The Concept of Norms of Unlawful Acts in the Renewal of Civil Law Based on Pancasila

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Abstract. After independence, the Republic of Indonesia passed the 1945 Constitution, the enactment of this transitional rule was the basis for the continued validity of the existing laws and regulations at the time the Constitution was enacted. Thus the legal vacuum in society can be avoided. Based on the Transitional Rules of Article II of the 1945 Constitution the fourth Amendment: "All existing state institutions still remain functional insofar as they are to carry out the provisions of the Constitution and no new ones have been held under this Constitution". As a result of such laws, some products of Dutch Colonial law, such as Burgerlijk Wetboek, are valid to the present. Burgerlijk Wetboek which is categorized as an unwritten law is not a law, based on Supreme Court Circular No. 3 of 1963 on the Idea of Considering Burgerlijk Wetboek Not as An Act. The legal consequences of an agreement born of an agreement are desired by the parties because the agreement is made on the basis of the agreement of the parties, while the legal consequences of an engagement born of law are determined by law, a violation of the provisions of the law and causing harm to others, are called Unlawful Acts. The drafting of future laws relating to unlawful acts, the formulation of legal norms may adopt the provisions of Article 1365 of the Civil Code so that the gap between the law and society never occurs.

Keywords: The Concept of Norms · Unlawful Acts · Civil Law Renewal

1 Introduction

One of the elements in human life that serves to regulate deeds is the law. The term law in English is known as "law", in addition to in English the term law is also known in French called "droit", then in German it is called "Recht", Dutch is known as "recht", and in Italian it is called "dirito". In Latin it is called "ius", to express the rules formed by the authorities it is called the law lex, loi, legge in Latin, while in Germany it is called Gesetz and in the Netherlands it is known as wet. Laxity between lex, leges and ius is usually used in the middle ages. In abstract ius, droit, dirito, Recht, recht also refer to the word "right" meaning right [1].

According to Jaap Hage to control behavior (recht als techniek om gedrag te sturen) is a technique of law, but legislation (written law/geschreven recht) is not always above all else (bij recht als techniek om gedrag te sturen hoeven we dus niet per se te denken) [2]. In addition, there is also an unwritten law (ongeschreven recht).

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Law in addition to being seen as a institution regulating human behavior can also be viewed in other forms. In this context, in the language of Marc van Hoecke referred to law as communication [3]. In another view, J.H.P. Bellefroid the laws applicable in the community of society govern the order of that society and base it on the power that exists in that society (stellig recht is een ordening van het maatschappelijk leven, die voor een bepaalde gemeenschap geld en op haar gezag is vastgelegd) [4]. Thomas Aquinas stated that the law is nothing more than a regulation/ordinance of the pedestal for the common good (law is nothing else of reason for the common good) [5]. So the law with regard to human life, in relations between people is based on communication in the form of deeds between individuals aimed at achieving order (rechtsorde) within society.

Civil law in its applicability has a coercive nature (dwingend), but there are also those that are voluntary, coercive, that is, require the law to be implemented, either by doing or not doing [6].

The Civil Code in Book III is specially compiled as a special form of engagement. So in general scholars view an agreement as referred to in book III of the Civil Code as: "an engagement is a legal relationship in the field of wealth, where on the one hand there are rights and on the other hand there are obligations" [7].

After Indonesia became independent, the 1945 Constitution, the Constitution of the Republic of the United States of Indonesia, the 1950 Constitution, and the 1945 Pre- and Post-amendment Constitution generally contained transitional rules. The purpose of enacting this transitional rule is to be the basis for the continued enactment of the existing laws and regulations at the time the Constitution was enacted. Thus the legal vacuum (recht vacuum) in society can be avoided.

