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The Act of Breaking The Law By The Government (Onrecthmatige Overheidsdaad) Which Resulted In A Loss Against The Person/Agency Law

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Abstract: The purpose of this study is to analyze the actions of the government whether legal actions or actions that are not legal action according to legislation, whether the government's actions meet the criteria as feitelijke accompelingan based on the concept of administrative law. Analyze the government actions that resulted in losses to the community both individuals and groups whether the act is unlawful acts committed by the government (onrechmatige overheidssdaad) or whether such action is an act that is protected from legislation.

Keyword: Breaking The Law, The Government, Loss Against

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I. INTRODUCTION

Within the State of law the administration of the state should be based on a good legal arrangement. With the power held by the government to run the government, it should be used to realize the welfare of the people in various aspects of public life and state as mandated by the Law The State of the Republic of Indonesia Year 1945 (hereinafter referred to as the Constitution).

In the preamble of the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia states that:"...then than that to form a Government of the State of Indonesia that protects the entire nation of Indonesia and the entire blood of Indonesia and to advance the welfare umu, educate the life of the nation, and participate in implementing the world order based on freedom, eternal peace and social justice, the independence of the Indonesian nationhood in an Indonesian State Constitution, which is formed in a composition of the Republic of Indonesia that is sovereign of the people based on mere uhana ketuhana, a just and civilized humanity, Indonesian unity, populistity led by the wisdom of wisdom in the deliberations / representatives, and by realizing a social justice for all the people of Indonesia.

States based on law means the means of the State to exercise its power only to the extent provided by applicable law and in the manner prescribed by that law. The state of law rests on the belief that the power of the State must be run on the basis of law.

The power of the president as head of state and the highest holder of governmental power based on the 1945 Constitution provides an illustration that the president has broad powers not only to the exercise of government affairs as executive power (the law), the president is also given the authority to form regulations in the form of regulations and also limited legislation, for example, in the making of a law between the president and the House of Representatives.

The use of government power is basically used to realize the welfare of society welfare (welfae state). The purpose and basis of the State as stated in the fourth paragraph of the Preamble to the 1945 Constitution that "the objectives of the State of Indonesia are, among other things, the intellectual life of the nation and of the general welfare of the people" this provides an affirmation of the purpose and the basis of the State as the duty of the Indonesian government to secure the welfare of its people.

With the broad powers held by the government, the state of law is embraced about the distribution of power as the trias politica teaches about the division of power between the executive power (government), the legislative power, and the judicial power.

The purpose of improving welfare is then realized with the enactment of regional autonomy. The enactment of regional autonomy on the one hand may provide an unfavorable impact due to inter-regional gaps that may be necessary if the division of government affairs is based on the provisions of Article 9 of Law No. 23 of 2014 on regional government (hereinafter referred to as UUPD) that the government affairs consisting of

absolute government affairs, concurrent and general government affairs. Regarding the absolute governmental affairs is the authority of the central government while the affairs of the concurrent government are submitted to the regions as the basis for the implementation of regional autonomy.

Indonesia is a unitary state called eenheidstaat, which is a sovereign and sovereign State whose government is governed by the central government, in the constitution of the Republic of Indonesia, namely in the provision of Article 4 Paragraph (1) of the 1945 Constitution stated that the presideng of the Republic of Indonesia holds the power of government according to the Constitution. Due to the wide area of the State belonging to some provinces, so that regions have local government with a view to facilitate the performance of the central government to the region so that used a principle called the principle of regional autonomy based on the provisions of Article 18 Paragraph (2) UUD 1945. Implementation of regional autonomy in local governments are excluded from governmental affairs which by law are determined as central government affairs, thus in this case raising a relationship of authority between central and local governments.

The local government in the legislation is the Governor, Regent or mayor including also the regional apparatus as an element of local government administration, but in practice also known as the ruling term meaning the person in power (to organize something, govern, and so on) or the holder of power (Great Dictionary of Indonesian Language: 1996).

According to M.A Moegni Djojodirdjo (M.A Moegni: 54) In social life it turns out that government occupies a very special and unique position, even can be said special. Its position is regional and principal.Because its privileged position leads to the mass responsibility of the government for the actions it undertakes in carrying out its government duties more complicated and complicated.It is seen in the development of jurisprudence cases of lawlessness committed by the authorities (onrechtmatige overheidsdaad) as well as in everyday life.

