Actions Under the Law of Agreements

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Abstract. This study aims to find out how action is based on contract law. This type of research is descriptive qualitative by analyzing the literature, the data collection instruments here are in the form of books, journals, and laws and regulations. The results of this study indicate that there is a dispute in the field of contract law, if it is proven that one of the parties committed a breach of contract, then indirectly that party also committed an unlawful act.

Keywords: Action · Regulation · The Law of Agreements

1 Introduction

In legal practice there is still uncertainty in determining between a claim for wanprestasi and a claim for tort in a civil case related to the implementation of the agreement. The cause of this can possibly come from the interpretation of the provisions of Article 1338 of the Civil Code [1].

The open system contained in book III of the Civil Code can be concluded from the provisions of Article 1338 of the Civil Code. By emphasizing the word "all", then the article seems to contain a statement to the public that anyone is allowed to make an agreement in the form and content of anything (or about anything) and the agreement will be binding on those who make it like a law. Or in other words; In matters of agreement, we are allowed to make laws for ourselves. The articles of the Law of the Agreement only apply, if or simply we do not enter into our own rules in the agreements that we enter into [2].

Apart from this, the principles of contract law can be interpreted from the provisions of Article 1338 of the Civil Code above. The principles arising from Article 1338 of the Civil Code can be stated as follows: (1) Consensual principle; (2) The Principle of Freedom of Contract; (3) Personality Principle; (4) The principle of Pacta Sunt Servanda (binding principle as law), where all of these principles are fundamental principles in contract law.

Uncertainty in the practical order of determining a lawsuit for default or an unlawful act in a civil dispute can be caused by the interpretation of the words "…applies as a law…". Even though in a grammatical sense the meaning of "law" in Article 1338 of the Civil Code is not the meaning of the law in the sense of a legal product made by the legislature together with the President, but the meaning from other aspects, for example

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the meaning by using analogy, The word "law" can be analogous to the same meaning as law.

If the meaning of the word "law" as mentioned above can be accepted in the logic and interpretation of law, then can there be a problem if someone who has been bound by an agreement with another person and commits a breach at the same time also commits a tort? This then becomes the initial basis for researchers to raise these issues in a dissertation writing. This research will discuss again the conception of tort as a conception born of an agreement originating from a law into a conception of a tort as a conception also born of an agreement originating from an agreement. This is as a result of the blurring of norms in the provisions of Article 1338 of the Civil Code, especially the meaning of the word "statute" in that article.

The discussion of tort (PMH) in the article uses a statute approach to look at the problems of PMH regulation in the Civil Code, especially in Book III of the Civil Code. Furthermore, a conceptual approach is used to analyze the conceptions of PMH contained in statutory provisions as well as PMH concepts that develop in contract law.

2 Method

This type of research is descriptive qualitative research. With the method of literature review. The research instrument was a literature review taken from books, journals and laws and regulations.

3 Results and Discussion

A. Regulation of Tort in the Civil Code

Classically, what is meant by "acts" in terms of unlawful acts is: (a) *Nonfeasance*, is not doing something that is required by law; (b) *Misfeasance*, is an act done wrongly, which act is his obligation or is an act which he has the right to do; (c) *Malfeasance*, is an act that is done when the perpetrator has no right to do so [3].

In the past, courts interpreted "against the law" as only a violation of the articles of written law solely (violation of applicable laws and regulations), but since 1919 there have been developments in the Netherlands, by interpreting the word "against the law" not only for violations legislation is written solely, but also covers every violation of decency or appropriateness in social life in society. See the decision of the Hoge Raad of the Netherlands on 31 January 1919 in the case of Lindebaum versus Cohen. Thus, since 1919, the actions of onrechmatige daad are no longer intended only as onwetmatige daad [1].

Since 1919, in the Netherlands, as well as in Indonesia, acts against the law have been interpreted broadly, which include one of the following acts [4]:

1. Actions that conflict with the rights of others;
2. Actions that are contrary to their own legal obligations;
3. Actions that are contrary to decency; and
4. Acts that are contrary to prudence or necessity in good social relations.