Based on the transitional rules in Article II of the 1945 Constitution it reads: "All existing state bodies and regulations are still in force immediately, before a new one is held according to this constitution". As a result of the law, several products of Dutch Colonial law such as the Civil Code, KUHD, KUHPidana, and HIR are valid until now, but without being realized by the Indonesian people, these legal products are not products of Indonesian law itself. Cornelis Van Vallenhoven predicted: "to Speak of the Indonesian language is nonsense, but to speak of Indonesian law makes quite good sense" [8].

Now this must be read in reverse, Indonesia as an independent country has succeeded in building a national language, namely Indonesian, but this success has not been seen in the development of a legal system that until now has not been successfully created by the Indonesian nation itself.

Philosophically and juridically, the existence of the Indonesian legal system may not be doubted, but it remains a question to this day regarding the criteria of the Indonesian national legal system. The existing translations are not made by the legislature as the official body of lawmakers [9].

As long as it is realized that this error has long occurred, for example, the Criminal Code officially only its name has changed from WvS to the Criminal Code under the legal umbrella of Law No. 1 of 1946 concerning Criminal Law Regulations, but every content of the provisions of the articles is still sourced from the Dutch Wvs translated by several legal scholars such as Moeljatno, R.Soesilo, even though the National Legal

Development Agency (BPHN) which in fact all of them are not lawmakers, considering and considering the aforementioned reality, the Supreme Court of the Republic of Indonesia realized this by making a legal breakthrough so that the legal products of the Dutch Colonial heritage could be applied in the context of law enforcement, it was realized that judicial institutions should not interfere with the authority of the legislature as a lawmaking institution.

The translations of Dutch legal products, as well as BPHN, are only used as guidelines for interpretation for the practice of law, especially the Civil Code which is categorized as unwritten law not a law, based on the Supreme Court Circular Number 3 of 1963 concerning the Idea of Considering Burgerlijk Wetboek Not as an Act [10]. Therefore, it is necessary to draft a Civil Law based on Pancasila.

The building of the law based on Pancasila is the draft of Indonesia's National Law in the future capable of protecting and protecting human rights which are the dignity and dignity of Indonesian people.

2 Findings and Discussion

1. The Concept of Norms
   When viewed from the dictionary Indonesian, "norm" has a similar subject matter with the word "rule" even though the two words have different meanings but still refer to one subject, namely rules. "Norms" in the dictionary Indonesian have a meaning as a rule or provision that binds all or as citizens of society; the default rules, the size to determine something. Whereas "rule" in the dictionary means the formulation of principles that become law; certain rules; benchmark; evidence [11].

   In terms of etymology, the word "norm" is derived from Latin while the word "rule" is derived from Arabic. Norms are derived from the word nomos which has the meaning of value and then narrowed down its meaning to legal norms. While in Arabic it is known as the word qo'idah which means measure or measuring value, [12] which is the source of the word rule. Some jurists use both words at the same time (the words norm and rule are considered synonyms). According to Maria Farida, norms are a measure that a person must obey in relation to his fellow man or his environment. Meanwhile, according to Kelsen, the norm is "…… That something ought to be or ought to happen, especially that a human being ought to behave in a specific way" [13].
2. Norms in Unlawful Acts
   Article 1365 of the Civil Code provides for Onrechtmatige Daad, which is translated as "Unlawful Acts" by some experts [14]. In practice, Unlawful Acts have an active or passive nature. It is active, namely if someone does something and because the deed causes harm to others. While passive means if someone does not do something but the consequences of not doing it cause losses to others.

   The notion of breaking the law before 1919 concerns only acts that violate the subjective rights of others or are contrary to the obligations of the maker himself [15]. In other words, Breaking the law is only interpreted as Breaking laws and regulations. The teaching of legism is an influence of that view [16] because it argues that the law exists only within the statute, outside the statute there is no law.

