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THE DEVELOPMENT OF CONCEPT AND ADJUDICATION OF TORT AGAINST THE GOVERNMENT FOLLOWING THE ENACTMENT OF PERMA 02/2019

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Abstract

With the enactment of PERMA 02/2019, the state administrative court (PTUN) has absolute competence in adjudicating Perbuatan Melawan Hukum Pemerintah (PMHP) or tort against the government. This study focuses on the PERMA 02/2019 effect on construction and competence to adjudicate PMHP. The author examines three court decisions to answer this question: Decision No. 230/G/TF/2019/PTUN-JKT, Decision No.99/G/2020/PTUN-JKT, and Decision No. 161/G/TF/2020/PTUN.JKT. Using the normative legal research method, the researcher finds that although the regulation contained procedural law rules, it must be implemented holistically to reconstruct the PMHP's elements. In dealing with PMHP cases, the author argues that judges are encouraged to use a comprehensive approach. This approach results from regulating judicial authority and PMHP, which are spread across several laws. PMHP must be interpreted as either an act or not acting due to a decision (KTUN) or without a KTUN. The provisions for compensation must be interpreted broadly, not limited to the interpretation prescribed by the Law on State Administrative Court (UU Peratun) and its derivatives regulations. With this approach, the judiciary is expected to conduct proper case examinations that ensure fair outcomes for the parties involved.

Keywords: *civil law, common law, tort, government, liability, PERMA 02/2019, pengadilan negeri, pengadilan tata usaha negara, PMH, PMHP.*

Abstrak

Dengan diberlakukannya PERMA 02/2019, Pengadilan Tata Usaha Negara (PTUN) memiliki kompetensi mutlak dalam mengadili Perbuatan Melawan Hukum Pemerintah (PMHP) atau perbuatan melawan pemerintah. Penelitian ini berfokus pada pertanyaan tentang pengaruh PERMA 02/2019 terhadap konstruksi dan kompetensi untuk mengadili PMHP. Untuk menjawab pertanyaan tersebut, peneliti mengkaji tiga putusan pengadilan: Putusan No. 230/G/TF/2019/PTUN-JKT, Putusan No. 99/G/2020/PTUN-JKT, dan Putusan No. 161/G/TF/2020/PTUN. JKT. Dengan menggunakan metode penelitian hukum normatif, peneliti menemukan bahwa meskipun peraturan tersebut memuat aturan hukum acara, namun harus diimplementasikan dengan interpretasi holistik untuk merekonstruksi unsur-unsur PMHP. Dalam menangani kasus PMHP, penulis berpandangan bahwa hakim didorong untuk menggunakan pendekatan yang komprehensif. Pendekatan ini merupakan konsekuensi dari pengaturan otoritas peradilan dan PMHP, yang tersebar di beberapa undang-undang. PMHP harus diartikan sebagai tindakan atau tidak bertindak karena suatu keputusan (KTUN) atau

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tanpa KTUN. PMHP harus diartikan sebagai tindakan atau tidak bertindak karena suatu keputusan (KTUN) atau tanpa KTUN. Ketentuan ganti rugi harus ditafsirkan secara luas, tidak terbatas pada Undang-Undang Peradilan Tata Usaha Negara (UU Peratun) dan peraturan turunannya. Dengan menggunakan pendekatan tersebut, diharapkan pengadilan melakukan pemeriksaan perkara secara layak dan menyeluruh guna memastikan hasil yang adil bagi para pihak.
Kata Kunci: civil law, common law, wanprestasi, pemerintah, pertanggungjawaban, PERMA 02/2019, pengadilan negeri, pengadilan tata usaha negara, PMH, PMHP.

A. INTRODUCTION

Law No. 5 of 1986, amended by Law No. 9 of 2004 and Law No. 51 of 2009 regarding the State Administrative Court (UU Peratun), stipulates that this court can examine state administration disputes. These namely disputes arise in the state administration court between persons or a civil legal entity with a government agency or official, both at the central and in the region, as a result of the issuance of a state administrative decree (KTUN), including employment disputes based on the applicable laws and regulations. According to UU Peratun, the object of the dispute is SKTUN. However, this provision changed after Law No. 30 of 2014 concerning Government Administration (UU AP) was enacted. The law expands the meaning of KTUN to include factual actions.

Notably, the meaning of factual actions under UU AP intersects with the authority of the general court in adjudicating civil cases, namely tort against the government (PMHP). The primary legal source is Article 1365 of the Civil Code (KUHPer), which regulates tort. Historically, in several case laws by the Dutch Supreme Court, the panel of judges focused on examining tort against the government (PMHP) elements in Article 1365 KUHPer by ignoring the categorization of whether the act in question was in the realm of civil law or public law. Soetojo finds that in the Netherlands, there were three interpretations. First, civil judges are not authorized to examine cases other than private cases. The government can become a party if the actions are in private law, such as contracts between the government and non-governmental individuals/institutions. Second, 'the compromised-based view' focuses on the existence of civil protection guarantees. If an agreement contains such a guarantee, the categorization of public and civil law violations can be ignored. In this situation, the civil judge can examine the case in question. Third, there is a broad opinion, as reflected in the case laws of the Dutch Supreme Court, that if the government's actions violate civil rights, a civil lawsuit can be filed. (Salam, 2018).

