the meaning of judiciary and court. However, in Article 1 Point 8 of the Judicial Power Law, it is stated that what is meant by a Special Court is a court that has the authority to examine, adjudicate, and decide certain cases which can only be established within one of the judicial bodies under the Supreme Court as regulated in the law. Based on this article, it can be concluded that a court is a place or institution that has the authority to examine, try, and decide on a particular case (Abrianto et al., 2020). The definition of *justice* is a process carried out in court that is related to the task of examining, deciding, and adjudicating cases.
The theory of independent judicial power adopted by Indonesia is based on Article 24 of the 1945 Constitution, which reads as follows: 1) Judicial power is independent power to administer justice to uphold law and justice; 2) Judicial power is exercised by a Supreme Court and subordinate judicial bodies in the general court, religious court, military court, state administrative court, and by a Constitutional Court; 3) Other bodies whose functions are related to judicial power are regulated by law (Maksum, 2020).

3 METHOD

This research will use socio-legal research methods, namely legal studies, legal science, and other social sciences. This interdisciplinary approach combines all aspects of the perspectives of social sciences and legal sciences into one approach. Socio-legal methods cover all approaches to law, legal processes, and legal systems by combining approaches included in the social sciences. This method combines knowledge, skills, and forms of research experience from several scientific disciplines to overcome the theoretical and methodological limitations of the studied scientific disciplines.

Based on socio-legal methods, research will explore the problems in this research topic by focusing on studying certain legal norms or doctrines and looking more fully at the context of these norms or doctrines. The first thing to do is conduct a doctrinal study or normative legal research and then combine it with a social approach. Normative legal research is based on the analysis of several legal principles and legal theories as well as statutory regulations that are appropriate and related to the problems in this research. Normative legal research is a scientific research procedure and method to search for the truth based on the logic of legal science from a normative point of view. Meanwhile, the problem approach used in writing this research consists of 3 (three) approaches, namely the statutory approach, the conceptual approach, and the comparative approach.

*Legal material* is the primary material that will be used as a reference or basis for writing this research. The legal material in writing this research consists of 3 (three) parts, namely primary, secondary, and tertiary legal material. Primary legal materials are legal materials that are authoritarian, meaning they have authority. Primary legal materials include statutory regulations, official records or minutes in making legislative regulations, and judges’ decisions. Secondary legal materials are legal materials that explain primary legal materials. Secondary legal materials used to explain material in primary legal materials come from several types of literature, textbooks, legal journals, scientific
essays, and other books that are directly related to the theme of this research writing. Lastly, tertiary legal materials are legal materials that provide instructions and explanations for primary and secondary legal materials. This legal material is a tool in writing this research because tertiary legal material can be in the form of a legal dictionary directly related to this research.

The data analysis technique in this research uses the deduction analysis method, namely an analysis method by analyzing the laws and regulations relating to the problem (problem identification) contained in this research and then correlating them with several principles and theories that form the basis or research tools. Analysis in writing this research is a step to find conclusions, solutions, and ideal conceptions of the matters discussed.

4 RESULT AND DISCUSSIONS
4.1 LEGISLATION REGARDING UNLAWFUL ACTS COMMITTED BY THE GOVERNMENT IN INDONESIA

Acts that violate the law by government agencies or officials (onrechtmatige overheidsdaad) are government actions and, therefore, fall under the authority of the state administrative court based on the Government Administration Law. In Supreme Court Regulation Number 2 of 2019, it is regulated that government actions are actions of government officials or other state administrators to carry out or not carry out concrete actions in the context of administering government (Chandranegara, 2017).

Furthermore, the Supreme Court Regulation stipulates that disputes over government actions arise in government administration between citizens and government officials or other state administrators as a result of government actions (Fadillah et al., 2023). What is meant by a dispute over an unlawful act by a government agency or official (onrechtmatige overheidsdaad) is a dispute that contains a demand to declare the action of a government official as invalid or void or does not have binding legal force along with compensation following the provisions of the regulations legislation.

The Supreme Court Regulation emphasizes that cases of unlawful acts by government bodies or officials (onrechtmatige overheidsdaad) fall under the authority of the state administrative court. Acts that violate the law by government bodies or officials (onrechtmatige overheidsdaad) are government actions. The State Administrative Court (PTUN) has the authority to adjudicate disputes over government actions after taking
administrative measures as intended in the Government Administration Law and Supreme Court Regulation Number 6 of 2018 concerning Guidelines for Resolving Government Administrative Disputes After Taking Administrative Efforts (Faiki & Azhari, 2023).

