Global Journal of Social Science and Innovation, Maret, 2025, Vol 2 (1), 1-10
E-ISSN: xxxx.xxxx & P.ISSN: xxxx.xxxx, http://doi.org/xx.xxxxx/xx-xxxx-xxxx-xx

Unlawful Acts (Onrechtmatige) in the Formulation of Administrative Disputes: A Perspective From the Law on Government Administration in Indonesia

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ABSTRACT

The low number of cases involving Government Actions in the State Administrative Court is partly due to the lack of clarity surrounding several legal concepts related to such actions as objects of dispute. This conceptual ambiguity creates uncertainty among both justice seekers and law enforcement officials regarding which Government Actions may be considered valid objects of administrative disputes in the State Administrative Court. Although the prevailing laws and regulations recognize Government Actions, Factual Actions, and onrechtmatige overheidsdaad (OOD) as objects of dispute, they do not provide clear and definitive definitions of these terms. For example, what is the distinction between Government Administrative Actions and Factual Actions? The explanatory notes for Article 1 and Article 87(a) of the Law on Government Administration merely state: "Sufficiently clear." Likewise, is OOD, as an object of dispute in the State Administrative Court, identical to OOD as an extension of Article 1365 of the Indonesian Civil Code, as interpreted in the Ostermann Arrest? Therefore, a legal analysis is essential to clarify the concepts of Government Administrative Actions, Factual Actions, and OOD within the framework of administrative dispute resolution.

Keywords: formulation of administrative disputes; onrechtmatige; the law on government administration; unlawful acts.

INTRODUCTION

Actions (handling) taken by the government or public authorities as state administrators will inevitably intersect with the interests of citizens. In such cases, conflicts may arise between public interests and the private interests of society as legal subjects under both civil and public law. There are instances when actions (or omissions) by the government can cause harm to the public, whether intentional or not. The question that arises is: when a citizen suffers a loss due to an act (omission) by the government, where should the lawsuit be filed?

Before the establishment of the State Administrative Court, all lawsuits filed by citizens against the state or public authorities had to be submitted to civil judges in general courts. In cases involving *onrechtmatige overheidsdaad* (unlawful acts by the government), such claims were brought under Article 1365 of the Indonesian Civil Code, with the government or relevant agency as the defendant. The argument was that the

Citation in APA style: Imran. (2025). Unlawful Acts (Onrechtmatige) in the Formulation of Administrative Disputes: A Perspective From the Law on Government Administration in Indonesia, *Global Journal of Social Science and Innovation, Vol. 2* (1), 1-10.

Received: 12 January, 2025; Revised: 13 February, 2025; Accepted: 15 March, 2025

losses suffered were civil in nature. However, a further question arises: are actions taken by the government in the context of state administration (*bestuurshandelingen*) governed by civil law or public (administrative) law? If they fall under civil law, then they rightfully fall within the jurisdiction of civil courts. However, if they are more administrative in nature, they fall under the jurisdiction of the State Administrative Court.

The State Administrative Court (hereinafter referred to as TUN Court) is intended as a form of legal protection and safeguard for the public, to ensure a harmonious, balanced, and aligned relationship between government officials and citizens, as stated in the considerations (Points a and d) of Law Number 5 of 1986 on the State Administrative Court:

a) That the Republic of Indonesia, as a state based on the rule of law grounded in Pancasila and the 1945 Constitution, aims to establish a prosperous, safe, peaceful, and orderly society that guarantees equality before the law and ensures a harmonious, balanced, and aligned relationship between administrative bodies and the citizens.
b) That to resolve such disputes, a State Administrative Court is needed that is capable of upholding justice, truth, order, and legal certainty, thereby providing legal protection to the public, especially in their relations with state administrative bodies or officials.

With the existence of the State Administrative Court, citizens "whose interests are harmed may submit a written lawsuit to the authorized court," as stated in Article 53 paragraph (1) of Law Number 5 of 1986 on the State Administrative Court, as most recently amended by Law Number 51 of 2009 (hereinafter referred to as the TUN Court Law).

According to the TUN Court Law, the court's competence is limited to administrative decisions (Keputusan *TUN*), subject to various limitations. An administrative decision is defined in Article 1, point 9, of the TUN Court Law as:
"A written stipulation issued by a state administrative body or official containing a state administrative legal action based on prevailing laws and regulations, which is concrete, individual, and final in nature, and which causes legal consequences for a person or civil legal entity".