In the conundrum of which court is competent in examining PMHP, the Indonesian Supreme Court (MA) issued Regulation of the Supreme Court No. 2 of 2019 concerning Guidelines for the Settlement of Government Actions and the Authority to Adjudicate Tort by

Government Agencies and/or Officials (Onrechmatige Overheidsdaad) (PERMA 02/2019). The PERMA regulates the authority to hear PMHP cases, resulting in the transfer of authority to hear PMHP from the district court (PN) to the state administrative court (PTUN). By the time the PERMA was issued, a few PMHP lawsuits had already been registered with the district courts. This article aims to unravel the consequences of the PERMA 02/2019 to the concept and adjudication of PMHP.

Furthermore, two years after the PERMA 02/2019 issuance, there has been a phenomenon of the use of PN in claiming rights to PMHP. Meanwhile, on the side of PTUN, there was a tendency for PMHP lawsuits not to be accepted because the panel of judges declared that the PMHP element was not fulfilled under the PERMA. The author analyzed four PMHP case decisions in previous research: Decision No. 99/G/2020/PTUN-JKT, Decision No. 230/G/TF/2019/PTUN-JKT, Decision No. 53/PDT.G/2012/PN.JKT.PST, and Decision No. 118/Pdt.G.LH/2016/PN.Plk. The author finds the complexity of implementing PMHP elements according to PERMA in district and state administrative court examinations (Susanti, 2021).

This complexity is reflected in how the panel of judges unraveled the PMHP elements. In one of those decisions, judges focused on how a government action violates the General Principles of Good Governance (AAUPB). In contrast, in another decision, the PTUN panel of judges examined the object of the lawsuit and the elements of concrete actions. Another decision was not to accept the PMHP lawsuit for reasons of competence due to incompliance with the PERMA; the case examination was carried out until the evidentiary stage. The author learned that the panel of judges must examine whether the case was met with the governance of PMHP elements (Susanti, 2021).

While the issuance of PERMA 02/2019 is expected to resolve the conundrum, consistency has not been in place. The author finds that the PMHP elements under the PERMA are more specific than the provisions for tort in Article 1365 KUHPer. In addition, the PMHP elements are also related to the General Principles of Good Governance (AUPB). Consequently, several legal experts claim that the existence of PERMA 02/2019 does not necessarily eliminate the PN's authority to examine PMHP; PMHP in PERMA 02/2019 must be interpreted in the realm of public law, while government actions related to guarantees of civil protection must remain the authority of the PN. However, the development of the state administration law shows a diminishing "role of civil law as a means of juridical control for the government (Simanjuntak, 2019)."

This dynamic condition certainly impacts the fulfillment of the rights of the parties. It is not just a matter of which court is in charge but also how the lawsuit is examined because the

provisions in 1365 KUHPer and the regime of UU Peratun and PERMA 02/2019 have differences. Although a number of researchers have foregrounded the issues of courts' competence in deciding tort against government cases, there is not yet a study that focuses on observing court decisions to see how the subsequent statutes and the PERMA 02/2019 have been implemented. The cases that the author chose represented a variety of public issues, from judicial enforcement to the right to information and education. By doing so, this article can show how crucial the clarity of competence is in the adjudication of tort against the government.

The juridical approach is used to process primary legal materials: laws and regulations in the realm of civil law and state administration related to PMHP: KUHPer, UU Peratun, UU AP, PERMA 02/2019, court jurisprudence, and others. Secondary legal materials include books, research papers, publication of articles in scientific journals, opinions of legal experts and practitioners submitted in scientific forums, and popular articles. The historical and conceptual approaches are used to understand the legislators' intent and judges' application in PMHP cases.

After analyzing the cases using primary and secondary legal resources, the author contends that judges should adopt a comprehensive approach when examining PMHP cases. PMHP should be understood as either a decision to act or a failure to act, with or without a KTUN. In addition, judges must pay attention to the guidelines for compensation, which should be interpreted broadly beyond the narrow confines set by the Law on State Administrative Court (UU Peraturan) and its related regulations. By employing this approach, the judiciary can ensure that case examinations are thorough and that fair outcomes are achieved for all parties involved.

B. ANALYSIS AND DISCUSSION

1. The Concept Government Tort and the Governance of PMHP Regulation in Indonesia

Tort is defined differently in civil law and common law nations. Observing the existence of codes in these respective legal systems is crucial to understanding the differences. Codes in civil law are drafted in an "organized fashion." "…what a code is supposed to do: place legal categories in order so that solution to practical problems can be identified by the lawyers, sanctioned by the judges, and adhered to by everyone else." In civil law tradition, judges play the critical role in fact-gathering (inquisitorial or non-adversarial model), while common law tradition is well-known for its "lawyer-dominated

system of civil procedure (Gordley & von Mehren, 2006)." In the issue of jurisdiction and venue, civil law nations, such as Germany and Switzerland, "…the rules on jurisdiction and venue are contained in statutes rather than being derived from constitutional principle. Thus, they are binding on the court and do not leave room for discretion or a balancing of interests by the judge (Walter, 2001) ."

In civil law nations, tort law is governed under civil codes, specifically the law of obligation. "The civil law's conception of tort liability is a unified one. Whereas the common law divides tort law into discrete wrongs with discrete elements (e.g., assault, battery, false imprisonment, trespass, conversion, trespass to chattels, intentional infliction of emotional distress, and negligence), civil law does not attempt to pigeon-hole different types of tort-like wrong (McClurg et al., 2007)."

Even though the two legal traditions own their respective concept of a tort, "[i]n both common and civil law systems judges play a significant role in developing the law." In common law nations, tort law is developed not "…in terms of grand theories, but in terms of judicial predilection, juristic influence and an ongoing need to meet the multifarious challenges posed by changes in the material and intellectual conditions of social life (Murphy, 2019)." In civil law nations, while codification is the main source, judges "…play a creative role in keeping the provisions of any code alive and relevant to contemporary social experience (Giliker, 2021)."