If statutory regulations specifically regulate administrative measures, the authority to adjudicate disputes over government actions is the State Administrative High Court (PT TUN) as the court of first instance. Furthermore, public members can submit a written complaint against government action to the competent court stating the reasons: a) contrary to statutory regulations and b) contrary to the general principles of good governance.

The lawsuit in question is submitted no later than 90 (ninety) days after government administrative bodies or officials carry out the government action. As long as members of the public take administrative measures, the time limit is extended until the decision on the final administrative measures is received. The Government Administration Law stipulates that administrative efforts resolve disputes carried out within the government administration environment due to the issuance of detrimental decisions or actions (Sudiarawan et al., 2022). Community members disadvantaged by decisions or actions can submit administrative measures to government officials or superiors of officials who determine or carry out decisions or actions. Administrative efforts consist of a) objections and b) administrative appeals (Abustan, 2023).

Even though the body that decides is within the government itself and is under its influence, in carrying out its duties and obligations, it must always be based on the law and treat every citizen according to their dignity as human beings, without discriminating. This is because one of the elements of the Indonesian Rule of Law is that in carrying out its duties and obligations, it is always based on applicable law, both written and unwritten law (Spaltani et al., 2022).

Fatah (2019), believes that in contrast to procedures in state administrative courts, in administrative appeal procedures or objection procedures, a complete assessment is carried out, both in terms of the law’s application and the policy by the agency that makes the decision. This means that the existence of administrative efforts in the form of objections and administrative appeals in the process of resolving government administrative disputes is expected to be able to maintain and restore harmony in the relationship between the government and citizens who have been harmed by issuing decisions or taking government action, thereby re-creating harmony.
Thus, administrative efforts will be necessary because they can function as legal protection, just like administrative justice. The Government Administration Law regulates that government agencies or officials have the authority to resolve objections to decisions or actions determined or carried out submitted by members of the public. Decisions can be objected to within a maximum of 21 (twenty-one) working days from the announcement of the decision by government agencies or officials (Putrijanti, 2021). The objection in question is submitted in writing to the government body or official who made the decision.

Government bodies or officials resolve objections no later than ten working days. If the government body or official does not resolve the objection within the said time, the objection is deemed to have been granted. Furthermore, if community members do not accept the resolution of objections by government agencies or officials, community members can submit an administrative appeal to superior officials. Decisions can be submitted for administrative appeal within ten working days of receiving the objection decision (Purnomo et al., 2020).

Administrative appeals are submitted in writing to the superior official who made the decision. Government bodies or officials complete administrative appeals no later than ten working days. If the government agency or official does not resolve the administrative appeal within the intended period, the objection is deemed to have been granted. If community members do not accept the resolution of administrative appeals by superior officials, community members can file a lawsuit with the State Administrative Court (Purnomo et al., 2020).

This is in line with Supreme Court Regulation Number 6 of 2018 concerning Guidelines for Resolving Government Administrative Disputes After Taking Administrative Efforts, which regulates that the State Administrative Court (PTUN) has the authority to receive, examine, decide, and resolve government administrative disputes after taking administrative efforts.

According to Fatah (2019), the procedural process in state administrative courts has the same principles as in general courts. However, several things are applied explicitly in state administrative courts following the Government Administration Law, namely as follows:

1. Article 55 states that filing a lawsuit is limited by a period of 90 (ninety) days from the time the State Administrative Decree (KTUN) being sued is issued
or announced by a State Administrative (TUN) body or official or from when it is received/known by the plaintiff;

2. Article 62 paragraph (1) states that there is a dismissal procedure, namely the authority of the Chair of the State Administrative Court (PTUN) to decide by stipulation that the lawsuit is not accepted because it does not meet the specified requirements;

3. Article 63 states that it is known that there is a preparatory examination before the subject of the dispute is examined at trial to complete/rectify unclear claims;

4. It is known that there are 3 (three) case examination procedures, namely as follows: a) Article 62 paragraph (4) concerning short proceedings, namely specifically for examination of opposition to dismissal decisions; b) Article 98 and Article 99 regarding fast proceedings, namely if there is a plaintiff's interests that are urgent enough and requested by the plaintiff, then the dispute will be examined in a fast proceeding with a single judge; c) Ordinary procedure, namely the case examination process through the regular examination flow which previously continued to go through a preparatory examination first. For this ordinary event, the person examining the case is a panel of more than one and an odd number of judges;

5. Article 72 states that in state administrative courts, there is no Verstek decision, but the judge has the authority to summon the Defendant through his superior;

6. There is no counterclaim (counterclaim) from the Defendant against the plaintiff.

The extraordinary things that apply in general justice include a mediation process before the judge examines the subject matter of the case. In Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court, it is regulated that mediation is a method of resolving disputes through a negotiation process to obtain agreement between the parties with the assistance of a mediator. Mediation is a method of peaceful dispute resolution that is appropriate and effective and can open more comprehensive access for the parties to obtain a satisfactory and fair resolution.