The numerous normative criteria (intension) outlined in Article 1 point 9 serve as a limitation of the TUN Court's jurisdiction. Bruggink posits two rules of thumb (*vuistregels*) regarding the meaning (intension) and scope (extension) of legal terms: "intension determines extension" and "intension is inversely proportional to extension." Thus, the more criteria imposed on an administrative decision, the narrower the scope of decisions that can be challenged in court. This is further narrowed by exceptions outlined in Articles 2 and 49 of the TUN Court Law.

Due to the combined effect of definitional and exception-based limitations, only a few administrative decisions fall within the jurisdiction of the TUN Court. The narrow scope of the court's jurisdiction is closely linked to the nature of the New Order government at the time Law Number 5 of 1986 was enacted, which resisted extensive judicial control over the executive. This policy of minimizing judicial oversight was part of the "Development Trilogy" ideology, which prioritized dynamic national stability as the foundation for economic growth and equitable development.

Following the reform era, the jurisdiction of the TUN Court was expanded alongside procedural legal reforms. The Supreme Court issued several procedural regulations

(*PERMA*), including: PERMA No. 2 of 2011 on Settlement Procedures for Public Information Disputes in Court, PERMA No. 4 of 2015 on Guidelines for Adjudicating Abuse of Authority Cases, PERMA No. 2 of 2016 on Guidelines for Location Determination Disputes for Public Interest Development, PERMA No. 5 of 2017 on Procedures for Resolving Electoral Disputes in the TUN Court, PERMA No. 8 of 2017 on Procedures for Obtaining Decisions and/or Actions by Government Bodies or Officials, and PERMA No. 6 of 2018 on Settlement Procedures for Administrative Disputes After Exhausting Administrative Remedies.

The most recent PERMA is No. 2 of 2019 on Guidelines for the Resolution of Government Action Disputes and Jurisdiction over *Onrechtmatige Overheidsdaad* (OOD), enacted on August 20, 2019—five years after the enactment of the Law on Government Administration (UUAP). With these regulations, the TUN Court is generally capable of examining disputes within its jurisdiction. However, there is still no standardized procedure for resolving disputes involving Government Actions. PERMA 2/2019 does not clearly define the concept of Government Action disputes. This lack of procedural clarity has resulted in relatively few Government Action cases being filed in the TUN Court.

In fact, since the enactment of the UUAP, it has been explicitly stated that Government Action cases fall under the jurisdiction of the TUN Court, and that general courts must transfer such cases to the TUN Court, as stipulated in Article 85 of the UUAP:

a) Administrative dispute claims registered in general courts but not yet examined shall be transferred to and resolved by the TUN Court upon the enactment of this law.
b) Disputes that are already under examination in general courts shall continue and be resolved by those courts.
c) Judgments issued as referred to in paragraph (2) shall be executed by the general courts that rendered the decision.

For illustration, cases involving unlawful acts (*perbuatan melawan hukum*) are still found in general courts, such as Case No. 783/Pdt.G/2019/PN Jkt.Pst. (Kantor, S.H., C.N. vs. The Government of the Republic of Indonesia Cq. The President), and Case No. 33/Pdt.G/2020/PN Jkt.Pst. (Johan Louis Lasut et al. vs. The Synod Council of the Protestant Church in Western Indonesia and the Government of the Republic of Indonesia Cq. The West Java Provincial Government). However, Article 10 of PERMA 2/2019 explicitly states:

"Upon the enactment of this Supreme Court Regulation, any pending *onrechtmatige overheidsdaad* cases filed in general courts must be transferred to the TUN Court in accordance with the applicable laws and regulations."

At this point, it becomes evident that the low number of Government Action cases in the TUN Court is partly due to the lack of clarity regarding several legal concepts related to Government Actions as objects of administrative disputes. This conceptual uncertainty has left both justice seekers and law enforcement officials unsure about which Government Actions can be challenged in the TUN Court.

Although legislation recognizes Government Actions, Factual Actions, and *onrechtmatige overheidsdaad* (OOD) as objects of dispute in the TUN Court, the laws have yet to provide clear definitions of these terms. For instance, what is the difference between a Government Administrative Action and a Factual Action? The explanations of Article 1 and Article 87(a) of the UUAP merely state: "Sufficiently clear." Similarly, is OOD as an object of dispute in the TUN Court identical to OOD as an extension of Article

1365 of the Civil Code, based on the *Ostermann Arrest*? Thus, a legal study is necessary to analyze the concepts of Government Administrative Actions, Factual Actions, and OOD.

METHODS

The method used in this writing is normative juridical, which is an approach based on legal materials by examining legal concepts, theories, principles, and statutory regulations relevant to the topic. In this context, the study draws upon all legal sources related to the discussion of Unlawful Acts by the Government or OOD, as well as the procedural law of the State Administrative Court. The objective of this paper is to examine the impact of the enactment of Law No. 30 of 2014 on the adjudicative authority of judicial institutions in Indonesia, particularly in relation to Unlawful Acts committed by the Government or OOD.

