
CHARACTERISTICS *WANPRESTASI* AND *ONRECHTMATIGE DAAD* AND THE CONSEQUENCES OF THE LAW

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ABSTRACT : *Onrechtmatigedaad* and *wanprestasi* claims always rely on a contractual relationship between parties, giving birth to legal rights and obligations. Rights and obligations here are manifested by an achievement. When an achievement is not fulfilled or carried out in accordance with the contents of the agreement, it is called a default. While the act of violating the law the starting point of the lawsuit is the interests of certain parties who are harmed by the actions of other parties, even though between the parties there is no contractual civil law relationship. In this case, the basis for the lawsuit is sufficient to prove whether the perpetrator's actions have actually harmed the other party. In other words, filing a lawsuit in violation of the law is solely oriented to the consequences caused by other parties experiencing losses. *Petitum* Lawsuit Defaults the plaintiff's demands in the form of: Granting the plaintiff's claim; Stating the Defendant has a Default, Punishing the Defendant to return the Principal, Interest and Profits to be obtained. In a Lawsuit for Violating the Plaintiff's Lawsuit; Stating the Defendant has committed an illegal act; Punish Defendant to pay compensation in the form of Material Compensation and Moral Compensation. the merging of Unlawful Acts with default in one claim violates the procedural code of conduct because both must be resolved separately

Keywords: *onrechtmatigedaad wanprestasi* and Compensation Actions

INTRODUCTION

The purpose of the law must be to create peace. In a situation of peace there must be differences, but not to the point of causing social inequality. Besides peace can provide legal protection (*rechtsbescherming*/legal protection) to every individual society both materially and immaterially detrimental acts.¹ The validity of law in a country is determined by the legal politics of the country concerned,² besides legal awareness (*rechtsbewustzijn*) the people in the country.³ Thus the nature of the law is a tool to regulate public order which aims to bring about peace so that the creation of justice. In general law according to its contents is divided into two types, namely public law (*public recht*) and private/civil law (*private recht*) public law are legal provisions governing the public interest or regulating legal matters relating to the public interest, whereas the law Private/private (*private Recht*) are legal provisions governing matters that are civil / personal interests.⁴ Indonesian civil law has a very strong influence from the Dutch Colonial due to the historical trajectory, even though the variant of its application is

1 Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Edisi Revisi, Jakarta : Kencana Prenada Media Group, 2012, hlm. 129.

2 Moh. Mahfud MD, 2009, *Politik Hukum di Indonesia*, Jakarta: PT Raja Grafindo Persada, hlm. 2.

3 Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum*, Jakarta: PT. Raja Grafindo Persada, 2005, hlm. 167.

4 Titik Triwulan Tutik, *Hukum Perdata Dalam System Hukum Nasional*, cet-4, Jakarta: Kencana, Prenadamedia, Jakarta. 2014, hlm. 9

different for legal events, considering that there are still Islamic laws and Customary Law.⁵

According to the legal doctrine that lives and develops in Indonesia, one of the applications of the law in the case of civil law is two types of lawsuits that refer to the provisions of binding legal provisions, namely: defaults and lawsuits that violate the law. The legal basis for a lawsuit is based on the provisions of Book III Article 1243 of the Civil Code for default and Article 1365 of the Civil Code for a lawsuit in violation of the law. In that case, filing a claim for breach of contract and unlawful act in practice is always separate, except if the basis between the breach of contract and the act of violating the law has a very relevant relevance, in such circumstances merging claims between breach of contract and unlawful act, in cases that are incidental.

Normally juridical, the Civil Code does not clearly explain what is meant by default and unlawful acts, however, in the Civil Code there are articles that limitatively regulate juridical consequences in the event of acts of default and or acts that violate the law. The understanding of defaults and unlawful acts develops through legal theories and teachings with the understanding explained by legal experts. This understanding must be truly understood materially for the creation of good judicial practices because often, due to the wide understanding of the meaning of defaults and violations of this law, resulting in judges who decide upon cases refusing or not accepting a lawsuit if the legal basis of the lawsuit is considered to be fundamentally containing obscurity (*obscuur*) or error.