The presence of government to achieve public welfare is unavoidable (Boestomi, 1994). The government's involvement through actions may affect individuals as citizens. Leon Hurwitz claims that bringing lawsuits against the government "…is a relatively new development in Western historical and political fabric." Notably, there has been reform to the traditionally passive role of the government, where its "…obligation is not only to protect people from each other…" but, importantly, "…to protect the individual from the state itself… (Hurwitz, 1981)." The goals of tort against the government are broader compared to ordinary tort between individuals or legal entities. "Compensation, risk-spreading, deterrence, and respect of law all support the imposition of the government liability ("Government Tort Liability," 1998). Specifically, government liability in tort can result in "economic incentives to avoid violations of the rule of law (Kellner, 2009)."

In the US, besides ordinary tort between individuals, citizens can bring constitutional court lawsuits against governments and their employees whose actions violate federal constitutional rights, particularly the Fourteenth Amendment. Plaintiffs

may ask for compensation for damages that they suffered caused by the government's action (Nahmod et al., 1995). The Federal Tort Claims Act (FTCA), which was enacted in 1946, is the source of the law for tort against the government and its employees. "According to the terms of the FTCA, the United States consented to be sued for the negligent or wrongful acts or omissions of employees within the scope of their employment (Clark, 1991)."

Rooted in civil law tradition, tort in the Indonesian context differs from the concept of tort in common law countries. Indonesia's tort was adopted from the Dutch's concept: onrechmatige daad, which the primary source of law is Article 1365 KUHPer. The article states: "[e]very act against the law that harms another person obliges the person because of his mistake to issue the loss, to compensate for the loss." This action is referred to as Perbuatan Melawan Hukum (PMH) or unlawful act or civil wrongdoing or tort. The author prefers to use tort as the term. According to Moegni Djojodirdjo, the article does not contain the formulation or what PMH is but regulates the conditions for compensation due to unlawful acts (Djojodirdjo, 1982). Rooted in civil law tradition, tort in the Indonesian context differs from the concept of tort in common law countries. Indonesia's tort was adopted from the Dutch's concept: onrechmatige daad, which the primary source of law is Article 1365 KUHPer. The article states: "[e]very act against the law that harms another person obliges the person because of his mistake to issue the loss, to compensate for the loss." This action is called Perbuatan Melawan Hukum (PMH) or unlawful act or civil wrongdoing or tort. The author prefers to use tort as the term. According to Moegni Djojodirdjo, the article does not contain the formulation or what PMH is but regulates the conditions for compensation due to unlawful acts (Sadino et al., 2020). The element of fault in tort is also adopted by other civil law nations, such as Germany and France where "…fault is seen as the core basis for liability (Giliker, 2010)."

After 1919, a violation of law was not only interpreted as violating written regulations (onwetmatigdaad), but was interpreted broadly to include (Fuady, 2013). Acts that violate applicable laws and regulations include:

- Acts that violate the rights of others guaranteed by law;
- Acts that are contrary to the legal obligations of the perpetrator;
- Acts that are against decency; and
- Acts that are contrary to good attitudes in society to be mindful of other people's interest.

To be held accountable, the act occurred due to an error, omission, or mistake (Djojodirdjo, 1982). Moreover, civil liability for a tort can also be imposed on someone who omitted to perform legal duties or someone who took an act although he/ she is not legally competent to perform (Dewi, 2013). In the issue of compensation, plaintiffs can ask for actual and potential loss. Potential loss, for example, can be illustrated in the case of compensation for damage to goods. When an accident occurs, the damaged car can be repaired. However, the price of the car will be lower than before the accident. (Agustina, 2003). Furthermore, to be fulfilled as PMH, a causal relationship (cause and effect) must be proven between the alleged act and the loss suffered. Nevertheless, Article 1367 KUHPer opens the possibility of punishing someone who is not only responsible for the damages by his deed but also for damages caused by the deeds of persons under his responsibility (Dewi, 2013).

The source of tort in Indonesia is under the obligation law scope of the Civil Code. Unlike a contract based on agreement, a tort arises from "infringement of the law." The source to seek compensation for tort is Article 1365 KUHPer, while in contract default, plaintiffs may use Article 1243 KUHPer (Giovanni, 2020). Nevertheless, it is not easy to clarify and cut the differences between tort and default, so breaching an agreement may also be categorized as breaching the law. Supreme Court (Mahkamah Agung) decisions prohibit combining tort and default claims into one lawsuit; there was also a case where tort was claimed based on breach of contract. In 2007, through Decision No. 886K/Pdt/2007, Mahkamah Agung accepted a submission of tort and breach of contract, reasoning that clear differentiation was made in the lawsuit; thus, it was adjudicated as a cumulative objective lawsuit (Paramita, 2021).

Regarding subject to sue, Article 1365 KUHPer does not explicitly mention legal subjects that can be liable for PMH. Following the concept of legal subjects adopted by KUHPer, legal subjects include person and entity. Per its function, legal entities can be either private or public legal entities. PMH was carried out by a public legal entity known Perbuatan Melawan Hukum Penguasa (PMHP), or government tort, which was adopted from onrechtmatige overheidsdaad. T Boestomi believes that there is no need to question the origin of the PMH provisions from KUHPer (Boestomi, 1994). The origin of the provisions from the realm of private law does not make PMH by the government in the realm of public law that violates private rights to have no legal basis. Acknowledging the existence of PMHP has become a necessity.