Actions that conflict with the rights of other people (inbreuk op eens anders recht) are included in one of the actions prohibited by Article 1365 of the Civil Code. The violated rights are the rights of a person recognized by law, including but not limited to the following rights:

a) Personal rights (*persoonlijikheidsrechten*);
b) Property rights (*vermogensrecht*);
c) The right to freedom; and
d) The right to honor and good name.

Some literature mentions several decisions of the Dutch State Supreme Court (Hoge Raad) regarding unlawful acts involving acts that violate the rights of others, including the decision of the Hoge Raad dated March 10, 1972. This decision considers whether the negative consequences of someone's actions are so great so that it can be categorized as an unlawful act. The issue of this case is whether it is illegal to close a watering place with municipal waste by Vermeulen near the garden from Lekkerkerker in Mastwijkerplas, which caused the arrival of birds of prey in large numbers and damaged the landscaping. The Hoge Raad decided that Vermeulen's action was a Tort, taking into account the following matters:

a. Consider the nature and place of the act;
b. The amount of loss suffered;
c. No excuses; and
d. Even though the Defendant had tried to prevent the arrival of the birds, but had failed to prevent it.

In this case, the Hoge Raad decided that the defendant had violated the property rights of other people, so that it was an unlawful act. The decision of the Hoge Raad dated March 10, 1972 was one of the many decisions of the Hoge Raad in the field of acts of nuisance (Hinder, Nuisance) or the environment, including noise (noise) which generally considers acts of disturbance or damage to the environment as such as an unlawful act., because this action causes the other party to decrease enjoyment of one's object, so that the value (price) of the object also decreases.

Actions that fall into the category of unlawful acts if the act is contrary to the legal obligations (rechtsplicht) of the perpetrator. By the term "legal obligation" (rechtsplicht), what is meant is an obligation given by law to a person, both written law and unwritten law. So, it is not only contrary to written law (wettelijk plicht), but also contrary to other people's rights according to law (wettelijk recht). Because of that, the term used for unlawful acts is onrechtmatige daad, not onwetmatige daad.

Actions that violate decency that society has recognized as unwritten laws are also considered unlawful acts. Therefore, if by violating decency there has been a loss for the other party, then the party who suffered the loss can claim compensation based on the unlawful act (Article 1365 of the Civil Code). In the famous Lindenbaum v. Cohen (1919), Hoge Raad considered Cohen's action to divulge company secrets to be considered as an act contrary to decency, so that it could be classified as an unlawful act.

Actions that are contrary to prudence or necessity in good social relations or what is referred to as zorgvuldigheid are also considered as an unlawful act. So, if someone commits an act that harms other people, without violating the articles of the written

law, he may still be charged with an unlawful act, because his action is contrary to the principle of prudence or necessity in society. Obligations in the community are of course not written, but recognized by the community concerned.

Tort (onrechtmatige daad) in civil law are further regulated in Article 1365 of the Indonesian Civil Code or Burgerlijk Wetboek (BW) [5]. Judging from this article, the elements of an act against civil law include a tort, an error, a cause and effect between the loss and the act and the loss. The Tort listed in Article 1365 of the Civil Code (BW) only regulates the form of compensation that is charged to the person who has caused the wrong to the aggrieved party. This compensation arises because of an error not because of an agreement [6].

The foundation for acts against civil law is Article 1365 of the Civil Code (Indonesia), which historically has the same meaning as Article 1401 Burgerlijk Wetboek (old) of the Netherlands. According to L.C. Hoffmann, from the wording of Article 1401, at least four elements can be derived, namely: (1) someone must do the deed; (2) the act must be against the law; (3) the act must cause harm to another person; and (4) the act was due to a mistake that could be harmed to him [7]. Mariam Darus Badrulzaman breaks down this tort into five elements, namely: (1) there must be an act (both positive and negative); (2) the act must be against the law; (3) there is a loss; (4) there is a consequential relationship between the unlawful act and the loss; and (5) there is an error [8].