The definition of unlawful acts varies according to the opinion of experts, but in general each of them provides a description of the nature of violating the law itself. If according to article 1365 of the Civil Code, then what is meant by an act that violates the law is an act that violates the law committed by someone because of their mistakes that cause adverse consequences to other parties.

There are also those who interpret unlawful acts as a collection of legal principles that aim to control or regulate dangerous behavior, to provide responsibility for a loss arising from social interaction, and to provide compensation to victims with an appropriate lawsuit. The starting point to distinguish between defaults and lawsuits against violations of the law is that breach of default always relies on a contractual relationship between parties, giving birth to legal rights and obligations. Rights and obligations here are manifested by what is referred to as achievement. When the achievement is not fulfilled or carried out in accordance with the contents of the agreement of the parties, then what is called breach of contract or can be called a breach of contract.

Whereas the act of violating the law starts with the lawsuit with the interests of certain parties who are harmed by the actions of other parties, even though between the parties there is no contractual civil law relationship (in the sense of causality). In this case, the basis for the lawsuit is sufficient to prove whether the perpetrators' actions have been detrimental to the other party. In other words, filing a lawsuit in violation of the law is solely oriented to the consequences caused by the other party experiencing a loss.

⁵ Herman J. A. C. Arens, *ADAT LAW IN INDONESIA*. By B. terHaar. New York: Institute of Pacific IR elations. 1948., 3 U. Miami L. Rev.657, (1949), hlm. 658.

FORMULATION OF THE PROBLEM

What are the Characteristics of Defaults and Actions that Break the Law and its Legal Results

DISCUSSION

The default can be in the form of not fulfilling the obligation at all, or being late in fulfilling the obligation, or fulfilling its obligations, but unlike what has been promised, is closely related to the existence of an agreement or agreement between the parties. Both agreements are based on agreements in accordance with Article 1338 to Article 1341 of the Civil Code and agreements that originate from the law as regulated in Article 1352 through Article 1380 of the Civil Code. If one party breaks a promise, then it becomes a reason for the other party to file a lawsuit. Likewise, the provisions of Article 1320 of the Civil Code regarding the legal conditions of an agreement are not a reason to cancel or cancel an agreement through a lawsuit.

One reason for filing a lawsuit to the Court is because of a default or broken promise from the debtor. Article 1234 of the Civil Code states that each engagement is to give something, do something or not do something. Default (negligent) that can be in the form of not fulfilling the obligations at all, or late to fulfill obligations, or fulfill obligations, but not like what has been promised. An agreement to give something is the obligation of the debtor (debtor) to surrender and to take care of it until the time of delivery. If the debtor (Debtor) is unable to surrender the material or has not taken care of him, then he is obliged to provide compensation and interest costs to the debtor (Creditor), the inability of the debtor to surrender the object is due to his own fault. Likewise he must treat the thing properly in order to save him. In the event of default, to prove it there must be somatic or warning from the creditor to the debtor to fulfill his performance. Article 1238 of the Civil Code states that a debtor is negligent if he has been issued with a warrant or with a similar deed which has been declared negligent or for the sake of his own agreement, if he determines that the debtor will be deemed negligent by arriving at the specified time.

According to the provisions, there is a new default if the debtor has been satiated, but not carried out or because the engagement (agreement) itself determines a grace period for fulfilling the achievement, which apparently cannot be fulfilled by the debtor. In the event that somatic has never been conducted, but the creditor continues to submit a lawsuit to the Court, the debtor will only be deemed to have defaulted since the lawsuit was filed in the Court, not since he failed to carry out the achievement.

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In the event of default that results in a loss for the creditor, the creditor may sue (according to Article 1266 of the Civil Code), namely: 1. Fulfillment of engagement; 2. Fulfillment of

engagement with compensation; 3. Compensation; 4. Cancellation of mutual agreement; 5. Cancellation with compensation.

According to Article 1236 of the Civil Code in such case the Defendant is obliged to pay compensation. However, because the Plaintiff only requested that the Defendant fulfill the contents of the agreement (not request that the agreement be canceled and compensation), the claim could not be accepted.

