

ACCOUNTABILITY (RESPONSIBILITY) OF THE GOVERNMENT OF INDONESIA IN THE CONTEXT OF *GOOD GOVERNANCE*

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Abstract

This study aims to analyze the Accountability (Responsibility) of the Government of Indonesia in the Context of Good Governance. The results showed that the Government has two positions, namely as one of the state organs and as a state administration. As an organ of state, the government acts for and on behalf of the state. Meanwhile, as a state administration, the government can act both in the field of regulation (*regelen*) and in the field of service (*bestuuren*). In order to guarantee and provide a legal basis that government actions (*bestuurshandeling*) carried out by the government as a *legitimate and* justified, accountable and responsible *act* (liable), then every act of government must be based on just, dignified and democratic laws. Compensation for the following: 1) Indemnification for unlawful acts; 2) Indemnity for acts committed by others; 3) Indemnity for animal owners; 4) Indemnity for owners of collapsed buildings; 5) Reparations for the family singled by the murdered person; 6) Indemnity because the person has been injured or disabled limb; and 7) Redress for acts of humiliation.

Keywords: Responsibility, Governance, Good Governance.

A. INTRODUCTION

The government has the authority to regulate, collect taxes, enforce laws, impose sanctions and so on, which is a series of "powers" in an effort to achieve the goals of state life. On the other hand, the community also has the right to obtain legal protection from various government actions that may cause harm to the community.

The responsibility of this government actually provides sufficient space for the emergence of community participation which is needed by a democratic government. By implementing the principle of government responsibility consistently and consequently, it will actually increase the prestige and dignity of the government in the eyes of its people, because if the government is willing to uphold the principle of responsibility of this government, at least several important things will be achieved, namely:

- a) upholding the principles of the rule of law, rule of law, *rule of law* and equality before the law in the administration of government, because the government also turns out to respect and obey the law;
- b) considering that in general Indonesian society still adheres to a paternalistic culture, the principle of government responsibility encourages the emergence of voluntary public legal awareness (*voluntary compliance*);

- c) strengthening reform commitment to realize good governance in line with strengthening civil society;
- d) To strengthen this principle of government responsibility, it is necessary to think about forming a law on State Responsibility or Government Responsibility and a law on National Compensation.

Responsibility means the state of being obliged to bear everything if there is something, it can be sued, blamed, prosecuted, and so on. In the legal dictionary there are 2 (two) terms that refer to responsibility, namely liability and responsibility. Liability (*aansprakelijkheid*) is a specific form of liability. The definition of liability refers to the position of a person or legal entity that is considered to have to pay a form of compensation / compensation after a legal event or legal action. *Liability* is a broad legal term, in which it means that; liability refers to the most comprehensive meaning, encompassing almost every character of risk or responsibility.¹

Public legal responsibility according to Tatiek Sri Djadmiati as personal responsibility and position responsibility, personal responsibility, is related to the functionary approach or behavioral approach. From the point of view of administrative law, personal responsibility pertains to administration in the exercise of authority in the public service. The use of authority referred to here includes government actions according to the provisions of laws and regulations and actions in determining a policy or discretion. While the responsibility of the position is related to *the legality* (validity) of government actions; in administrative law, the issue of legality of government actions is related to the approach to government power. The power approach relates to the authority granted under law based on the principle of *legality* or the principle of *rechtmatigheid*.²

Based on the description above, the author will discuss the Accountability (Responsibility) of the Government of Indonesia in the Context of *Good Governance*.

B. METHOD

This research is included in the type of doctrinal research, where the approach method used is normative juridical. The study method used in this study is normative legal research, which is a study conducted by examining certain legal problems based on the implementation of applicable laws and regulations or applied to a legal case.³ *The research* approach used is Legislation approach and the Conceptual Approach.⁴

The research source used in this study is the result of data collection carried out with primary data and supported by *library research*. Secondary data are then grouped into three sources of legal materials used in this study are primary legal materials, secondary legal materials, and tertiary legal materials. Research techniques are descriptive analytical, where analysis is carried out critically using various theories of research problems. The collected data is analyzed descriptively with a *qualitative approach*, namely by providing a thorough and in-depth explanation and explanation (*holistic / verstelen*) scientifically.

C. DISCUSSION

1. Government Accountability Review

Liability is widely used to mean *liability*, other terms that are often used are *Responsibility* and *acuntability*. The three terms in their use are associated with aspects of their birth, namely:⁵

- a. *Liability* is born from the principle of the rule of law.
- b. *Responsibility* is born from the principle of democracy.
- c. *Acuntability* was born related to good governance.