Article 1365 does not regulate the meaning of unlawful acts, it only regulates the conditions that must be met to claim compensation if a person suffers a loss. The conditions that must be met are the existence of an act, the act violates the law, the existence of errors, [17] there is a loss and there is a cause-and-effect relationship between unlawful acts that result in losses [18].

a. Violates the subjective rights of others
   He subjective right of another person is a special right or authority granted or guaranteed by law to a person for his benefit.
b. There is an error (Schuld)
   Mistakes must be wrongdoings or not doing wrong, which can be intentional or negligent. Intentionality is sufficient if at the time of doing the deed or neglecting his obligations he already knows or can think, that the result of his deed will inevitably arise Mistakes in the form of willfulness [19].
c. There are Losses
   Losses from the cause of unlawful acts can be in the form of:

   1). Material losses consist of real losses suffered and expected profits.
   2). Immaterial losses, namely losses in the form of reduced comfort in a person's life, for example due to humiliation, disability and so on, but a person who commits an unlawful act does not always have to provide compensation for the immaterial loss.

d. The existence of a causal relationship between deeds and losses
   As for seeking damages, there is a causal relationship between the Unlawful act and the loss suffered by the Plaintiff. The relationship must be clear in order for it to be proven to be granted.

There are two teachings related to causal relationships, namely:

1). Conditio Sine Qua Non Theory (Van Buri) [20]
   The point of this teaching is this: every problem, which is a condition for the onset of an effect, is the cause of the effect. The application of this teaching causes the liability under article 1365 of the Civil Code to be greatly expanded because acts that are far from the consequences must also be regarded as causes. In practice, to prove there is a causal relationship between deeds and losses cannot be done perfectly but is summed up as the most possible cause.
2). Adaequate Veroorzaking's Theory (Von Kries) [21]
   This theory teaches that actions that should be considered as the cause of the effect that arises are actions that are balanced with the effect. The foundation in determining "balanced deeds" is a feasible calculation, that is, based on common sense, it is reasonable to assume that the act can cause certain consequences.

   The formulation does not provide an explanation of the meaning of unlawful acts, so that in judicial practice in Indonesia it is guided by the Jurisprudence of the Supreme Court of the Republic of Indonesia Number: 3191/K/Pdt/1984 dated February 8, 1986, where it is stated that an act is considered an unlawful act if it

has met 4 (four) criteria, namely: Unlawful Acts must be interpreted as doing or not doing things that are contrary to:

a). Subjective Rights of others.
b). The legal obligations of the offender.
c). Moral methods.
d). The propriety of rigor and prudence (Patiha) in society [22].

3. Pancasila as a Pillar a Legal Renewal

Pancasila is a philosophy or philosophy of the state that contains the noble values of the Indonesian nation, these values in development including the development of the legal field should be applied [23]. Pancasila values are stated in mprs decree No. XX/MPRS/1966, in essence is a view of life, awareness, and legal ideals as well as noble moral ideals which include the psychological atmosphere and disposition of the Indonesian nation which by the Indonesian Independence Preparatory Committee has been purified and compacted on August 18, 1945.

According to Hamid S. Attamimi, Pancasila as the basis and ideology of the state, Pancasila must become a paradigm (frame of mind, source of value, and directional orientation) in legal development, including in renewal.

The birth of laws and regulations that are arranged hierarchically and sourced from Pancasila as the basis of the state does have a juridical connotation, while Pancasila as an ideology can be connoted as a socio-political program where the law is one of its tools and therefore must also be sourced from Pancasila [24]. Mochtar Kusumaatmadja argues that "Law is a tool to maintain order in society. Given its functioning of the nature of the law, it is essentially conservative that is to say, the law is to maintain and maintain that which has been achieved. Such a function is necessary in every society, including the society that is building, because here too there are results that must be maintained, protected and secured. However, a society that is building, which in our definition means a society that is changing rapidly, the law it is not enough to have such a function alone. He must also be able to help the process of changing that society. A coherent view of law that emphasizes the function of maintaining order in a static sense, and emphasizing the conservative nature of the law, considers that the law cannot play a meaningful role in the process of renewal" [25].