All civil disputes submitted to the District Court, including cases of resistance (verzet) to the verstek decision and resistance of litigants (partij verzet) or third parties
(derden verzet) to the implementation of decisions that have permanent legal force, must first seek resolution through mediation unless otherwise specified. We do not find this mediation procedure when litigating at the State Administrative Court (PTUN).

Regarding changes in authority in adjudicating cases of unlawful acts by government bodies or officials (onrechtmatige overheidsdaad), when Supreme Court Regulation Number 2 of 2019 comes into force, then:

1. Cases of unlawful acts by government bodies or officials (onrechtmatige overheidsdaad) which are submitted to the District Court but have not yet been examined shall be delegated to the State Administrative Court (PTUN) following the provisions of statutory regulations;
2. For cases whose administrative efforts have been specifically regulated at the time the Supreme Court Regulation was promulgated, have been delegated by the District Court to the State Administrative Court (PTUN) and have not been examined by the State Administrative Court (PTUN), the case files are transferred to the competent State Administrative High Court (PTTUN);
3. In cases of unlawful acts by government bodies and/or officials (onrechtmatige overheidsdaad), which the District Court is examining, the District Court must declare that it has no authority to try.

4.2 CONTROVERSY OVER THE ABSOLUTE COMPETENCE OF THE COURTS IN LAW VIOLATIONS COMMITTED BY THE GOVERNMENT

The government is a public legal entity. Based on public law, the government is an office organization or collection of state instruments, which includes government organs. Then, based on civil law, the state is a collection of legal entities within which there is a government body. The government carries out acts or legal actions of government bodies, both humans and private legal entities, which carry out legal association traffic (Faiki & Azhari, 2023).

The Supreme Court issued Supreme Court Regulation (PERMA) Number 2 of 2019, where Article 2 paragraph (1) confirms that "Cases of unlawful acts committed by Government Agencies or Officials (Onrechtmatige Overheidsdaad) are the authority of the State. State Administrative Court", and Article 11 reaffirms that "In the event of unlawful acts committed by Government Agencies or Officials (Onrechtmatige Overheidsdaad) which the District Court is examining, the District Court must declare
that it has no authority to adjudicate", while the Circular The Supreme Court (SEMA) Number 2 of 2019 states that "disputes that are civil in nature or arise as a result of acts of default by the authorities remain the absolute authority of civil justice within the scope of the General Court".

In Law Number 30 of 2014 concerning Government Administration, what is meant by legal subjects is that Government Bodies or Officials are elements that carry out Government Functions, both in the government and other state administrators. Citizens are individuals or bodies of civil law entities related to decisions or actions (Putrijanti, 2021).

To explain what is meant by a government deed, it can be seen from a linguistic perspective. A government deed consists of "deed" and "government". The word "deed" means something done (completed) or action. Thus, government actions can be categorized as government actions. Meanwhile, the definition of government can be seen from a broad and narrow understanding. In a broad sense, government is all affairs carried out by the state to carry out the welfare of its people and the interests of the state itself, which can include executive, legislative, and judicial duties (Purnomo et al., 2020). In a narrow sense, the government includes implementing functions that carry out government (executive) tasks, which can be carried out by the cabinet and its apparatus from the same central to regional levels (Rumesten et al., 2023).

Lawsuits regarding unlawful acts committed by the government originate from individuals who feel their rights and interests have been violated or feel that their assets have been reduced or lost due to the government’s actions. Therefore, government actions that violate individual rights or interests also violate the law regarding property (Agustina, 2018). Therefore, Sudikno Mertokusumo concluded that unlawful acts carried out by the government violated the rights or interests of individuals so that even though one of the parties was the ruler or the government, it became part of civil law (Putrijanti, 2021).