RESULTS

Up to this point, there have been numerous civil court decisions that granted claims for compensation for unlawful acts committed by the government. One example is the decision of the Jambi District Court No. 51/PDT.G/2010/PN.JBI dated April 6, 2011, which sentenced the Government of the Republic of Indonesia Cq. the Minister of Home Affairs of the Republic of Indonesia Cq. the Governor of Jambi, Cq. the Mayor of Jambi, Cq. the Head of the Public Works Office of Jambi City (Defendant I) and the Government of the Republic of Indonesia Cq. the Minister of Home Affairs of the Republic of Indonesia Cq. the Governor of Jambi, Cq. the Mayor of Jambi (Defendant II) to pay damages to the Plaintiff in the amount of IDR 3,963,164,326 (three billion nine hundred sixty-three million one hundred sixty-four thousand three hundred twenty-six rupiah). This ruling later obtained permanent legal force based on the Cassation Decision of the Supreme Court No. 1400 K/Pdt/2012. Therefore, based on existing practices and the legal doctrines that have developed, the civil law aspect has been emphasized in these matters, where the main legal basis lies in the concept of *Unlawful Acts* (Perbuatan Melawan Hukum / PMH or *onrechtmatige daad*) as regulated under Article 1365 of the Indonesian Civil Code, which states:

"Every unlawful act that causes harm to another person obliges the person who, because of his fault, caused the harm, to compensate for such loss".

Meanwhile, in the General Elucidation of Law No. 30 of 2014 on Government Administration, Paragraph Five explains: "Citizens may also file lawsuits against Decisions and/or actions of Government Agencies and/or Officials in the Administrative Court, because this Law constitutes the substantive law of the Administrative Court system".

Article 1 point 8 defines *Action (Handeling)* as follows: "Government Administrative Action, hereinafter referred to as Action, is the act of a Government Official or other state administrator to carry out and/or not carry out a concrete act in the context of government administration".

Furthermore, upon examining Article 87 of the Government Administration Law, it is found that *Factual Actions (Feitelijke Handelingen)* are also included within the definition of State Administrative Decisions (KTUN) as expanded in the PERATUN Law (Law on State Administrative Court Procedures). If indeed factual or concrete actions can be adjudicated in the Administrative Court, the next question is whether this relates to claims for compensation that have been pursued through the OOD/PMH mechanism (Unlawful Acts by the Government) in the Civil Court? The author believes the answer is yes.

Historically, claims for compensation were also possible in the Administrative Court, provided that they were submitted together with a claim against the original KTUN issued by the State Administrative Agency/Official being sued. But what about factual actions carried out without a written KTUN? The answer is that a compensation claim can still be filed in the Administrative Court through an OOD lawsuit. This is also stated in the Circular Letter of the Supreme Court of the Republic of Indonesia No. 4 of 2016, SEMA No. 4 of 2016, specifically in Dictum E, the Administrative Chamber section, point 1, which states:

Paradigm shift in procedures at the Administrative Court after the enactment of Law No. 30 of 2014 on Government Administration (UU AP):

1. Competency of the Administrative Court:
   a) Authorized to adjudicate cases in the form of claims and petitions.
   b) Authorized to adjudicate unlawful acts by the government, namely unlawful acts committed by government authorities (Government Agencies and/or Officials), commonly referred to as *onrechtmatige overheidsdaad (OOD)*.

Based on this, claims for compensation due to factual actions (*Feitelijke Handelingen*) may be pursued in the Administrative Court. This is also supported by provisions in the Government Administration Law, particularly Article 85:

1) Claims regarding Government Administrative Disputes that have been filed in the General Court but have not yet been examined shall, upon the enactment of this Law, be transferred to and resolved by the Administrative Court.
2) Claims regarding Government Administrative Disputes that have been filed and examined in the General Court before this Law came into effect shall continue to be resolved and decided by the General Court.
3) The decision of the court as referred to in paragraph (2) shall be executed by the General Court that rendered the decision.

Also, Article 76 paragraphs (3) and (4):

(3) In the event that the Citizen does not accept the resolution of the appeal by the Superior Officer, the Citizen may submit a lawsuit to the Court.

(4) The resolution of Administrative Remedies as referred to in Article 75 paragraph (2) may involve the annulment or invalidation of the Decision, with or without a claim for compensation and administrative demands.