The domain of the ruler is a translation of the term Overheids or Autoreteit (Dutch) and the Administrative Authority (English). The rulers may be interpreted collectively or individually. Collectives are typically personified as officials holding positions and or having certain public authority. Within the provisions of Law No. 51 of 2009 concerning the second amendment to Law No. 5 of 1986 concerning State Administration Courts which gives the title of State Administration or Administrative Body.

Government action in implementing the government can sometimes cause a loss to the community be it people or legal entities. Government actions that sometimes cause harm to the public are government legal actions such as government policies as well as other government actions that for these actions cause diverse consequences to society. In conducting governmental administration the government has an authority to perform discretion in order to launch government tasks.

The government basically has the authority to perform discretion in carrying out government duties such as discretion in the making of regulations, carrying out judicial and government, including on the ways that can be taken in implementing governmental affairs policy. The use of discretion in accordance with its objectives is one of the rights possessed by government officials in making decisions and / or acts based on the provisions of Article 6 Paragraph (2) Letter e jo Paragraph (1) of Law Number 30 Year 2014 on Government Administration (hereinafter referred to as UUAP). However, the freedom to take certain actions by the government has restrictions that do not mean that the government is immune from the law and can not be prosecuted. In practice the development of a theory of unlawful acts committed by the government as the development of onrechtmatige daad actions against the law known in criminal law and civil law.

At the level of practice the authority to do the dikesresi for local government is often contrary to the moral ethics of a government apparatus, this is because on the one hand the discretionary authority to give freedom and flexibility to the head of the region whose goal is to innovate in public services, previously not regulated in regulations or regulations which is as long as it is good for the region. And on the other hand that there is an opportunity to commit irregularities and abuse of authority that lead to unlawful behavior and even an administrative mall will most likely occur.

The regulation of unlawful acts contained in Article 1365 Burgelijk wetboek (BW) has different connotations and arrangements with unlawful acts in criminal law called crime or criminal act and has different connotations and arrangements with unlawful acts by the authorities, so the protection of the law of the community against unlawful acts can be channeled through different means too. The authority of discretion from the government on the one hand also raises some problems about the freedom it has. When the government is said to have committed an act against the law. The government is said to have committed an unlawful act if it is insufficient in its actions to be of interest to the State or in other words if the government has acted arbitrarily. The judge in this case has the authority to consider whether in this case the government has acted for the interest of the State and whether in this case the government does not take any unlawful actions resulting in harm to the community of both individuals and groups.

A. Problem Formulation

Based on the above theoretical framework the authors will raise some legal issues that will be the discussion in this study, namely:

1. How is the Government's responsibility for unlawful acts that result in harm to individuals / legal entities?
2. To what extent is the unlawful settlement by the Government for any loss to a person / legal entity?

B. Theoretical Framework

Division of Power in the Constitutional System

An English philosopher named John Locke once posed a concept in his book Two Treaties on Civil Government (1690), in which Jhon Locke argued about the power of the state divided into three powers: the legislative power (the powers of forming the Law), executive power (power in enforcing the law and prosecution), and federative power (maintaining the security of the State in relation to other States), where the power is separate from other powers (Miriam From the concept of power sharing proposed by John Locke then developed by Montesqieu who comes from france is poured in his book entitled L'Espirit des Louis (the spirit of law). Mesntesqieu in his power divides power into 3 namely legislative power, executive power, judicial power. According to Montesqiue such power must be separate both of the function and the equipment (organs) that organize it.

The theory of retaliation of power then spawned various understandings in various constitutional laws, such as an understanding of the system of checks and balances, the independence of judicial power as an independent power, the delegation of legislative power, executive responsibility to the legislature, the right of the material test and so on.

If we look at the form adopted in the constitutional system in Indonesia we can see that the influence of Baron de Montesquieu triad politics is very strong about the existence of three powers namely, legislative power, executive power, and yudiatif. However, our country does not adhere to the concept of separation of powers proposed by Montesqiueu. In his function, Soepomo in siding BPUPKI in 1945 said that the 1945 Constitution does not embrace the doctrine of trias politics in the art of trias politics by Mostesquie.