Teachings about unlawful acts are no different from teachings about unlawful acts in general, which are about social balance. In general, teachings about unlawful acts are viewed from the perspective of the party who suffers the loss. This view of unlawful acts carried out by the government is directed at the government as the perpetrator. It is necessary to consider whether the balance of society is disturbed due to losses incurred due to violations of these interests (Abrianto et al., 2020).
Based on this, it can be concluded that in the event of an unlawful act committed by the government, it can be viewed from 3 (three) points of view, namely: 1) the point of view of the act, 2) The government is the party that commits unlawful acts. The culprit, and 3) the legal consequences of his actions are against the law. What is meant by legal consequences, according to R. Soeroso, are the consequences of an action carried out to obtain the consequences desired by the perpetrator and regulated by law. In short, legal consequences are the consequences of a legal action (Faiki & Azhari, 2023).

In the case of unlawful acts committed by the government, it is necessary to prove that an act or action carried out by the government in carrying out its duties constitutes a violation of the interests of citizens. It is also necessary to know whether the consequences of the violation are detrimental to the institution or citizens, whether it affects themselves or the victims' property (Simanjuntak, 2019).

According to Maksum (2020), state or government administrators, in carrying out their duties, always carry out actions, namely all actions that are active or passive, which cannot be separated from the power attached to them because they are derivatives of the use of their power official duties. Government acts can be classified into ordinary and legal acts, including civil and public law. This action is realized in 3 functions, namely: a) Establishing legal regulations in the material sense, namely provisions that are under the law which have general binding force, and making provisions (beschiking) that are concrete, individual, and conditional; b) Carrying out the government in state life in order to achieve goals; c) Carrying out judicial functions.

These three actions need to provide protection for citizens and the State or Government administration. Limited protection for citizens is provided if the government's actions cause harm to the citizens of that country. Usually, citizens must be given legal protection against state administration attitudes that are against the law (onrechtmatige overheidsdaad) (Asimah et al., 2020). Maksum (2020), explains the criteria regarding whether an action by the government or authorities constitutes a valid law or is against the law by referring to the position of the act based on the decision of the Supreme Court Number 838 K/Sip/1970 dated March 3 of 1971, which was later condensed into Supreme Court Circular Letter (SEMA) No. MA/Pemb/0159/77 dated February 25, 1977, are as follows: a) Must be measured based on applicable law and formal regulations; b) Must be measured by propriety in society which must be obeyed by the authorities; c) The assessment of socio-economic factors (from cultivators and
owners) is the full authority of the Regional Head as governor, excluding the authority of
the court to assess them, unless this authority is exercised in a way that violates statutory
regulations or violates statutory regulations.

As explained above, Chandera & Indrianto (2022), conclude that unlawful acts committed by the government are violations of individual rights or interests so that even though one of the parties is the government, they are part of civil law. To see the government's actions, you can pay attention to the differences between public and civil law. Bellefroid said that public law regulates the State, namely regulating a) How state bodies carry out their duties, b) Legal relations held between the State as a government and individuals, and c) Legal relations held between each state body (Sudiarawan et al., 2022).

Historically, the term unlawful acts by the authorities (onrechtmatige overheidsdaad) was first known through Otemann's arrest on November 20, 1924. The main issue in this case is regarding efforts to apply for permits to export goods abroad. In attempts to obtain an export permit, the relevant agency did not grant it. The court of first instance and appeal as judex facti then declared Ostermann's lawsuit unacceptable. However, Hoge Raad, as judex iuris, granted the lawsuit because if the action violates a statutory regulation, it can be considered that the action is an unlawful act, regardless of whether the violated regulation is in the field of public law or civil law, as well as violations of unlawful law are also said to be committing unlawful acts according to Article 1365 of the Civil Code (Jannah & Fatmawati, 2022).

Seeing this, unlawful acts by the authorities are an extension of the concept of unlawful acts (onrechtmatige daad). Therefore, the provisions governing onrechtmatige overheidsdaad continue to use Article 1365 of the Civil Code. There are several elements in the formulation of articles on unlawful acts regulated in Article 1365 of the Civil Code, including: 1) there must be an act; 2) the act is unlawful; 3) the perpetrator must be guilty; 4) the action causes losses; and 5) there is a causal relationship between the action and the loss.