Thus, it appears that there is a paradigm shift in the Government Administration Law, which seeks to include all administrative actions of the government, whether in the

form of written KTUN or factual actions, within the scope of Administrative Actions. Therefore, the conclusion that can be drawn is that lawsuits concerning *Onrechtmatige Overheidsdaad (OOD)* or Unlawful Acts by the government should be submitted to the Administrative Court (PTUN), and no longer to the Civil Court. In fact, all unresolved OOD/PMH disputes by the government in the General Court (civil court) should be transferred to the Administrative Court based on Article 87 of the Government Administration Law.

DISCUSSION

4.1. The Element of "Unlawfulness" (Onrechtmatig) in the Formulation of Administrative Disputes as Intended by the Administrative Governance Law

In civil law doctrine, the criteria for the element of “Unlawfulness” originate from the ruling of the Hoge Raad (Dutch Supreme Court) on January 31, 1919, in the case of *Lindenbaum vs. Cohen* (a tort case in printing business competition). At the first instance in the Amsterdam District Court, Lindenbaum (Plaintiff) won. However, at the appellate level, he lost on the grounds that there was no written law prohibiting the object of the lawsuit. Then, at the cassation level, Lindenbaum won again based on the reasoning of the Hoge Raad judges that "Unlawfulness" is not the same as "Against a Regulation." This is evident in the court’s consideration:

The Court’s decision on the terminology of 'Unlawful Act' was interpreted so narrowly that it was only understood to include actions directly regulated by legal provisions, while actions beyond that could not be considered (as unlawful acts), even if they were contrary to decency and social morality.

However, such a limited interpretation is not supported by the article, either by its wording or by its legislative history. The term 'Unlawful Act' is not equivalent to 'Against a Provision. An 'Unlawful Act' should be understood as an act or omission that violates another person’s (subjective) rights, contradicts the duties of the actor, or is contrary to good morals (ethics) or the propriety required in social interactions concerning other persons or property. Therefore, due to fault arising from such actions, the actor is obligated to compensate for the damage caused.

Based on the Hoge Raad's ruling of January 31, 1919, the general criteria for determining whether an act is considered unlawful are as follows:

a) Contrary to the legal obligation of the actor; or
b) Violates the subjective rights of others; or
c) Violates moral norms (good morals); or
d) Contrary to principles of propriety, care, and prudence in social life.

In this context, if an administrative action by the state violates any of the four criteria above, it can be considered unlawful. With regard to the element of unlawfulness within the domain of administrative governance, these four criteria are linked to the "testing grounds" found in Article 53 paragraph (2) of the Administrative Court Law (UU PERATUN), as follows:

The two grounds that can be used in a lawsuit as referred to in paragraph (1) are:

a) The disputed administrative decision is contrary to applicable laws and regulations;
b) The disputed administrative decision is contrary to the general principles of good governance.

4.2. Factual Actions (Feitelijk Handelingen) and Unlawfulness (Onrechtmatig) in the Formulation of Administrative Disputes from the Perspective of the Administrative Governance Law as the Basis for the Shift in Absolute Competence Over OOD

Article 87 of the Administrative Governance Law expands the definition of a "Decision" in the PERATUN Law, one of which in letter a states: *"Written determination which also includes Factual Actions"* This raises the question: does letter a of the Article also mean that OOD (Unlawful Government Acts) fall under the scope of "Decisions" in the PERATUN Law? Or is it merely referring to Factual Actions in the form of physical acts implementing a Written Determination?

Some scholars argue that the expanded definition of "Decision" in the PERATUN Law as regulated in Article 87 letter a of the Administrative Governance Law is limited only to Factual Actions preceded by a Written Determination. This is logical from a grammatical approach since the wording of Article 87 letter a is: *"Written determination which also includes Factual Actions,"* suggesting that the factual actions must be the execution of a written determination.

Based on this view, OOD, which is a physical act without a written determination, remains under the jurisdiction of the General Court, not the Administrative Court. The question arising from this grammatical approach is: what is the object of the dispute in "Written Determination which also includes Factual Actions"? Is it the Factual Action or the Written Determination itself? If consistently using the grammatical approach, the object of the dispute is the Written Determination. But what if the problem lies in the Factual Action, not the Written Determination?

The author provides an example: a dispute over Land Procurement Location Determination for Public Interest Projects, as regulated in Law No. 2 of 2012. Suppose the plaintiff has already relinquished their land for the project, but the compensation is deemed inadequate. Should the plaintiff revoke the Location Determination decree? Or just sue the government to pay appropriate compensation (violating Article 9 of Law No. 2/2012)? It would be less harmful if they only demanded proper compensation without revoking the decree. Especially if the decree itself has no procedural or substantive issues—only its implementation (i.e., the compensation) is problematic.