In the US, in environmental cases, the tort theory must respond to how "…tortious liability can be shifted from the protection of private interests to the protection of public interests (Wilde, 2002)." For example, the urge to protect the public interest can be seen in toxic tort cases. Usually, a large number of citizens in vast areas suffer damage from toxic substances. Consequently, in this type of tort, there is the possibility that lawsuits are submitted to more than one jurisdiction (Ellis Jr., 2007).

Comparatively, in Indonesia, David Nicholson finds a unique characteristic in environmental disputes: they can contain "private pecuniary interests as well as public, environmentally related interests." Law Number 4 of 1982 on Environmental Management, particularly on environmental restoration, provides governance on the matter. However, the Elucidation of the Law does not explain whether environmental organizations can sue the State to seek for environmental restoration costs. He interviewed Adriaan Bedner, who raised the possibility of tort action under Article 1365 KUHPer to end "unlawful polluting activities (Nicholson, 2009)."

The basis for consideration of the lawsuit against the authorities, namely

- The act has violated a right.
- The government's actions are contrary to its legal obligations.
- The government is not careful in its actions, measured by appropriateness and propriety in social interaction (Salam, 2018).

The government acts on its authority in the realm of public law. However, the actions result in losses or violating private property rights so that authorities can be sued for tort (Salam, 2018).

In tort against the government, the defendant is not an individual; in the U.S., "[t]he Supreme Court has long recognized that the federal government is a unique litigant. It is involved in a broader range of litigation and is a party to more cases "than even the most litigious private entity (Figley, 2020)." Scholars have also foregrounded the issue of competence to adjudicate tort against the government. Comparatively, France, which adopted civil legal tradition, differentiates between a faute de service and a faute personnelle. Public bodies are liable for a faute de service, which is under the competence of the administrative courts. Meanwhile, a public servant who commits a faute personnelle is adjudicated in the ordinary, civil courts (Fairgrieve, 2003).

Meanwhile, looking back at PMHP adjudication's history in the Netherlands, Syukron Salam concludes Soetojo and Setiawan's analysis of several Hogeraad decisions In Rhedense Koe (Arrest HR 21 April 1898), Arrest 10 May 1901, Ontvanger Arrest (HR

20 December 1940), Zaanvoorstse Geval (Arrest HR January 14, 1949), Boetinchem (Arrest HR 25 February 1940), Kwedergronden Groningen (Arrest HR 24 June 1949), Osterman (Arrest HR 20 November 1924), in these cases, the Dutch Supreme Court decided the PMHP case without considering the civil or public categories of the act. Nor does it focus on whether the rights violated are civil or public subjective rights. The focus is on the legal obligations of the authorities and the provisions of both private and civil laws (Salam, 2018).

The PN's authority to adjudicate PMHP is referred to Article 2 of the RO and the provisions on judicial power in the 1945 Constitution of the Republic of Indonesia. The phrase "...judicial power, according to the division of jurisdiction, legal authority and the method specified in this regulation" is interpreted as a general court that handles civil and criminal cases. Notably, at the beginning of Indonesia's independence, the state administrative Court had not yet been formed, so the PN examined PMHP. For example, in the Jakarta District Court Decision dated July 15, 1953, No. 1278/1953 G. where, the court rules, "According to Article 2 of the RO and Article 101 of the Republic of Indonesia's Constitution, district courts have the competence to examine and hear cases against the government (Djojodirdjo, 1982).

2. The Reconstruction of PMHP Interpretation and The Authority of State Administrative Court over PMHP

Peratun was established by Law No. 5 of 1986 with the authority to examine KTUN disputes. The law defines KTUN as a written decree issued by a government agency or official containing state administrative and legal actions based on applicable laws, which are concrete, individual, and final and cause legal consequences for a person or civil legal entity. The meaning of this written decree includes fictitious TUN decisions and negative TUN decisions where the TUN agency/official does not issue a decision under its authority. A negative TUN decision is a "silent refusal" by the TUN agency/official not to issue a decision according to a specific period (Djojodirdjo, 1982). Seeing these provisions, even though the Peratun has been formed, PMHP will still be tried by the general court through the district courts.

The governance of Peratun above reflects the choice of legislators to have a narrow view of Peratun's authority. The view, for example, was brought by Syachran Basah. His view is based on Article 2, paragraph 2 Wet AROB (Netherlands), which formulates a written decision of the state administration and the opinion that an unwritten decision is challenging to prove and easily refuted by the opposing party (Abdoellah, 2016). This

narrow view continued to be used until the Law on State Administrative Court was amended by a newer law, namely Act No. 51 of 2009.

Priyatmanto Abdoellah argues that Peratun's authority to examine the SKTUN is no longer in line with the community's needs. Paul Effendie Lotulung and Aadrian Bedner have expressed the same concern. Bedner emphatically said limiting the Peratun's competence would jeopardize the rule of law and allow state officials to evade judicial power (Abdoellah, 2016). Due to the limited competence in 2007-2012, the lowest number of cases tried in the PTUN was 0.02%-0.049% of the total cases received by all four judicial circles. From this data, half of the cases submitted to the PTUN were declared unaccepted. One of the reasons is that the object of the lawsuit is not under the absolute competence of Peratun (Abdoellah, 2016).

The concern was finally answered with the issuance of UU AP. In the transitional provisions of Article 87 of the UU AP, it is stated that the KTUN must be interpreted as:

- A written decree which also includes factual actions;
- Decisions of state administration bodies and/or officials in the executive, legislative, judicial, and other state administrators;
- Based on statutory provisions and AUPB;
- It is final in a broader sense;
- Decisions that have the potential to have legal consequences; and/or
- Decisions that can be applied to citizens.