The form of compensation for losses due to unlawful acts, descriptively, is not regulated in the Civil Code. Therefore, the rules for compensation for losses analogously use those for compensation due to default as regulated in Articles 1243-1252 of the Civil Code. Moegni Djodjodirjo thinks that Article 1365 of the Civil Code provides for the possibility of several types of prosecution, namely compensation for losses in the form of
1) Money, 2) Compensation for losses in equivalent form or returning the situation to its original state, 3) Statement that the act committed is unlawful; 4) Prohibition of acting; 5) Eliminating something that is held against the law; and 6) Announcement of a decision regarding something that has been corrected (Fatah, 2019).

The term "acts", as referred to in onrechtmatige overheidsdaad, can be equated in meaning with the terms "government acts", "state administration acts", and "government acts". Next, the term "government action" will refer to the "action" element as intended in the concept of onrechtmatige overheidsdaad to make writing easier. What is meant as a government action (Bestuurshandelingen) must be distinguished from the actions of individual officials (position holders) (outside of their official functions) in social traffic. This is because determining the location of legal responsibility for claims for compensation for losses incurred by government actions is based on the theory of responsibility, namely official responsibility (faute de service) and personal responsibility (faute de personille) (Birnbach, 2017).

If an act is carried out within the competence and capacity of a government official, then the government bears responsibility. Purnomo et al., (2020), mentioned the elements that must be fulfilled in order for an action to be categorized as government action or deed, namely: a) The action was carried out by government officials in their position as rulers or as government equipment (bestuursorganen) with their initiative and responsibility; b) The act is carried out in the context of carrying out government functions; c) The action is intended as a means to give rise to legal consequences in the field of administrative law; d) The act in question was carried out in the context of maintaining the interests of the state and the people.

In theory, government actions can be divided into two: actual actions (Feitelijke Handelingen), which can also be called material actions, ordinary actions, or factual actions, and legal ones (Rechtshandelingen). Actual 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 (Bergling et al., 2008).

Legal actions carried out by the government as a public legal entity have two dimensions, namely private legal actions (privaatrechtelijke rechtshandelingen) and actions in public law (publiekrechtelijke rechtshandelingen). Private legal actions are government legal actions based on civil or private law. Public legal actions are government legal actions that are based on public law. It should be noted that even when
carrying out private legal actions, the government's aim is still in the public interest and the benefit of society.

The concept of onrechtmatige overheidsdaad contains the substance that a government action that violates the law will result in liability for the losses caused by that action. Indeed, there is debate about whether government actions subject to public law can be prosecuted within a private law framework. Regarding this matter, citing the opinion of E. Utrecht, the government's actions as an administrator of the general welfare are: "Like all other legal subjects, administration is also subject to civil (private) law, which I can call ordinary law (gemenrecht; Hamaker, Scholtern) in order to carry out (a division of its duties, the administration can also, like all other legal subjects, use the legal relations used by other legal subjects, for example, the money regulations contained in the B.W regarding buying and selling, renting, and so on" (Martel, 2011).

According to Soetojo, even though the authorities carry out these actions in the public domain; as a result, they cause losses or violate people's private property rights, then the authorities can be sued for committing unlawful acts. However, the next question that arises is regarding when can a government action be said to be "unlawful"? Before 1919, the meaning of "violating the law" was only interpreted narrowly, namely only as violations of applicable laws and regulations (Spaltani et al., 2022).

This narrow interpretation was no longer followed by the standard Arrest decision dated January 31, 1919, in a case known as the Drukkers Arrest or Lindebaum v Cohen case. In the decision regarding this case, the judge interpreted "unlawful" actions broadly, where the action is considered unlawful not only if the action violates written law but also if the action: 1) Violates another person's subjective rights; 2) Contrary to the legal obligations of the maker; 3) Contrary to good decency; and 4) Contrary to the decency that exists in society towards oneself or other people's things (Firdaus et al., 2021).

In the Stroop Arrest dated June 29, 1928, Hoge Raad argued that the actions of the authorities (government) can only be declared unlawful as long as they conflict with written law, violate other people's rights, or conflict with the legal obligations of the maker but do not constitute an act of violation law if it violates unwritten legal provisions (Sundari et al., 2022). The Arrest states that “unwritten legal norms cannot be applied to the actions of the authorities because the prohibition against violating the norms of decency in society only applies in interactions between fellow citizens” (Parker, 1952).
In short, criteria/measures based on good morality and decency, as referred to in Drukkers Arrest, are not used in assessing unlawful acts by the authorities (government). However, in subsequent developments, the jurisprudence issued by Hooge Raad, which emerged later, argued that the norms of decency also applied to rulers. In the period after the proclamation, the general judiciary continued to declare that it had the authority to handle claims against the government. Three things are raised inconsistently: first, it still refers to Article 2 of the *Reglement op de Rechterlijk Organisatie* (RO) as the legal basis; secondly, it states that the ground is that there is no state administrative court; and third, it referring to jurisprudence (Simanjuntak, 2019).