There are 2 (two) things behind the emergence of this legal theory, namely: First, there is an assumption that in changing society the law does not play a role or even hinder. Second, in reality in Indonesia, a society that has changed to the direction of modern law [26].

Therefore, Mochtar Kusumaatmadja [27] said that the main point of the purpose of law when reduced to one thing is order which is used as a basic requirement for the existence of an orderly society. The achievement of justice of different contents and measures is another goal of the law, according to society and its era.

Furthermore, legal certainty in the midst of community associations is a form of achieving order, because it is impossible for society to develop the talents and abilities that God has given to him optimally without the certainty of law and

order [28]. In a developing Indonesian society, the function of law is not enough to guarantee certainty and order.

The accentuation of the above context benchmarks shows that there are 2 (two) dimensions as the core of the Theory of Development Law created by Mochtar Kusumaatmadja, namely:

a. Order or order in the context of development or renewal is desirable, even considered absolute;
b. Law in the sense of legal rules or regulations does function as a regulatory tool or means of development in the sense of channeling the desired direction of human activities towards renewal.
   As for the relationship with the function of law that he has stated, Mochtar Kusumaatmadja expressed the definition of law in a broader sense, not only is it the whole of the principles and rules that govern human life in society, but also includes institutions (institutions) and processes (processes) that embody the enactment of these rules in reality [29].

4. The Concept of Unlawful Act Norms in the Renewal of Civil

a. Theory of Strict Liability
   In general, unlawful acts in the law are perpetrators or parties who commit wrong actions, so they are charged with responsibility, namely being obliged to pay compensation for their actions. Legally, guilt is intentional or negligent. However, in law it is known that there is a liaibility without fault or absolute liability (strict liability).

   The definition of absolute responsibility is that legal responsibility is imposed on the perpetrator or party who committed an unlawful act, the charge without seeing the perpetrator or party committing an act that meets the element of guilt or not. The perpetrator or party even in the event of committing an act not intentionally or not fulfilling the element of negligence is still held legally responsible.

   The concept of absolute responsibility is also known as errorless responsibility. The maxim of error here is a mistake in the legal sense. However, it is also possible that the act meets the element of guilt based on morals. Many acts are held responsible for both intentionality and negligence that clash with the interests of other parties, which interests are protected by law, it is a responsibility without legal and moral errors.

   Errors in legal science in general are often considered to satisfy one of the following three points:

   1) There is an element of intentionality, or
   2) There is an element of negligence (negligence, culpa), and
   3) There are no justifying reasons or forgiving reasons (rechtvaardigingsgrond), such as overmacht, self-defense, insane, etc.
      The degree of error of the perpetrator or party who committed the unlawful act is in terms of the severity or lightness of the act, so if you compare

the act based on negligence with the act based on intentionality, the degree of intentional act error is certainly higher. If a party knowingly and intentionally harms others, it means that the party has committed a very serious unlawful act rather than negligence.

However, with the development in human life and the better law enforcement against an unlawful act, then in social facts or das sein shows that the number of cases of intentional unlawful acts is decreasing, and conversely the number of cases of unlawful acts caused by negligence is increasing, this is in line with the increasing number of cases of strict liability.

Unlike an act as intentional, in the history of law, initially it did not accept an omission as an act of breaking the law that stood alone. Countries that adhere to the Continental European system, generally recognize unlawful acts of negligence in the codified legal regulations, as in Article 1365 of the Civil Code.

Then in the Netherlands, in 1919 (after the case of Lindenbaum v. Cohen), acts of negligence (carelessness) in the form of violations of customs and propriety in society, were accepted as part of unlawful acts.

Unlawful acts that contain elements of negligence do have differences with unlawful acts with elements of willfulness. Intentionally, there is an intention in the perpetrator or the party who committed it to harm the victim, or at least be able to know for sure that the consequences of his actions will occur. But in negligence, there is no intention in the perpetrator or the party who committed to cause losses, and even has a desire not to cause losses.