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- a. Agree those who bind themselves.
- b. The ability to make an engagement.
- c. A certain thing.
- d. A halal (Causa) cause.

Agreement or agreement is free means that it is true of the parties' willingness, no coercion at all from any party, no oversight and no fraud.⁷ The second condition states that the freedom of a person to make an agreement is limited by his ability to make an agreement. For someone who according to the law is incapable of entering into an agreement to make an agreement. Each party has the right to take legal actions ".⁸ Based on these things it can be concluded that married women are sufficient to make agreements. In the third condition referred to a certain thing is the object of an agreement. The object of the agreement must be tradable goods. According to the provisions of Article 1333 of the Civil Code "an agreement must have an item of at least the type specified. There is no obstacle that the quantity of goods is uncertain, as long as the amount can be determined later calculated ". In Article 1334 paragraph (1) of the Civil Code states that "New goods that will be available later can be the subject of an agreement". In the fourth condition, it is stated that the parties are not free to make agreements concerning causa that are prohibited by law, contrary to decency or contrary to public order. Agreements made for causa that are prohibited by law, contrary to decency or concerned with public order are invalid.⁹ In the Petitum Lawsuit the plaintiff's demands include: Granting the plaintiff's claim; Declare the Defendant has a Default Punish the Defendant to return the Principal, Interest Profit to be obtained,

Liability in Onrechtmatigedaad

Onrechtmatigedaad is regulated in Article 1365 of the Civil Code, which by several experts including Wirjono Prodjodikoro¹⁰ call it an illegal act. Acts against the law in practice can be active or passive. Being active means when someone does something and causes harm to others. While being passive means that a person does not do something which consequently

6 R. Subekti, 1983 : *Pokok-pokok Hukum Perdata*, PT, Intermasa Jakarta, hlm. 147

7 Abdul Kadir Muhamad, 1992. *Hukum Perikatan* Citra Aditiabakti, Bandung hlm. 90.

8 MGS. Edy Putra, *Kredit Perbankan Suatu Tinjauan Yuridis*, Liberty, Yogyakarta, 1989, hal. 22.

9 J. Satrio, *Hukum Perjanjian*, Citra AdityaBakti, Bandung, 1992, hal. 37.

10 Wirjono Prodjodikoro, 2000 *Perbuatan Melanggar Hukum di pandang dari sudut Hukum Perdata*, Mandar Maju, Bandung, hlm 1

causes losses to others. Article 1365 BW formulates acts that violate the law is every act that violates the law that causes harm to others, obliging people who because of their mistakes compensate for the losses incurred. The elements of Article 1365 BW are as follows: Before 1919 the definition of breaking the law was only related to actions that violated the subjective rights of others or contradicted the obligations of the maker himself.¹¹ Or in other words, breaking the law is interpreted as breaking the law only. This view is influenced by the teaching of legism which argues: there is no law outside the law.

ONRECHTMATIGE DAADAFTER 1919

On January 11, 1919 a bill was submitted to the Dutch parliament (TweedeKamer), to amend the Article 1401 of Ned - BW which coincides with Article 1365 of the Civil Code, called the Regout plan. The aim is to provide a broad interpretation of the meaning of "breaking the law". The draft in Article 1401 paragraph (2) of Ned - BW reads: breaking the law is doing or not doing what is the fault of the makers themselves, contrary to public order, good decency, or the obligations of a good household father. This design was never approved because there were many challenges. A broad interpretation of Article 1401 Ne - BW or Article 1365 of the Civil Code was then carried out by HogeRaad through its decision on January 31, 1919, known as Arrest Standards, namely Drukkers Arrest. There are several jurisprudencies that need to be known about the development of this interpretation. With this new criterion, an act which, although not contrary to the law, could have been considered against the law if it was found to be contrary to the propriety of the community. In fact, this criterion can be used to sue acts, such as inciting, striking, giving incorrect information about bonafide, someone.

An agreement to give something is the obligation of the debtor (debtor) to surrender and to take care of it until the time of delivery. If the debtor (debtor) is unable to surrender the material or has not taken care of him, then he is required to provide compensation and interest to the debtor (Kretur). The inability of the debtor to surrender the object is due to his own mistake.