The development of onrechtmatige overheidsdaad in Indonesia can be dynamic, where several jurisprudence provide different criteria regarding when government action is said to have violated the law. There are at least two jurisprudence that can illustrate this shift in standards. The first is the Supreme Court's decision in the Kasum case (Decision No. 66K/SIP/1952), which confirms that an unlawful act occurs when there is an arbitrary action by the government or an activity that lacks sufficient public interest factors. The second is the Supreme Court's decision in the Jasopandojo case (Decision No. 838K/SIP/1970), where in this case, the Supreme Court held that the criteria for onrechtmatige overheidsdaad are the formal laws and regulations in force, community etiquette which the authorities must obey.

In 1986, with the promulgation of Law Number 2 of 1986 concerning General Courts and the National Administrative Court Law, the basis for the authority of the general court to adjudicate onrechtmatige overheidsdaad cases was Article 50 of the General Courts Law linked to Article 4 in conjunction with Article 1 number 4 of the National Administrative Court Law. Article 4 of the National Administrative Court Law explains that the State Administrative Court (PTUN) is one of the implementers of judicial power for people seeking justice regarding state administrative disputes. *State administration disputes* are defined as disputes arising in state administration between individuals or civil legal entities and state administration bodies or officials, both at the central and regional levels, as a result of the issuance of State Administrative Decrees, including employment disputes based on statutory regulations.

Thus, the competence of the National Administrative Court is to examine, decide, and resolve disputes arising from a National Administrative Decree, as well as claims for compensation for damages due to such National Administrative Decree, becoming the
competence of the National Administrative Court based on Government Regulation No. 43 of 1991 concerning Compensation and Procedures for Its Implementation in the National Administrative Court (PP 43/1991). In the general explanation of the National Administrative Court Law, it is also explained that administrative disputes or lawsuits against the government that do not fall within the competence of the state administrative court and do not include the competence of the military state administrative court become the competence of the general court.

The consequence of the construction of the authority of the National Administrative Court as described in the National Administrative Court Law is that there are two types of accountability systems. Lawsuits against National Administrative Decisions issued by the government that cause harm to citizens (individuals or civil legal entities) are filed through the National Administrative Court, while for government actions that cause damage to citizens, both caused by National Administrative Decrees and the government's factual actions (feitelijke handelingen) legal efforts that can be taken are channeled through the general court (district court) based on unlawful acts by the authorities (onrechmatige overheidsdaad).

Bearing in mind that cases of claims for unlawful acts by the government (onrechmatige overheidsdaad) are the competence of the general court in civil terms, formally procedurally, of course, the procedural law used in this is civil procedural law, namely the Het Herziene Indonesian Reglement (HIR) or the updated Indonesian Reglement S.1848 No. 16 jo. S.1941 No.44, Rechtsreglement Buitengewesten (RBg) or Regional Reglement Overseas, S. 1927 No.227, Book IV of the Civil Code, Law Number 20 of 1947 concerning Judicial Review Regulations for Java and Madura Regions, and so on.

One of the significant differences between civil procedural law and state administrative procedural law is regarding verstek decisions. Civil procedural law has regulations for verstek decisions based on Article 125 HIR / Article 149 RBg. Meanwhile, in the state administrative procedural law, which refers to the State Administrative Court Law, there is no known verstek decision. In cases of lawsuits against unlawful acts by the government, the verstek mechanism allows the government party to be defeated if they are not present at the first hearing. The civil procedural process also requires mediation to be carried out before proceeding to the legal response process.
The obligation to carry out mediation before 2014 is regulated in Article 4 of Supreme Court Regulation Number 1 of 2008. This article states that except for cases resolved through commercial court procedures, industrial relations courts, objections to decisions of the Consumer Dispute Settlement Agency, and objections to decisions of the Supervisory Commission Business Competition, all civil disputes submitted to the Court of First Instance must first be resolved through peace with the help of a mediator.