Thus, unlawful acts with elements of willfulness, intention or mental attitude are the main factor, but in negligence, the intention or mental attitude does not exist, but in negligence is the outward attitude and the deed done, without taking into account what is in his mind. The Civil Code through Article 1369 provides for the same, in which in order for legal responsibility to be requested to the owner of the building, it is required that there is an element of error in the form of negligence, namely in the following cases:

1) Maintenance of the building, or
2) Defects in the construction of the building, or
3) Defects in the building arrangement.

So, the obligation to be careful of the perpetrator or a party becomes an element of negligence, this is because if you are not careful, it is known that there will be losses, so that there is an element of negligence that results in unlawful acts.

The risk problem, namely the risk of danger or loss, is one of the important things in negligence, negligence is a risk arising from an attitude that involves inappropriate risks because the risk causes losses. Attitudes that are below these standards are created by law in order to protect the interests of society from harm or harm caused by unfit risks, because it has a difference from unlawful acts intentionally, therefore negligence as a human attitude is not a will (intent) nor an awareness (state of mind) to do.

Such negligence is known to have several levels that have varying legal consequences. Generally, the degree of negligence is as follows:

1) Minor negligence
2) Ordinary negligence, and
3) Gross negligence.

In addition to the difference in the degree of negligence, between the act of negligence and the act of recklessness (reckless, or wilful, or wanton misconduct) there are also differences in the type of each unlawful act.

If the negligence of the perpetrator or the party who committed the act in a state of only lack of attention, incompetence or lack of caution, but in the act of carelessness, the perpetrator is fully aware or presumed of awareness that there will be a loss to the victim, but still does the act. But this act of carelessness is different from an unlawful act by willfulness, because in an act of carelessness, the perpetrator or the party who commits never has the intention of deliberately inflicting harm on others, but he is doing something that he is fully aware of that certain consequences that harm others will occur, in which he does not care about the consequences and still chooses to do so.

b. Responsibility Without Error Legally or Morally

As for the theory that will be applied to cases related to the element of "conceivable" (for see ability), various legal problems will arise when the theory is applied to the following facts:

1) Unimaginable consequences

For example, the victim is indeed the party that can be imagined to be the victim, but what happens is a result or danger that is completely unexpected and never imagined. For example, an unlawful act committed against a person causes the person to suffer a slight injury, which should normally heal the wound. However, unexpectedly, everyone turned out that the victim was a person with sugar disease, so the wound did not heal and even he died. In this case, the death of the person is an unimaginable result. In cases like this, justice demands that the perpetrators of unlawful acts remain fully responsible.

2) Unimaginable way

The consequences that occurred can indeed be imagined, but the consequences occurred in a completely unpredictable way.

3) Unimaginable casualties

It is possible that the consequences can be imagined to occur, but it should only happen to a certain group of people, but what turns out to be a victim is against people who are not included in that group.

3 Conclusion

That any loss of a party caused by unlawful acts, obliges the party who by mistake caused the loss to indemnify. In the regulations, it is explicitly explained that every party

who commits an unlawful contest has a causal relationship between the parties, either the party to the loss or the party who is entitled to receive compensation and also in the regulations every party who commits an unlawful act will give rise to an obligation that can be imposed, meaning that the act can be sued in court.

The concept of Unlawful Act Norms in the Renewal of Civil Law based on Pancasila as stated in MPRS Decree No. XX/MPRS/1966, in essence is the ideal of law and noble moral ideals refers to the definition of the meaning of unlawful acts, then the concept of civil law law related to unlawful acts, should refer to the principles of:

1. Theory of Strict Liability, or b. Responsibility Without Legal or
2. Moral Error (for see ability) Drafting future legislation relating to Unlawful Acts.

The formulation of legal norms can adopt the provisions of article 1365 of the Civil Code so that the gap between the law and the community never occurs, so that in the renewal of the law based on Pancasila can be realized.

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