This is evident from the 1945 Constitution (Before the amendment) Chapter II of the State Administration Article 5 Paragraph (1) reads "The President has the power to form a law with the approval of the People's Legislative Assembly" this is not in accordance with the concept of Baron de Montesquieu Politics) in which the Legislature makes the law.

II. DISCUSSION

The existence of regulations limiting the actions of government or government bodies which are stipulated in the Law of the State Administration which provides restrictions on the freedom of government exercises an authority which can lead to arbitrariness. The government's unrestricted authority will lead to an authoritarian government which in its tendency will create discretionary principles in the implementation of government.Outside the State Administrative Court, the State of the Government concerned may also be challenged by law before the ordinary judge, since the late nineteenth century no longer accepted the theory of state sovereignty, wishing to see the state as something above the law (hegel, Jelineck) it has now generally accepted the principle that even under the law, the principle is, among other things, the result of a famous theory (in the famous Dutch country of Prof. Krabbe).

Since the law is above any social organization, the state may also be challenged before an ordinary court if it has violated the rule of law or harms the interests of one of the persons under its authority, but even if there is legal recognition above the state, still the government can not be sued by just like that. Some restrictions must be considered. This is because the state becomes an organization that has a special position. The state is the organization that maintains and administers supreme power. In the community the question arises to what extent can the government be sued?

In the 20th century, the government is seen from two angles: the government as the leader of the state (staat overheid) and the government as the fiscus (staat fiscus). The government as the leader of the state performs the actions of the government, while the government as the fiscal party enters into private law act entirely (zulver privaatrectelijke handelingen). Only the government as a fisher can be sued (Utrecht: 206: 1985). In 1919 by Hoge Raad in the Netherlands the decision of 31 January, that included "onrechtmatige daad" was also a "handelen of natelen" the indruist ...togen de zorgvuldighed, welke in het maatschappelijk verkeer betaamt ten aanzien van eens anders person of goed "(the complete formulation after being translated in Indonesian)" makes or does not make (anything), which violates the rights of others, is contrary to the legal obligations of those who perform the rule, contrary to both decency and social association principles of respect other people or goods of others, by this formula the judge is given a very wide opportunity to declare an "onrechtmatige daad" Utrecht :207 : 1985).

In the realm of civil law, unlawful acts (there is a difference in the use of the term among experts) are referred to as onrechtmatige daad listed in Article 1365 (BW) Burgelijk Wetboek, Wirjono Prodjodikoro defines the word onrechtmatigedaad as an act against the law, the meaning of the word " deeds "can be interpreted positively but also negatively, which includes also the thing that people with silence can be said to violate the law because according to law should the person act. Negative acts that are meant to be active are people who are silent, can only be said to do the act of law, if he realized that in silence violate the law then move not the body of a person, but his thoughts and feelings. So the moving element of the notion of "deed" now exists. The meaning of the word "breaking" in the sentence of the act of violating the law in question is active, then according to him the most appropriate word to translate onrechtmetigedaad is the act of violating the law because the act of violating the law according to wirjono prodjodikoro addressed to the law that generally applies in Indonesia and the most customary law (Wirjono Prodjodikoro: 2000: 2). The meaning of the formula adopted in 1919 for the administration of this country was magnified by a decision of Hoge Raad in 1924, the decision dated November 20 in the Netherlands Jurisprudentie, 1925, p. 89 (Ostermann arrest), in this decree Hoge Raad accepts the State responsibility also "Publiekrechttelijke onrecthmatige daden" in general, so whether a violated rule is a private law or a regulation of public law is not an issue (...het handelen of natalen is onrechtmatig door de enkele overtreding van een wettelijk voorschrift ", which means making or does not make it against the law if there is a violation of a legislation.

The concept of "onrechtmatige overheidsdaad" as one of the state's responsibility for unlawful acts by civil law concerning unlawful acts (onrechmatige). The performance or "daad" is "good deeds that are positive or negative, meaning any behavior of doing or not doing". law if the loss arising from the actions of another person is unlawful (onrechmatige), and is the cause (oorzaak) the loss.