The term *liability* is more meaningful to the juridical aspect associated with the court, while responsibility is more meaningful to the political aspect, while acuntability is more meaningful to the moral side. The responsibility of the State and the Government is related to the provision of protection (*rechtbescherming*) to citizens as a result of the exercise of authority by State and Government organs carried out by State Administrative Agencies or Officials

Thoughts related to the responsibility of the State and Government began or were based on the views of R. Kranenburg, according to him there are 7 (seven) rationales about whether the state or the Government can be sued in the judiciary, the seven rationales, as follows:⁶

1. The concept of the state as an institution of power is associated with the concept of law as a decision of the will embodied by power, stating that there is no state responsibility.
2. The concept that distinguishes the state as the ruler and the state as *fiscus*, as the ruler, the state cannot be sued and vice versa as a *fiscus* the state can be sued. Based on this concept, Openheim presents criteria for testing a legal relationship based on the alignment of the parties.
3. A concept that presents the criteria for the nature of rights, namely whether a right is protected by public law or civil law.
4. A concept that presents the criteria of legal interest that is violated.
5. A concept based on unlawful acts (*onrechtmatigedaad*) as the basis for suing the state. This concept does not matter whether what is violated is a public law regulation or a civil law regulation.
6. The concept that separates between function and function execution. Functions cannot be sued but their implementation that gives birth to losses can be sued.
7. A concept that presents a basic assumption that the state and its instruments are obliged in its actions regardless of its aspects (public law or civil law) to pay attention to normal human behavior. Justice seekers can demand from the state and its instruments that they behave normally and produce damages, can be sued. Thus, the state can be sued for disorderly functioning.

Of the seven foundations of thinking put forward by R Kranenburg above which pertain to, whether the state can be sued, according to the author, the basis of thinking in numbers 5, 6, and 7 in its development today is still very relevant to be used as a basis for footing, while the rationale in numbers 1 and 3 is no longer relevant, for the basis of the footing in number 2 specifically on the idea of the state as a fiscus can be sued is still relevant as a basis for footing

Based on the theory of representation and responsibility, the basis of state responsibility for actions carried out by State Administration Officials is, state actions are essentially human works as well. The government is a legal entity and the people acting for the government are its representatives. That government must be represented by those people. In other words, the deeds of that person should be regarded as those of the government. This theory of representation and responsibility is the same as contained in Article 1367 of the Civil Code (the principle of respondeat superior), to this theory there are certainly limits, these restrictions are actions carried out by a State Administrative Officer must be within the scope of his own obligatory duties.

Regarding state representation by State Administrative Officials, it must also be seen in aspects of Civil Law, aspects of Administrative Law and aspects of Criminal Law. In the event of an unlawful act, can the government be blamed or should the person who committed the act be held accountable himself, i.e. when it can be categorized as an act that must be accounted for in office and when it must be held personally accountable.

According to J.H. Nieuwenhuis⁷, liability arises because of unlawful acts (*onrethmatige daad*) and is the cause (*oorzaak*) of losses. While the perpetrator is guilty (*schuld*), then the person must be sued for the loss. This is also in line with the opinion of Marthalena Pohan⁸, who put forward a liability because there is an *unstfout*.

2. Accountability of the Government of Indonesia in the context of Good Governance

This conception of responsibility we can examine the opinion of Peter Mahmud Marzuki. He said, that the definition of responsibility in the sense of *liability* is defined as liability which is a translation of *liability/aansprakelijkheid*, a specific form of responsibility. According to him, the definition of liability refers to the position of a person or legal entity that is considered to have to pay a form of compensation or compensation after a legal event or legal action. A person, for example, must pay compensation to another person or legal entity for having committed an unlawful act (*onrechtmatige daad*) so as to cause harm to the other person or legal entity. The term liability falls within the scope of private law.

Peter Mahmud Marzuki's opinion is not much different from the opinion of civil law expert in the early 20th century, J.H. Nieuwenhuis, that liability is an obligation to bear compensation as a result of violations of norms. Acts that violate these norms can occur due to: (1) unlawful acts, or (2) default. The Nieuwenhuis further elaborated that the responsibility rests on two pillars, namely lawlessness and wrongdoing.

Referring to the opinion of Niewenhuis⁹, it can be drawn an understanding that liability can occur because:

1. Law; This means that a certain person / party is declared liable not because of the mistakes he committed, but he is responsible because of the provisions of the law. This kind of liability is called risk liability.
2. The error that occurred was caused by an agreement between the parties that harmed one of the parties as stipulated in Article 1365 of the Civil Code (unlawful acts). This kind of liability is known as liability based on the element of guilt and in its development also because proof becomes liability on the basis of the presumption of guilt.