Based on this reasoning, the author concludes that the grammatical approach to Article 87 letter a of the Administrative Governance Law is less relevant, and therefore an extensive approach can be applied to broaden the scope of this provision.

The author adopts the position that Article 87 letter a of the Administrative Governance Law should be interpreted to include all factual actions of administrative

governance, whether or not accompanied by a written determination. This interpretation follows an extensive approach, in line with the Supreme Court's position in SEMA No. 4 of 2016, which states that OOD falls under the jurisdiction of the Administrative Court. If Article 87 letter a is interpreted strictly grammatically, then nearly all decisions or written determinations will be accompanied by concrete physical actions, rendering the article insignificant.

Additionally, plaintiffs could simply file for compensation under Article 53 Jo. Article 97(10) of the PERATUN Law without the need for a new norm (i.e., Article 87 letter a). Therefore, this provision should ideally read: *"Written Determination and/or Factual Action,"* separating the two, as the Administrative Governance Law itself distinguishes between "Decisions" (Rechtshandelingen) and "Actions" (Feitelijk Handelingen) (see Article 1 points 7 and 8). Thus, Factual Actions can stand independently as the object in this provision.

This is also in line with SEMA No. 4 of 2016 on page 13, letter a point 1: "The object of lawsuits in the Administrative Court includes: 1) Written determinations and/or factual actions." Additionally, the general explanation of Law No. 30 of 2014 on Administrative Governance, in paragraph five, explains:
"Citizens can also file lawsuits against decisions and/or actions of government agencies and/or officials to the Administrative Court, as this Law is the substantive law of the Administrative Court system."
According to Article 1 point 8, "Action" (Handeling) is defined as:
Administrative government actions, hereinafter referred to as Actions, are acts by government officials or other state administrators to perform and/or not perform concrete acts in the administration of government.

The author's extensive approach is also implicitly supported by Article 85 of the Administrative Governance Law, which states that administrative disputes already registered but not yet examined in the General Court by the time the Law takes effect will henceforth be handled by the Administrative Court. So, what is meant by "administrative disputes examined by the General Court" in Article 85? The author believes one of them is OOD, since no other type of dispute with administrative characteristics is examined in the General Court besides OOD and Citizen Lawsuits (to be discussed later).

Based on preliminary analysis, the author concludes that the judicial system in Indonesia follows a residual approach ("Residual Rechtspraak"): all cases can be submitted to the General Court unless explicitly stated otherwise by law. This doctrinally aligns with past expert opinions e.g., Muchsan, SH, argued that the Administrative Court only had jurisdiction over written KTUN (administrative decisions), while unwritten ones could be adjudicated in civil court. Hence, OOD claims have been handled by general courts (civil courts). However, this approach is flawed, especially after the enactment of the Administrative Governance Law, which should shift the paradigm. The legal character of a case whether administrative or civil—should now guide jurisdiction. If a government action pertains to public law (bestuurszorg) and is not subject to civil law (multi-party/multilateral relationships), it belongs in the realm of administrative law.

From the discussion above, it is clear that both legal and factual actions of the state can be unlawful (Onrechtmatig). This raises the question: how is "unlawfulness" defined in the Administrative Governance Law?

Based on Article 87, factual actions are included in the definition of KTUN in the PERATUN Law (expanded definition). Therefore, disputes involving factual actions are also included in the definition of administrative disputes in Article 1 point 10 of the PERATUN Law and Article 85 of the Administrative Governance Law.

CONCLUSION

The original formulation of *onrechtmatig overheidsdaad* in civil courts refers to an unlawful factual act by the authorities that causes harm to the people, and thus can be challenged in court based on Article 1365 of the Indonesian Civil Code. However, following the enactment of the Law on Government Administration, factual actions have also been incorporated into the definition of State Administrative Decisions (KTUN) under the Law on State Administrative Court (PERATUN). With the inclusion of factual actions in the definition of KTUN in the PERATUN Law, disputes concerning such factual actions are also considered within the scope of State Administrative Disputes as defined in the PERATUN Law (or Administrative Disputes under the Government Administration Law), which fall under the jurisdiction of the State Administrative Court (PTUN). Therefore, an unlawful factual act by the authorities that causes harm to the people (*onrechtmatig overheidsdaad*) now falls within the adjudicative authority of the State Administrative Court.

Declaration of Conflicting Interests
The authors declare that there is no conflict of interest of this article.

Acknowledgments
The author would like to express thanks to *Universitas Muhammadiyah Mataram* for supporting this research.

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