The classical definition of unlawful behavior according to Munir Fuady by quoting William C. Robinson, that is (Munir Fuady : 2002 : 2):

a) Nonfeasance, that is to do nothing that is required by law;

b) Misfeasance, which is an act done wrongly, what act is his duty or is an act he has the right to do;

c) *Malfeasance, which is an act done when the perpetrators are not entitled to do so*

The conception of lawlessness (onrechmatigedaad) in the Netherlands before 1919, is considered to be merely a violation of the articles of written law that are identical with "onwetmatige". However, since the case of Lindenbaum versus Cohen in 1919, onrechtmatige daad is not only onwetmatige daad only, but widely (Philipus Hadjon: 1985: 4):*Inbreuk op een anders rech*;

a) *In strijd met sigen rectsplicht*

b) *Strijh met de geode zeden*;

c) *Strijd met de maatshhappelijl.*

According Amarullah Salim, onrechmatige overheidsdaad done with material daad (factual action) the aggrieved party can demand compensation, only in terms of determining whether or not an onrechmatige overheisdaad is not only seen in factual acts committed by the authorities, must also consider the circumstances in which the deed it occurs, whether the violation of the law is unlawful (Amrullah Salim: 157).

Based on the opinion of some experts above it is known that the factual action of the government (feitelijke handelingen) that harms the citizens can lead to a legal effect as an act that is classified into unlawful acts by the ruler (Onrechmatige Overheidsdaad) by matching the act of breaking the law in general in the private field (Onrechtmatigedaad), which are categorized as civil liability under general justice.

Unlawful acts by state administrative bodies / administrators (onrechtmatige overheidsdaad) by jurisprudence are measured by applicable laws and regulations, with propriety in society that the authorities should obey, socio-economic factor assessments (from tenants, from owners) is a supplementary authority to the region as a ruler who does not include the competence of the court to judge it, unless the authority is committed by violating the rules or passing the limits of decency in society which the authorities must pay attention to. Perbuatan melangggar hukum oleh penguasa menurut Mahkamah Agung(Philipus M Hadjon dkk : 302 : 1994)

The first criterion of the "rechmatigheid" act of the authorities according to the Supreme Court is the applicable laws and rules of the form, The second criterion is the propriety to be observed by the authorities "(Circular Letter of the Supreme Court dated February 25, 1977 N / MA / Pemb / 0159/77) , the third Supreme Court affirmed that the act of the authorities policy does not include the competence of the court to judge it.

In the administration of government, the government take actions for the implementation of government processes. Utrecht (Kuntjoro: 1978: 42) gives an example of government action in carrying out government as the "administrative act" of the State. Although some experts use different terms but basically government actions have the same meaning. Government action or in Dutch is called Bestuurhandeling is an action or deed done by equipment in running the government (bestuurs organ) in running the function of government (bestuur functie).(Philipus M Hadjon: 2008:6) argued that "government" is understood by means of two meanings of government functions (governing activities) and "governmental organizations" (collections of governmental units, as subjects of public law, government (government organizations) can perform various

actions or deeds in order to carry out the functions government and any actions or actions of the government have consequences or consequences of actions or acts it undertakes, it's just that all government actions undertaken by the government are always directed to the public interest as the basis for the implementation of government.

Government action should be based on the authority it has and not on power. Of course the use of discretion should not be based on the authority that gives freedom of action for the government apparatus to use discretion and not the power of government. The use of discretion should be based on the authority of the government apparatus. The authority in Dutch is known as bevoegheid, which is always in the concept of public law, especially administrative law which gives birth to government authority (bestuur bevoegheid). In black law dictionary called authority or authority is defined as "*legal power; a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in scope of their public duties*" (Black Law : 133 : 1990)

Power in the true State is the rule of law primarily in the constitution as the supreme law which authorizes the government to act in accordance with the authority granted by law. In the administration of government functions, government action must be based on the authority it has and not on power. The use of authority to discretion by officials must also be based on the need for good governance under the good Governance Principles and not by personal will by government officials.

The government should not refuse to provide services to citizens on the grounds there is no legislation governing it (iura officialibus consila). When there is no legislation, but the norm is interpreted as multiinterpretation, the government can use discretion (Ridwan: 132: 2014).