B. Unlawful Acts or Tort in the Law of the Agreement

Discussion of wanprestatie and unlawful acts is a legal issue in the field of contract law, both academically and practically. One of them is a dissertation written by Suhendro entitled "wanprestatie and Actions Against the Law in Contracts in Indonesia". The dissertation discusses: First, the difference between wanprestatie and tort; Second, the benchmark that should be established by the court to determine the boundary between wanprestatie and tort in the contract [9].

The results of the discussion of the dissertation state that conceptually the principles between wanprestatie and tort must be returned to the "home" of each of these legal institutions. The "house" of wanprestatie is not carrying out contractual obligations, while a tort is not carrying out non-contractual obligations, namely an agreement born from statutory regulations. If there is a conflict between wanprestatie and tort in an event or case, it is resolved based on the principle of lex specialis derogat legi generali [10]. Wanprestatie is a species of the genus of tort. If there is a contractual violation, then that thing is a breach of contract as a species, and consequently acts against the law as a genus must be ruled out.

In addition, the dissertation also mentions the fact that the court through its decisions, especially in the section on considerations, does not have a deep and comprehensive understanding of the meaning of wanprestatie and the tort. As a result, the overlapping understandings regarding default and unlawful acts regulated by Book III in one generic engagement cannot be clarified by the court. The court has not been able to determine benchmarks to determine the boundary between wanprestatie and tort.

The overlapping concepts of PMH and wanprestatie in the practical context originate from the formulation of Article 1338 and the formulation of Article 1365 of the Indonesian Civil Code (KUHPerdata). The connection between the two articles lies in the origin of the engagement. According to Article 1233 of the Civil Code, engagements

originate from 2 (two) sources, namely first, engagements born out of agreements, and secondly, engagements born out of laws [11]. Furthermore, Article 1352 of the Civil Code states, "an agreement born by law, arises from the law as a law or from a law as a result of someone's actions". Furthermore, engagements that are born from laws as a result of human actions are divided into 2 (two), namely engagements that originate or are born from actions that are in accordance with the law (rechtmatig), which are regulated in Article 1357 of the Civil Code and actions that are not in accordance with the law. -laws or acts against the law (onrechtmatigedaad), which are regulated in Article 1365 of the Civil Code.

The Tort as regulated in Article 1365 of the Civil Code, in its development have various definitions. A Tort is defined as an act against the law, an act that is contrary to the rights of other people, an act that results in a loss to another party and of course the party who commits the unlawful act must compensate for the loss to the party who has been harmed. There are also those who interpret the tort as actions carried out outside their authority or beyond their control. Then acts against the law are also interpreted as acts that violate the values of decency, decency values that develop in society and actions that violate the general principles that apply in the field of law [1].

The formulation of norms in Article 1365 of the Civil Code is more of a normative structure than a complete substance of legal provisions. Therefore the substance of the provisions of Article 1365 of the Civil Code always requires materialization outside the Civil Code. The Tort develop through court decisions and through laws. The Tort in the civil code are regulated in book III on engagement. Acts against Indonesian law originating from Continental Europe are regulated in Article 1365 of the Civil Code to Article 1380 of the Civil Code. These articles regulate the form of responsibility for the tort in Article 1365 of the Civil Code initially contained a narrow understanding as the influence of the teachings of legism. This actually contradicted the doctrine put forward by scholars at that time, including Molengraaff, who stated that a tort not only violates the law but also violates the principles of decency and propriety [12].

The provisions of Article 1338 of the Civil Code contain a consensual principle which implies that basically agreements and engagements arise from the moment an agreement is reached. In other words, the agreement is valid if an agreement has been reached on the main matters and no formalities are required. However, there are times when the law stipulates that for an agreement to be valid, it is required that the agreement be made in writing (for example a peace agreement) or with a notarial deed (for example an agreement on the grant of fixed assets). This is an exception. While what is common is that the agreement is valid in the sense of being binding since an agreement was reached on the main points of the agreement. This principle is deduced from the word "legally made agreement" in Article 1338 Paragraph (1) jo. Article 1320 Number (1) of the Civil Code [1]. Because the article does not mention a specific formality in addition to the agreement that has been reached, it can be concluded that each agreement is valid in the sense that it binds the parties, if an agreement has been reached regarding the main matters or matters that are the object of the agreement [2].