UU AP introduces factual action as one of the meanings of KTUN. Philipus M Hadjon calls this a form of contradiction in terms? Decree and action are two very different things (Sudarsono, 2017). Hadjon's opinion is the center of Peratun's narrow competence.

The addition of factual action competence in the UU AP is under the broad view of Peratun's competence. Peratun's competence must include written decisions, unwritten decisions, or actions that violate the law, that are inefficient (unwise) and violate the law (Abdoellah, 2016). Sudarsono concludes that the factual action meant by the law as feitelijkehandelingen, namely actions that are not intended to have legal consequences but in reality have or have the potential to cause legal consequences (Sudarsono, 2017). When referring to the origin of the word from the Dutch doctrine, factual action comes from the term feitelijkehandelingen. Within the scope of administrative law, there are two types of administrative actions (bestuurhandlingen): first is feitelijkehandelingen (material/factual actions), and the second is rechtshandelingen (legal actions).

Furthermore, the author analyzes the position of the factual action provisions in the UU AP with the existence of onrechtmatige overheidsdaad/PMHP. The grammatical interpretation of Article 87 of UU AP leads to the interpretation that a written decree must precede the factual action. This opinion results in the understanding that if PMHP is in the form of physical actions without any written determination, it is not under the competence of Peratun but the general court. This grammatical interpretation does not change the object of the lawsuit in the Peratun is only the written decree (Bimasakti, 2018). Muhammad Adiguna Bimasakti uses a comprehensive approach that the factual actions referred to in UU AP include those with written or unwritten stipulations. Article 87 of the UU AP must be read together with SEMA No. 4 of 2016, which regulates the authority of the Peratun over PMHP. All forms carried out by the government in the public sphere except those that are subject to civil law (perbuatan bersegi banyak) are included in the administrative law jurisdiction (Bimasakti, 2018).

Using the comprehensive approach above, PMHP, without a written decree, is also under Peratun's competence. In examining the PMHP lawsuit in PTUN, it is not enough to fulfill Article 1365 KUHPer. In front of the trial, it must also be proven that the defendant carried out the act in his position as a TUN agency/official (Bimasakti, 2018). However, the provisions regarding the limit of compensation in UU Peratun cannot be used for factual action claims because these provisions are intended for written stipulation disputes (Bimasakti, 2018).

With the comprehensive approach, the use of UU Peratun, UU AP, and SEMA 4 of 2016 is sufficient to establish the competence of Peratun to adjudicate PMHP, which includes factual action; in reality, there is uncertainty not only for judges but also for lawyers and the public. The narrow meaning of the Peratun's competence and UU AP Law still exists. Finally, in 2019, the Supreme Court issued PERMA 02/2019, which regulates details regarding PMHP. In the consideration section of this PERMA, per UU AP, PMHP is defined as a government action included in Peratun's competence.

PERMA 02/2019 seeks to clarify the meaning of factual action by defining government action. In its general provisions, Article 1 states that government action is the act of a government official or other state administrator to take and/or not to take concrete actions in the context of administering the government. Disputes on tort by government agencies/ officials (OOD) are disputes that contain demands to declare invalid and/or to cancel the actions of government officials or to declare that the government’s actions do not have binding legal force along with the petition for

compensation under the provisions of laws and regulations. By Article 3 of this PERMA, to be able to sue an agency/official, the community member states the reasons for the action as:

- Contrary to statutory regulations; and
- Contrary to AUPB.

Articles 10 and 11 of PERMA 02/2019 regulate the authority of Peratun over PMHP cases. PMHP cases that have been submitted to PN but have not yet been examined are transferred to PTUN. Meanwhile, for PMHP cases that the PN is examining, it must be stated that the PN is not authorized to adjudicate.

This PERMA provision provides hope for clarity of the competence over PMHP. However, Muhammad Addi Fauzani and Fandi Nur Rohman saw the PERMA as problematic for three reasons. First, "violating" is defined narrowly, not broadly, as "against," which includes active and passive action. Second, the PMH elements in the PERMA are not yet clear compared to Article 1365 KUHPer. Third, the PERMA regulates reducing the time for filing a lawsuit, which is 90 days deducted from the administrative dispute settlement process (Fauzani, 2020).

If using a grammatical interpretation, the author agrees that PERMA narrows the meaning of "violating" according to Article 1365 of KUHPer. Article 3 of PERMA stipulates that the accused action must be against the law and AUPB. This narrow governance contradicts the broader meaning of tort (PMH). PMH has been interpreted broadly, including any actions that conflict with rights, propriety, obligations, etc. Grammatical interpretation will again lead to limitations of Peratun's competence over PMHP.

Different conclusions will come if we use an extensive interpretation. The author argues that PERMA 02/2019 cannot be read alone. The competence to adjudicate PMHP must be applied based on other related laws: Article 1365 KUHPer, UU Peratun, UU AP, SEMA 04/2016, and PERMA 02/2019. This approach will result in these characteristics of PMHP:

- PMHP’s subject is government agency/official;
- The object of PMHP can be in the form of a written decree or an action that is mandated or not mandated by a written decree;
- The PMHP element includes violating the law in a broad context. This includes laws, AUPB, people's rights, propriety, obligations of actors, and so on;

- The authority to adjudicate PMHP is under Peratun;
- PMHP compensation does not refer to UU AP Law but PERMA 02/2019;
- To be able to prove PMHP, the case examination must include the fulfillment of the elements of Article 1365 KUHPer and elements of government actions, namely any actions carried out within the authority of the perpetrator as a government agency/official;