The word discretion comes from a foreign language discretion, According to the Black law Dictionary, the seventh edition (1999: 479) discretion contains two penegrals. Discretion of bias is defined as a public official's power or right to act in certain circumstances according to personal judgment and conscience. This first sense is often called discretionary power. Discretion also means "the capacity to distinguish between right and wrong, sufficient to make a person responsible for his / her own actions". Then, discretion can also be interpreted as wise conduct and management, cautious discernment, prudence.In the Dutch language discretion is defined as simplicity, caution, silence, awareness to not convey something (S. Wojowasito: 2003: 146)

The term discretion is often found in the realm of law, including in the state administrative law which is also called freies ermessen derived from the word frei, which means free, loose, unbounded words ermessen means to judge, consider, suspect.diskresi is the authority given to do a specific actions. According to the provisions of Article 1 Sub-Article 9 of the Law concerning Government Administration, it is stated that "discretion is a decision and / or action determined and / or performed by government officials to address the concrete problems faced in governing governance in terms of legislation that gives choice, not regulating, incomplete or unclear, and / or stagnation of government ". Pramudi Admosudirjo expresses discretion as a freedom to act or make decisions according to his own opinion, while Nata Saputra understands my discretion as a freedom given to the state administration tools prioritizing the effectiveness of a goal (doelmatigheid) rather than sticking to the law (Sadjijino: 2008: 64) .

Muchsan (Muchsan :1992:13) menjabarkan diskresi sebagai suatu kewenangan yang bersifat bebas yang diberikan kepada pejabat publik karena peraturan perundang-undangan yang menjadi dasar kewenangan memberikan ruang gerak kebebasan utnuk bertindak. Artinya, pejabat publik diberikan kebebasan untuk menetukan sendiri bagaimana mengartikan dari kewenangan untuk menyelenggarakan pemerintahan yang dibebankan kepadanya.

Unlawful acts, or violating the law of course refer to an act contrary to law or legislation. Ruler as the actor who is authorized to perform the functions of one of the Government Bodies, in order not to be arbitrary in carrying out their duties and functions, shall be limited by the rules of law. Administrative law as a law limiting the actions of government apparatus or Government Agency, according to Van Vollenhoven is the Law of the State Administration where it is stated that: "Governmental Entity without the Law of State Administration shall be completely free, because this body may exercise its authority according to his own free will".

In the event that the unlawful act is committed outside the scope of work of the Official performing the act (binnen de kring van zijn bevoegheid / within the course of his duties), the act of violating the law is qualified as the act of the ruler in violation of the law or the act of the government is unlawful (onrechtmatige overheids daad). In this case, civil liability lies with the state. Thus, if for any unlawful act / offense by the government (onrechtmatige overheids daad) it is punishable for payment of compensation, the responsibility for paying the compensation lies with the state. In practice, the process of payment of indemnity in this relationship usually takes a long time, because for the payment of the compensation, the state Cq. The relevant minister must adjust the budgetary provision.

If the State fails to fulfill its obligation to pay within a reasonable period of compensation to the victim from an offensive ruling (onrechtmatige overheids daad) against the state property may be seized for execution. However, based on the provisions of Article 66 and Article 67 of the State Treasury Law (ICW / S.1864-106 jis

S.1925-448 and Act No. 9 of 1968 concerning State Treasury), confiscation of state property can only be done by the court after obtained prior permission from the Supreme Court.

The above description shows that the process of compensation payments in relation to civil liability responsibility for unlawful deeds (onrechtmatige overheids daad) is not a simple and easy process. Existence of Government Official Acts that Did Not Result Cultivation of Civil Liability. As previously described, the condition of unlawful acts set out in Arrest Lindenbaum - Cohen, is cumulative. That is, to be able to claim civil liability all the conditions listed in the Arrest must be met.

III. CONCLUSION

1. The occurrence of Acts Against the Ruling by the Authority can be caused by the use of free freies ermessen authority and the use of such authority without control so tend to be authoritarian in governing the government.
2. Responsibility of the authorities for acts against the law in the civil sector is often qualified as an act of the State in respect of legal construction stating that the State is a legal body, and the absence of explicit provisions stating who has the right to act for and on behalf of the State has a great deal of ambiguity in in the filing of a lawsuit which, according to civil liability for the exercise of government

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