By reaching an agreement between the parties an agreement was born, even though the agreement at that time had not been implemented. This also means that when an agreement is reached by the parties, it creates rights and obligations for those who make

it. Based on this principle, the agreement is obligatory, that is, it creates an obligation for the parties to fulfill the agreement. The principle of consensualism does not apply to all types of agreements, it only applies to agreements that are consensual to formal and real agreements that are not yet valid and must be followed by other formal conditions. The consensual principle can be seen in Article 1320 Paragraph (1) of the Civil Code, that one of the conditions for the validity of an agreement is the agreement of both parties [2].

Based on Article 1338 Paragraph (1) of the Civil Code it also contains the principle of pacta sunt servanda, meaning that the parties must comply with and respect the agreement they made because the agreement is a law for both parties. This is confirmed by Article 1338 Paragraph (2) which stipulates that an agreement made by both parties cannot be canceled unilaterally. The principle of pacta sunt servanda relates to the consequences of the agreement. This principle is often called the principle of legal certainty. With this principle it is concluded that there is a prohibition for judges to interfere with the contents of the agreement. In addition, this principle also aims that judges or third parties must respect the substance of the agreement made by the parties as appropriate in a law [2].

The use of the words "…applies as a law…" in the formulation of the norms of Article 1338 of the Civil Code can have a different meaning if these words are interpreted grammatically. Indeed, it can be ascertained that the intent of the formulation of the word "law" is not meant as a law in statutory terms as referred to in Law Number 12 of 2011 [1], who use the term legislation, wetgeving or Gesetgebung. The term legislation (legislation, wetgeving or Gesetgebung) in some literature has two different meanings, in the applicable general dictionary, the term legislation can be interpreted as legislation and legislators. The term wetgeving is translated with the meaning of forming overall laws rather than state laws [1]. Meanwhile, the term Gesetgebung is translated with the meaning of legislation [4].

The definition of wetgeving in Juridisch woordenboek is defined as follows:

1. Legislation is the process of establishing or forming state regulations, both at the central and regional levels.
2. Legislation is all state regulations, which are the result of the formation of regulations, both at the central and regional levels.

Maria Farida Indrati Soeprapto said that: theoretically, the term "legislation", wetgeving or gesetgebung has two meanings, namely: first, legislation is the process of forming or forming state regulations both at the central and regional levels; second, legislation is all state regulations which are the result of the formation of regulations both at the central and regional levels. The definition of legislation in the construction of Law No. 12 of 2011, is a written rule that is generally binding and made by authorized officials through procedures set out in statutory regulations as well.

Legislation itself is one of the forms of legal norms. In the legal and statutory literature, in general there are three (3) kinds of legal norms which are the result of the legal decision-making process, namely:

a) keputusan normatif yang bersifat mengatur (*regeling*);
b) normative decisions governing administrative decisions (*beschikking*);

c) a normative decision called a verdict. In addition to the three forms of legal products above, there is also a form of regulation called "beleids regels" (policy rules). These are usually translated into Indonesian into policy regulations, which is often referred to as quasi regulation.

Then according to Satjipto Rahardjo, laws and regulations have the following characteristics:

a. General and comprehensive in nature which is the opposite of specific and limited properties.
b. Universal. That is, it is formed to deal with future events whose concrete form is not yet clear. Therefore, it cannot be formulated to deal with certain events only.
c. Usually for a statutory regulation includes a clause that contains the possibility of conducting a review.

Thus, it can be said that the meaning of the word "… Applies as a law…" is the binding power of the agreement as the force of the enactment of the law which applies only to both parties making the agreement, does not apply to parties outside the agreement. Supposedly the formulation of Article 1338 of the Civil Code requires changes so that other parties do not interpret it differently.