3. The Judicial Practice Handling PMHP Cases After the Issuance of PERMA 02/2019

The author chose three court decisions to understand the performance of PN and PTUN handling PMHP cases after the PERMA 02/2019. The three decisions are:

- Decision No. 230/G/TF/2019/PTUN-JKT
- Decision No.99/G/2020/PTUN-JKT
- Decision No.161/G/TF/2020/PTUN.JKT

The panel of judges in Decision No. 230/G/TF/2019/PTUN-JKT (the action of slowing down, blocking access, and blocking internet data in Papua) provides careful legal considerations on establishing the government's liability in tort. The case was filed by the Alliance of Independent Journalists (AJI) and the Defenders of Freedom of Expression in Southeast Asia (SAFEnet) against the Minister of Communication and Information (Defendant I) and the President of the Republic of Indonesia (Defendant II).

The objects of the lawsuit are government actions taken by the Defendants, which include:

- Access slowdown in some areas of West Papua Province and Papua Province on August 19, 2019 from 13:00 to 20:30 WIT;
- Blocking of data services and/or complete termination of internet access in Papua Province (29 Regencies) and West Papua Province (13 Cities/Regencies) on 21 August 2019 until at least 4 September 2019 at 23:00 WIT;
- Extend the blocking of data services/or termination of internet access in 4 Cities/Regencies in Papua Province (i.e. Jayapura City, Jayapura Regency, Mimika Regency, and Jayawijaya Regency) and 2 Cities/Districts in West Papua Province (i.e. Manokwari City and Sorong City) since September 4, 2019 at 23:00 WIT to September 9, 2019 at 20:00 WIT.

  by everyone els

In the lawsuit, the plaintiffs mentioned that in his authority as the Minister in charge of communication and informatics through the above actions, defendant I reduced the right to internet access. Meanwhile, as the highest head of government, defendant II ignored the actions of defendant I. These actions violate several laws, including Law No. 11 of 2008 jo. Law No. 16 of 2016 concerning Information and Electronic Transactions (UU ITE). The law stipulates that if there is information and/or documents contrary to the law, law enforcement must be enforced. Internet access restrictions and blocking are meant to respond to criminal perpetrators and content that violates the law, not to the broader community. In addition, the plaintiff noted that several principles of AUPB were violated: the principle of legal certainty, orderly state administration, public interest, transparency, not abusing authority, and proportionality.

As a result of these actions, the plaintiffs who came from journalists' backgrounds were unable to verify and clarify information, and the relevant mass media were unable to submit news according to schedule, and this resulted in a decrease in online media income. In addition, other groups of people also experience losses, one of which is online drivers. Without the internet, they could not make a living. The administration of the government was hampered; e-budgeting, e-planning, and the procurement of goods and services were hampered.

The defendants denied the above arguments, stating that these actions were carried out based on discretion due to an emergency. The goal is to prevent the spread of hoaxes that can trigger ethnicity, religion, ancestry, and riots among a group of people (Suku, Agama, Ras, Antar Golongan, or SARA). Backed by this reason, neither defendant I nor II did PMHP.

The panel of judges' legal considerations helped the author understand how elements of PMHP were examined. First, the panel stated that the plaintiff had a legitimate interest, according to law, to sue, and the defendants are government officials who can be sued by PMHP.

The panel then assessed the fulfillment of the formal requirements of the lawsuit. The time to file a lawsuit is not more than 90 days. The object of the lawsuit is stated clearly, and the defendants are considered to have authority related to the object of the case. The author captures two critical findings:

- The panel considered that the termination of action did not close the opportunity to sue.

- Although the President (defendant II) is not an official who takes action, in his authority as the head of government, defendant II is an official under his presidency.

The panel continued to examine the main points of the case by stipulating two legal issues in this case, as follows:

- Is the action of defendant I contrary to the laws and regulations and/or AUPB?
- What is defendant II's responsibility for the occurrence of government actions by defendant I?

Answering the first question, the panel outlined 3 (three) criteria for the government actions' validity, namely:

- determined by a competent authority;
- made according to the procedures; and
- the substance that corresponds to the object of action.

The defendants have acknowledged that the object of the dispute was carried out by the authority of Defendant I as regulated in UU ITE. Furthermore, the panel examines the suitability of the government's actions above, both in procedure and substance, with the law. The panel concluded that slowing access and blocking data did not follow UU ITE. The law regulates the termination of access to electronic information and/or electronic documents with unlawful content but does not include the termination of access to the internet network. These actions are carried out against perpetrators and contents that violate the law, not the community. The actions of defendant II harmed the community. The panel emphasized that internet access is part of the right to information.

Furthermore, the panel reasons that restrictions on human rights are known but must be regulated by law. The emergency argued by the defendants was not proven through examination of evidence. In the case of an emergency, defendant I must declare it, and issuing a decree is required. The argument that government actions are based on discretionary power because of a legal vacuum was also not fulfilled. UU ITE stipulates that those who can be restricted and/or blocked are perpetrators and content that violates the law. The panel did not examine AUPB violations because it concluded that the object of the case violates the law.

With those considerations above, the panel decided that the defendants are proven to have committed PMHP. The author draws essential findings from the panel's ruling, namely:

- Failure to act according to authority (omission) is also under the meaning of government action;
- The basis of rights to sue can be the implementation of rights that are explicit in the law;
- The panel did not examine AUPB violations because they had established the violation of law;
- Discretion may be exercised in emergency conditions and/or due to a legal vacuum, but it must be based on objectives and conditions that comply with the law.