Referring to these provisions, in disputes over unlawful acts by the government, mediation must be held between the government as the defendant and individuals or legal entities as plaintiffs. Apart from differences in settlement forums, the number of compensation claims between losses resulting from the issuance of State Administrative Decrees that are sued at the State Administrative Court and losses that are sued through the general court environment are also different—based on Government Regulation 43/1991 as the implementation of Article 120 paragraph (2) of the State Administrative Court Law, the amount of compensation for the issuance of a State Administrative Decree is limited to a minimum of IDR 250,000.00 (two hundred and fifty thousand rupiahs), and a maximum a lot of IDR 5,000,000.00 (five million rupiahs). Meanwhile, compensation for factual acts that violate the law is not limited in amount, bearing in mind that the provisions refer to Article 1365 of the Civil Code.

Something is interesting about the limitations on compensation in the State Administrative Court, namely regarding compensation if the number of plaintiffs in a lawsuit is more than one person. Limitations on compensation following Government Regulation No. 43 of 1991 certainly limit claims for compensation per lawsuit, not per plaintiff. In practice, the compensation limit is also interpreted as a limit on compensation per person or plaintiff. One decision that reflects this view is Decision No. 06/G.TUN/2002/P.TUN.JPR. In this case, the panel of judges sentenced the Regent of Jayapura as the defendant to pay compensation to the 220 (two hundred and twenty) plaintiffs, amounting to IDR 2,000,000.00 (two million rupiahs) for each plaintiff. In practical terms, the total compensation for this lawsuit is IDR 400,000,000.00 (four hundred million rupiahs). The Makassar High Court and the Supreme Court later upheld this decision.

In practice, civil legal action is often taken after taking legal action at the State Administrative Court in cases related to State Administrative Decisions. A detrimental State Administrative Decision is challenged first at the State Administrative Court. If it
turns out that the plaintiff wins the lawsuit and the official or agency concerned does not implement the decision, disobedience to the decision of the State Administrative Court will be used as a basis for suing for onrechtmatige overheidsdaad to the District Court.

Another reason for carrying out a civil lawsuit after filing a lawsuit at the State Administrative Court is the limitations on claims for compensation, which were mentioned previously. Indeed, it seems quite an injury to justice if compensation arising from issuing a State Administrative Decree is only limited to IDR 5,000,000.00. What if it turns out that the losses incurred exceed this amount? Does the plaintiff then have to bear the remaining losses himself? The Supreme Court's operational guidelines state that if compensation claims exceed the maximum limit in Government Regulation no. 43 of 1991, in legal considerations, the consideration regarding the granting of the request for compensation is limited to Government Regulation no. 43 of 1991, while the remaining compensation claims can be submitted to the General Court. Of course, the legal basis for filing a compensation claim is the existence of onrechtmatige overheidsdaad.

This kind of consideration can also be seen in several decisions of State Administrative Court judges, one of which is Decision No.06/G. TUN/2002/P.TUN.JPR, which was discussed previously. In its considerations, the panel of judges thought that because the losses suffered by the plaintiffs exceeded what had been granted by the Panel of Judges, the panel of judges was of the view that, if necessary, they could be prosecuted in the scope of general justice based on the existence of an unlawful act by the authorities (onrechtmatige overheidsdaad), ex 1365 Civil Code. Observing the practice of civil lawsuits, at least the question will arise whether such a mechanism is ne bis in idem.

Compensation in a lawsuit before the state administrative court is essentially an additional claim that will be granted after the main claim has been made. Article 53 of the State Administrative Court Law states, "A person or civil legal entity who feels that a State Administrative Decision has harmed their interests may submit a written lawsuit to the competent Court containing a demand that the disputed State Administrative Decision be declared null and void valid, with or without claims for compensation or rehabilitation."

In the explanation of Article 53, it is further explained that in contrast to lawsuits before civil courts, what can be sued before the State Administrative Court is limited to one type of primary claim in the form of a demand that the State Administrative Decision, which has harmed the plaintiff's interests be declared null and void or invalid, while
compensation is only an additional claim. This differs from constructing a lawsuit based on Article 1365 of the Civil Code, where the primary demand is to obtain compensation. If a lawsuit is submitted to the State Administrative Court and then proceeds to civil Court, even though it arises from the same incident, the object of the claim is different. The State Administrative Lawsuit is to cancel the State Administrative Decision, while the civil lawsuit is to obtain compensation for damages.

Thus, this is not a ne bis in idem. Even though legally, it does not cause problems, this kind of mechanism makes the process of seeking justice drag on. It should be remembered that the procedural process in general courts is the same as in administrative courts, which takes quite a long time (Ridwan, 2022). This will make it challenging to guarantee legal certainty (rechtzekerheid) and make it difficult to uphold a sense of justice for society.