Likewise he must treat the thing properly in order to save him. In the event of default, to prove it there must be somatie or warning from the creditor to the debtor to fulfill his performance. Article 1238 of the Civil Code states that a debtor is negligent if he has been issued with a warrant or with a similar deed which has been declared negligent or for the sake of his own agreement, if he determines that the debtor will be deemed negligent by arriving at the specified time.

The provisions of Article 1365 above regulate the liability resulting from unlawful acts either by doing (positive culpa in commitendo) or for not doing (passive culpa in ommitendo). While Article 1366 of the Civil Code is more directed to the demands of accountability caused by mistakes due to negligence (onrechtmatigenalaten). Grant the Plaintiff's claim; Stating that the Defendant has committed an illegal act; Punish Defendant to pay compensation in the form of Material Compensation and Moriel Compensation Juridical Consequences in the Case of Arising of Violating the Law As a result of unlawful acts regulated in Article 1365 to 1367 Civil Code as follows: According to Article 1365 the Civil Code is quoted as saying: it compensates".

While Article 1366 of the Civil Code states: "Everyone is responsible not only for losses caused by his actions, but also for losses incurred due to negligence or carelessness".

11 R. Setiawan, 1979: *Pokok-Pokok Hukum Perikatan*, Binacipta, Bandung, 1977. p. 76

12 *Ibid.* p. 81

Furthermore, Article 1367 of the Civil Code states: "A person is not only responsible for losses caused by his own actions, but also for losses caused by the actions of those under his care, or caused by people under his supervision".

Based on the excerpt from the article above, in general it provides a description of the scope of the consequences of an unlawful act. As a result of acts that violate the law legally have consequences for the perpetrators as well as those who have legal relations in the form of work that cause unlawful acts. So, the consequences arising from an unlawful act will be realized in the form of compensation for the victims who have experienced it.

Compensation for losses resulting from unlawful acts, as mentioned above, can be in the form of material and immaterial damages. In the normal way, in the practice of compensation is calculated with money, or equalized with money in addition to demands for replacement of objects or items that are considered to have suffered damage/seizure as a result of acts that violate the law of the perpetrator.

If we look at the formulation of the provisions of article 1365 of the Civil Code, it is restrictively adhering to the principle of law that compensation for the occurrence of an act that violates the law is mandatory. In fact, in various cases that appear in court, judges often ex-officio determine compensation, even if the victim does not demand the intended loss.

Theoretically, compensation as a result of an unlawful act is classified into two parts, namely: actual loss and future losses. It is said that the actual loss is a loss that is easily seen in real or physical, both material and immaterial. This loss is based on concrete matters that arise as a result of unlawful acts from the perpetrator. While losses that are in the future are losses that can be expected to arise in the future due to unlawful acts on the part of the offender. This loss is like filing a claim for restoration of good name through announcements in print and or electronic media against the perpetrators. This compensation in the future must also be based on a loss that is actually imaginable in the future and will actually happen.

WANPRESTASI ANDONRECHTMATIGE DAAD

As for the starting point for distinguishing breach of claims and lawsuits against violation of the law is that the breach of contract always rests on the existence of a civil relationship (contractual) between the parties, thus giving birth to legal rights and obligations. Rights and obligations here are manifested by what is referred to as achievement. When achievements are not fulfilled or carried out in accordance with the contents of the agreement of the parties, then what we call defaults or can be called a breach of contract. In the Petitum Lawsuit the plaintiff's demands include: Granting the plaintiff's claim; Declare the Defendant has a Default Punish the Defendant to return the Principal, Interest Profit to be obtained, while violating the law the starting point of the lawsuit is the interests of certain parties who are harmed by the actions of other parties, even though between the parties there is no contractual civil law relationship (in the sense of causality). In this case, the basis for the lawsuit is sufficient to prove whether the perpetrators' actions have been detrimental to the other party. In other words, filing a lawsuit in

violation of the law is solely oriented to the consequences caused by other parties experiencing losses. Grant the Plaintiff's claim; Stating that the Defendant has committed an illegal act; Punish Defendant to pay compensation in the form of Material Compensation and Moriel Compensation.