Related to The Tort in disputes in the field of Agreement Law, if one party is proven to have committed an act of wanprestatie, then it can also be sued for the tort. However, this does not necessarily apply to all agreement disputes. The principle of good faith is one of the benchmarks for whether an agreement dispute can be sued with a PMH lawsuit.

There are two principles of good faith, namely subjective and objective, regulated in Article 1338 Paragraph (3) of the Civil Code that agreements must be implemented in good faith. The principle of subjective good faith is honesty in one's self or clean good intentions of the parties, while the principle of objective good faith is that the implementation of the agreement must proceed on the right track, must comply with the norms of decency and decency. So implementing the agreement in good faith means implementing the agreement on the basis of rationality and decency (volgens de eisen van redelijkheid en billijkheid). The judgment lies in common sense and fairness, an objective measure is made to assess the situation (impartial judgment) according to objective norms.

The clauses in the agreement are private law norms that are agreed upon by the parties which become the provisions and guidelines for the parties in acting for a common goal that was agreed upon. Not implementing the things promised in the agreement is a violation of the law that applies to both parties. Not fulfilling the obligations in the agreement is a violation of the rights of other parties. Therefore, it is very logical that the act of wanprestatie in the agreement is indirectly an act that is against the law in the realm of the law of the agreement.

4 Conclusion

The regulation of the tort in Indonesian law contained in Book III of the Civil Code is in one generic, namely engagement, giving rise to overlapping understandings between wanprestatie and the tort. Engagement in the context of Book III of the Civil Code has a broad scope, which includes engagements arising from agreements and statutory regulations. An important element in the engagement is achievement. The achievement itself is meaningful as an obligation arising from the engagement. With such a meaning, wanprestatie can be interpreted as non-performance of the obligations or achievements of the debtor in the engagement. Further consequences, the tort can include not carrying out contractual obligations or non-contractual obligations within the scope of property law.

In a dispute in the field of Agreement Law, if it is proven that one of the parties committed a breach of bad faith, then indirectly that party also committed a tort.

5 Suggestion

The regulation of the provisions of Article 1338 of the Civil Code related to the words "…applies as a law…" needs to be amended so as not to create confusion in interpreting the word "law".

References

1. E. Novianty, "*Analisa Ekonomi*," FH UI, Jakarta, 2011.
2. Jimly Asshiddiqie, "*Perihal Undang-Undang*," Jakarta, Konstitusi Press dan PT Syaami Cipta Media, 2006.
3. K. F. Sulaiman, "*Teori Peraturan Perundang-undangan dan Aspek Pengujiannya*," Yogyakarta: Thafa Media, 2017.
4. M. F. I. Soeprapto, "*Ilmu Perundang-undangan*," Yogyakarta, Kanisius, 2007.
5. M. Fuadi, "Perbuatan Malawan Hukum Pendekatan Kontemporer," PT Citra Aditya Bakti, Bandung, 2005.
6. R. Agustina, "*Perbuatan Melawan Hukum*." Jakarta, Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2003.
7. S. J. F. Andreae dikutip dalam Maria Farida Indrati Soeprapto, "*Ilmu Perundang-undangan*," Yogyakarta, kanisius, 2007.
8. S. Rahardjo, "*Ilmu Hukum*¸" Bandung, PT Citra Aditya, 2004.
9. Subekti, "*Hukum Perjanjian*," Intermasa, Jakarta, 2005.
10. H. S. Salim, "Hukum Kontrak Teori Dan Teknik Penyusunan Kontrak," Sinar Grafika, Jakarta, 2008.
11. I. Sari, "Perbuatan Melawan Hukum (PMH) dalam Hukum Pidana dan Hukum Perdata," *Jurnal Ilmiah Hukum Dirgantara,* vol. 11, no. 1, 2020.
12. N. A. Sinaga, "Implementasi Hak Dan Kewajiban Para Pihak Dalam Hukum Perjanjian," *Jurnal Ilmiah Hukum Dirgantara*, vol. 10, no. 1, 2019.