Decision No. 99/G/2020/PTUN-JKT is the second example of plaintiffs who submitted PMHP accordingly to PERMA 02/2019. In this decision, the plaintiffs, namely Sumarsih and Ho Kim Ngo, faced the defendant, the Attorney General. The plaintiffs are parents of the victims of the Semanggi I and Semanggi II incidents. They feel that the plaintiff's right to the guarantee, protection, legal certainty, and equal treatment of the law has been violated. In a working meeting with Commission III of the DPR, the defendant stated: "…The Semanggi I and Semanggi II incidents, there is already resulted from a plenary session of the House of Representatives (DPR) stating that these events were not serious human rights violations, Indonesia Human Rights Commission (Komnas HAM) should not have followed up because there was no reason for the establishment of the ad hoc court which is based on the recommendation of the DPR to the President to issue a Presidential Decree on the establishment of an ad hoc Human Rights Court following Article 43 paragraph (2) of Law No. 26 of 2000 concerning the Human Rights Court…"

The plaintiffs argued that the statement could be used as the object of the case because it is a government action taken by the defendant. Made in his capacity as the Attorney General, the statement was detrimental to the plaintiffs. This statement contradicts the 1945 Constitution of the Republic of Indonesia Article 28 D paragraph (1), Law No. 30 of 1999 concerning Human Rights (UU HAM) Article 3 paragraph (2), Law No. 16 of 2004 concerning the Attorney General's Office (AGO), Article 30 letter d and Article 35 letter b. In short, apart from violating the rights of the plaintiffs, this statement is also inconsistent with the duties and authorities of the Attorney General, namely, to make the law enforcement process effective. The plaintiffs added that some principles of AUPB have also been violated: accuracy, legal certainty, and

professionalism. For these reasons, the plaintiffs asked the judges to declare that the government had committed a tort.

In its rebuttal, the defendant stated that the lawsuit did not meet the formal requirements, according to UU AP. The next point is that the defendant's statement cannot be separated from the immunity rights of members of parliament as was made before a DPR hearing. The lawsuit lacks legal standing and parties because it does not include the DPR members as joint defendants. Meanwhile, regarding the subject matter of the case, the defendant has carried out law enforcement under the authority, procedure, and substance of the Semanggi I and Semanggi II events. Thus, the object of the case does not violate the law, and the reason for the violation of legal certainty proposed by the plaintiffs is wrong. The defendant also denied that there was a violation of AUPB.

In this case, the panel did not formulate a systematic, structured consideration of PMH elements but directly responded to the arguments of the parties and the evidence submitted. Responding to the defendant's rebuttal, the panel considered that the object of the lawsuit was clear because the defendant stated it in his authority as the Attorney General in a meeting to discuss his official performance. Regarding the right to immunity, in this case, the panel stated that this right is only for members of the DPR. Was the lawsuit premature because the plaintiffs filed an open letter appeal? The panel analyzed the provisions in UU Peratun, UU AP, PERMA 02/2019, then stated that because these laws and regulations do not specify the form of appeal in administrative settlements, the open letter containing the substance of objections met the requirements as an appeal.

The panel declared the statement as an act of the government. The concrete element of action must be interpreted as the event, the purpose, and the implementation of a specific action can be determined. The defendant's statement or the object of the case fulfills this meaning. Thus, the object of the case is within the court's competence under PERMA 02/2019. The plaintiff's loss was "…the plaintiffs lost hope in seeking justice because the defendant…" stated that based on the 2001 DPR's plenary meeting, the incidents' investigation did not need to be followed up even though the process was still ongoing. As a result, there is detrimental uncertainty for the plaintiffs. In addition to violating the plaintiffs' rights in the law, the panel also stated that the defendant's statement that was not correct to the facts was a form of lying and violated the principle of accuracy.

The panel decided that the defendant was against the law and required the defendant to make a statement explaining the actual state of the investigation in a meeting with Commission III of the DPR if there was no decision/decision stating otherwise. The author can draw several findings from this ruling:

1. The statement that the agency and/or official is categorized as a government action if it is carried out within their authority or capacity as a government official;
2. Government officials are not immune from lawsuits unless the law provides such immunity;
3. Concrete elements are also used to assess whether the dispute object is categorized as a government action. The concrete definition used is the concrete explanation in UU Peratun, which means that the intent can be determined and implemented.

Decision No. 161/G/TF/2020/PTUN.JKT was chosen to examine how the judges examine action elements in PMHP. This decision is related to accepting new students (PPDB) for the 2020-2021 Academic Year in DKI Jakarta. The plaintiffs consisted of the Student Guardian Association 8113 (plaintiff I) and four guardians of students in DKI Jakarta. The defendants are the Head of the Education Office (defendant I) and the Governor of DKI Jakarta Province (defendant II).

The plaintiffs argued that the defendant I did not take alternative actions to anticipate the consequences of implementing PPDB on the students who were not accepted in public schools because of one of the following reasons:

- Age is the primary determinant for the zoning and affirmation programs;
- Age restriction for inclusion program;
- A minimum quota of 40% for the zoning program for middle school (SMP) and high school/vocational school (SMA/SMK) levels;
- The selection mechanism for the academic orientation program is based on the calculation of the average multiplication of semester performance in grade 4, grade 5, and the first semester of grade 6 elementary school (SD) (5 semesters) to enter junior high school with school accreditation scores; and the average count of grade 7, grade 8 and first semester of grade 9 (5 semesters) to enter SMA/SMK with school accreditation scores.