COMPENSATION CLAIM MECHANISM

Based on acts against the law Article 1365 of the Civil Code. In order to be able to sue for damages based on unlawful acts, the following elements must be fulfilled: it is assumed that the claim is based on the same case and addressed to the same defendant, the claim can be made in writing or verbally. In current practice, lawsuits are made in writing, known as lawsuit. The claim letter must include the date including the date of granting the power of attorney when giving the power of attorney, signed by the plaintiff or his representative, mentioning the identity of the plaintiff and the defendant, containing a clear description of the issue (fundamentum of the party or posita), and the petitum which is what is desired for decided by the judge. The lawsuit was then addressed in accordance with the provisions of Article 118 HIR.

Claims for default and tort actions are based on different provisions. Claims for default are based on breach of contract in the agreement so that one party must take responsibility. As for the lawsuit against the law, it is usually based on Article 1365 of the Civil Code "Every act that violates the law and brings harm to others, obliges the person who caused the loss due to his mistake to replace the loss." If a civil claim is filed on the basis of default and PMH, it will confuse the judge because it is based on a different legal basis so that the claim becomes unclear (*obscur libel*). Citing the article Merging Defaults and PMH Laws Cannot Be Justified, the Supreme Court even issued Supreme Court Decree No. 1875 K / Pdt / 1984 dated April 24, 1986 which confirms this. Plus in MA Decision No. 879 K / Pdt / 1997 dated January 29, 2001 explained that the merging of PMH with default in one lawsuit violated the procedural code of conduct because both must be resolved separately.

M. Yahya Harahap¹³ is of the opinion that in this decision the posita of the lawsuit is based on the agreement, but in the petitum it is demanded that the defendant be declared to have PMH. If this is considered to contain a contradiction (*obscur libel*) it means that it is too formalistic because if the petitum is connected with posita, the judge can correct it according to the purpose of posita.

The issue of merging defaults and PMHs in one claim is also permissible. This can be seen from the MA jurisprudence in MA Decision No. 2686 K / Pdt / 1985 dated January 29, 1987. Still in the same book, Yahya Harahap explained that in the decision, even though the arguments filed in the lawsuit were PMH, while the actual legal event was default, the lawsuit was not *obscur libel*, because the judge can consider that the argument from the lawsuit is considered a default. The same thing can also be found in MA Decision No. 886 K / Pdt / 2007 dated October 24, 2007. The panel of judges in their deliberations stated: "Even though in the lawsuit there is a position of Default and Unlawful Act, but explicitly described separately, then such a claim in the form of objective cumulation can be justified." So, in practice there is jurisprudence which states that the merging of PMH with breach of contract in one lawsuit is in violation of the rules of law because both must be resolved separately. However, there are also other jurisprudencies

13 M. Yahya Harahap 2005 Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan, Penerbit Sinar Grafika, Jakarta hlm. 456

that allow the merger of PMH and default in one claim.

Doctrinally according to the law that lives and develops in Indonesia, civil lawsuits are divided into two types, namely: default breaches and law violations. The legal basis for each of the two lawsuits is based on the provisions of Book III Article 1243 of the Civil Code for default and Article 1365 of the Civil Code for lawsuits against unlawful acts. Therefore, filing a lawsuit against breach of contract or unlawful act in practice is always separate, except if the basis between the breach of contract and the act of violating the law has a very relevant relevance, then in such circumstances it is still permissible to merge lawsuits between breach of contract and unlawful acts, but its nature of course it is very incidental depending on the considerations of judges who examine, hear and decide on cases.

CONCLUSION

In the Petitum Lawsuit the Defaults contain the plaintiff's demands in the form of: Granting the plaintiff's claim; Declare the Defendant has a Default Punish the Defendant to return the Principal, Interest and Benefits to be obtained, in his petition the Act of Law Violates the Plaintiff's Lawsuit; Stating the Defendant has committed an illegal act Punishing the Defendant to pay compensation in the form of Material Compensation and Moriel Compensation.

There is a fundamental difference in the Default Lawsuit according to the provisions of Article `1234 Civil Code and Legal Violations According to the provisions of Article 1365 of the Civil Code.

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