If it is within the scope of general justice and uses civil procedural law, the execution of onrechtmatige overheidsdaad decisions will also at least cause problems (Gilles, 2000). This execution problem arises if there is no goodwill on the government's part to implement a condemnatory court decision. In situations like this, the question arises regarding what steps the plaintiff can take to force the government to implement the court decision (Tasioulas, 2019). In civil procedural law, there are known attempts to request the execution of a decision by the court based on Articles 195–224 herzien inlandsch reglement (HIR).

Based on Article 195 herzien inlandsch reglement (HIR), if the defeated party is unwilling or neglects to comply with the contents of the decision peacefully, then the winning party can submit a request, either verbally or by letter, to the chairman of the district court to summon the defeated party and warned him to fulfill the decision within the time determined by the chairman, which is a maximum of eight days. Then, if the defeated party still does not carry out the contents of the decision after that period has elapsed, the chairman of the Court orders that the losing party's belongings be confiscated until it is deemed sufficient to replace the amount of money stated in the decision and also add all the costs to carry it out. that decision.

The problem in the onrechtmatige overheidsdaad case is whether state property, goods with a public interest, can be confiscated. Before 2004, based on the provisions of Article 66 and Article 67 of Law Number 9 of 1968 concerning the State Treasury and ICW/S.1864-106 jis S.1925-448, state property could still be confiscated by the court. It
just had to obtain prior permission from the Supreme Court. However, with the issuance of Law Number 1 of 2004 concerning the State Treasury, confiscation of state/regional property became prohibited based on Article 50 of the law. Of course, this provision makes compensation in cases of *onrechtmatige overheidsdaad* utterly dependent on the government's goodwill (because it cannot force compliance with the contents of the decision through confiscatory execution efforts).

The difficulty in obtaining the execution or implementation of the contents of the decision in the *onrechtmatige overheidsdaad* case can be seen in one case, namely between Petamburan residents and the DKI Jakarta government. This case began when 473 heads of families in RW 09 Petamburan, Central Jakarta, were evicted by the DKI Jakarta Provincial Government in 1997. The eviction was for the construction of public housing for residents. In the past, the DKI Jakarta Provincial Government promised rent replacement money as compensation for delays in the completion of the public housing. Each year, the money should have been paid to the residents for IDR 2,000,000.00 (two million rupiah), but the money was never paid.

The construction of the public housing was also delayed for up to five years, and residents who had already been evicted lived homeless. The residents then sued the DKI Jakarta Provincial Government based on Unlawful Actions and won through the Supreme Court Decision at the cassation level in 2005 (MA Decision number 2409/KPDT/2005). However, until now, residents have not received compensation from the DKI Jakarta Government. Execution efforts cannot be carried out considering the provisions of Article 50 of Law No. 1 of 2004.

5 CONCLUSION

Unlawful acts committed by the government can be actions that impact administrative matters or public affairs. This unlawful act will be tried in the state administrative court. Meanwhile, unlawful acts that harm oneself, property, and the wealth of individuals or legal entities must be tried in civil court. Therefore, civil courts have absolute authority to try unlawful acts committed by the government if the government's actions impact the victim's civil case, which harms the person, property, and wealth of citizens. With the development of State Administrative Decrees in Article 87 of Law No. 30 of 2014, concrete action is a form of State Administrative Decree. Thus, lawsuits regarding actual actions, which are *onrechtmatige overheidsdaad*, which
previously belonged to the absolute competence of the District Court, have changed to the absolute competence of the State Administrative Court. With the change in the absolute competence of the onrechtmatige overheidsdaad lawsuit, there are various juridical consequences, namely procedural law changes. Apart from changes to the procedural law, there are changes to the petitum that can be requested in a lawsuit onrechtmatige overheidsdaad when it is submitted to the district court and when it is submitted to the State Administrative Court. Apart from that, the most important thing is the change related to the implementation of decisions or executions, where in the past, when lawsuits onrechtmatige overheidsdaad were the absolute competence of the district court, it depended on the goodwill of the government. However, after switching to the absolute competence of the State Administrative Court, there have been various efforts so that these decisions can be carried out by the relevant government agency (defendant). When the relevant government agency (defendant) does not implement the decision of the State Administrative Court, it can be subject to criminal sanctions.

REFERENCES