The object of the lawsuit was the actions of the defendants in the form of:

- The defendant I did not take alternative actions as an effort to anticipate the impact of implementing PPDB for the 2020-2021 Academic Year in DKI Jakarta Province to school students who were not accepted in public schools because of the four selection programs above;
- The Governor of DKI Jakarta or defendant II did not provide a solution to the problem of the education right of children who were not accepted in public schools as a result of the implementation of PPDB for the 2020-201 Academic Year in DKI Jakarta Province for school students who were not accepted in public schools.

The plaintiffs argue that the above actions are contrary to the laws related to the rights to education in the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 on Human Rights, Law No. 20 of 2003 concerning the National Education System (UU Sisdiknas), Law No. 11 of 2005 concerning Ratification Covenant on Economic, Social and Cultural Rights. The above actions are also argued to violate the goal of equal distribution of education. The defendants were also charged with violating the principles of legal certainty, orderly state administration, and accountability.

These actions resulted in the plaintiffs' child or sibling not being accepted into the state junior high school or high school in the 2020 PPDB. For example, even though the target school is close to home, one of the plaintiffs' children could not be accepted because of the age requirement.

Based on the argument above, the plaintiffs ask the panel to decide whether the object of the dispute is declared as PMHP and an invalid action; regulations are the basis for the action to be revoked. In addition, defendant I was required to:

- Collect data on students whose rights have been violated in the PPDB selection process or who are not accepted in public schools due to the object of the lawsuit;
- Placing students whose rights have been violated because of the object of the lawsuit in vacant public schools. The defendant I must prioritize students who have been recorded by the plaintiff I, whose data can be confirmed by the defendant I;
- Providing school financing facilities to students who are not accepted in the state schools as referred to in letter (b) until the completion of their education at one level (SMP and SMA/SMK).

Meanwhile, defendant II was required to:

- Supervise the obedience of defendant I in carrying out the implementation of Point (6) petitum (plaintiffs' request);
- To produce a guide for defendant I to improve equitable education services;
- Ordered defendant I and defendant II to obey and comply with this decision by coordinating with plaintiff I to address the issue of children's rights, which were not accepted in public schools.

The defendants filed an exception that the lawsuit was expired and obscuur libel. The defendants argued that the lawsuit was not based on law and that the defendant did not carry out PMHP. The proceedings of the trial resulted in a change of the object of the lawsuit:

- The defendant I did not take any alternative actions to overcome the impact of the implementation of PPDB in DKI Jakarta Province. It did not provide any school students who were not accepted in public schools due to the implementation of the provisions referred to in SK No. 501 Year 2020.
- The actions of defendant II did not provide a solution to the problem of the right to education of children who were not accepted in public schools due to the implementation of PPDB for the 2020-2021 Academic Year in DKI Jakarta Province.

In legal considerations, the panel began by examining the fulfillment of the formal requirements of the case. The main question is whether the object of the dispute is an act of government. Under UU Peratun, UU AP, and PERMA 02/2019, actions can be in the form of taking action or doing nothing. In line with the considerations in the decision regarding the statement of the Attorney General above, the panel, in this case, stated that the action in question must be concrete. This means that the process can be determined and executed. The panel concluded that the plaintiffs could not define exactly what actions the defendants should have taken. To assess the validity, the panel stated that testing must be carried out:

- Whether some regulations or laws oblige and/or prohibit government officials from doing/not doing something concrete actions,
- Whether the loss suffered by the plaintiff is due to the failure to act as it should or is due to direct neglect of legal obligations (proximate omission),
- Whether in carrying out/not carrying out government actions/actions, some procedures or materials can be proven to be contrary to the AUPB.

The panel found that the PPDB had been implemented based on objective regulations without discriminating against SARA. The object of the dispute does not open opportunities for law violations. Hence, the panel stated that the plaintiffs' interest was the revocation and/or cancellation of regulations related to PPDB, which, according to the panel, was not within the authority of the PMHP examination in Peratun. The decision stated that the lawsuit was not accepted.

The author draws several findings from this third ruling:

- Concrete elements are also used to assess whether the dispute object is categorized as government action. The concrete definition used is the concrete explanation in UU Peratun, which means that the intent can be determined and implemented.
- If the object of the dispute is not doing an act, then the object of the dispute should be the action a defendant should have taken.
- PTUN is not authorized to assess the revocation and/or cancellation of regulations in PMHP disputes.

After analyzing the three cases above, the author finds that there has not been any consistency in examining PMPH cases. While in the first case, the court successfully established a systematic examination, in all cases, judges approached the presented applications differently, confusing what constitutes PMPH, especially after the enactment of the PERMA 02/2019.

C. CONCLUSION

After the enactment of PERMA 02/2019, the absolute competence over PMHP is in Peratun. Notably, the PERMA raises debate over a matter of authority and which actions must be interpreted as a means of reconstructing PMHP elements. The author contends that the broad definition of PMHP should be used. Not only violations of the law PMHP also applies to violations of AUPB, individual rights, and values in society. The authority to prosecute the government’s tort is Peratun. In the future, it is unavoidable that the incoming lawsuits will be diverse and can no longer match the narrow box of the meaning of PMHP. The action element must be interpreted as doing or not doing with or without a written decision. The compensation amount is not limited to the maximum under UU Peratun and its derivatives. The author appreciates the panels of judges on those cases above because they implemented the broader interpretation of PMHP. However, Article 3 of the PERMA states that the reasons to sue PMHP are a violation of laws and AUPB. No laws or regulations state that the fulfillment of violation

laws would authorize judges not to examine AUPB violations. Additionally, there must be precise guidelines on what constitutes not doing something under PMHP.

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