The responsibilities and responsibilities of government positions in the public sector are set forth in the form of laws and regulations (regeling), policy regulations (beleidsregel), and state administrative decisions (beschikking), as well as factual actions (feitelijke handeling), in the form of government actions resolved through different court institutions, if government actions cause harm to citizens.

According to Toshiro Fuke,¹⁰ from the historical aspect of the development of responsibility against the state, there are 6 (six) phases. The phases of such development are as follows:

1. Since the liberation theory;
2. State liability;
3. Non-authoritative activities;
4. The welfare State;
5. The case of compulsory acquisition of property (land in particular);
6. Of loss/injury such as that caused by natural disaster.

In a broad sense, state *liability* is that the state will provide compensation (reimbursement) for any loss or loss arising and occurring, caused directly or indirectly, materially or mentally to citizens, as a result of the use of public authority.

Theoretically, the president or government has two positions, namely as one of the organs of the state and as a state administration. As an organ of state, the government acts for and on behalf of the state. Meanwhile, as a state administration, the government can act both in the field of regulation (*regelen*) and in the field of service (*bestuuren*).¹¹ In order to guarantee and provide a legal basis that government actions (bestuurshandeling) carried out by the government as a legitimate *and* justified, accountable and responsible *act (liable)*, then every act of government must be based on just, dignified and democratic laws. Recent societal developments have forced the political system that once gripped hard to conform to respect for human rights. A democratic political system demands an independent judicial power which of course also has good quality and supervision

The existence of the principle of government accountability is actually one of the balances in positioning between the position of the government and the community in running the wheels of state organization. The government has the authority to regulate, collect taxes, enforce laws, impose sanctions, and so on, which is a series of "powers" in achieving the goals of state life. On the other hand, the community also has the right to obtain legal protection from various government actions that may cause harm to the community. Therefore, the existence of this accountability actually provides sufficient space for the emergence of community participation which is needed by a democratic government.

According to Agus Yudha Hernoko¹², liability is a series to bear losses caused by mistakes or risks. It was also explained by Y. Sogar Simammora¹³ that liability is not only in the form of compensation, but also restoration to its original state.

Accountability in the Netherlands (*civil law system*) is known several teachings regarding civil responsibility, namely:

1. Liability by mistake (*schuldaansprakelijkheid*).

Under this model, the plaintiff is obliged to prove the guilt of the defendant. Liability based on wrongdoing in Indonesia is known as unlawful acts as stipulated in Article 1365 of the Civil Code (BW).

2. Liability based on guilt with reverse burden of proof (*schuldaansprakelijkheid met omkering van de bewijslast*).

Under this model the plaintiff does not need to prove that the defendant was not careful enough, but instead the defendant to avoid a claim for damages is obliged to prove that he has been cautious enough. This model in Indonesia is regulated in Article 1367 of the Civil Code (BW) paragraphs (2) and (5) regarding the liability of parents, guardians, and animal owners.

3. Liability based on risk (*risicoaansprakelijkheid*).

This model according to Mas Ahmad Sentosa is the same as strict liability, which is regulated in Article 1367 paragraph (3) concerning employer liability, and building owner liability. In the Dutch legal system, the equivalent of *strict liability* is *risico-aansprakelijkheid*.¹⁴

Risk-based responsibility is a form of responsibility that is not based on the element of error. Liability based on risk applies on a limited basis, only for the following activities:

- (1) hazardous materials management;
- (2) waste management plants; and
- (3) drilling mine activities.

The distinction between the term responsibility and liability is strongly influenced by the distinction between the term responsibility and liability in English literature. Responsibility is matched with *responsibility* while liability is equivalent to *liability*. The distinction between responsibility and liability is only known in the English legal system. The French legal system uses the terms *responsabilite*, Spanish *responsabilidad* and Italian *responsabilita* which include

the notions of liability and responsibility at the same time.¹⁵

Responsibility itself is a general concept that can relate to morals, religion, society in general and the legal context.¹⁶ Etymologically, responsibility is a combination of the two words response and able which means the ability to respond or respond.

Article 1365 BW liability based on unlawful acts, as well as to the fault of the maker. Liability without fault, a matter which in some foreign laws is duly regulated (the liability provided that the person concerned has sufficient financial liability and the loss cannot be claimed in lieu of it from a third party who is obliged to supervise).¹⁷

Article 1365 a person who incurs damages is liable only if he is guilty. What does error mean.¹⁸ According to Philipus M. Hadjon¹⁹ Article 1365 BW can be a regulation that applies both in the atmosphere of civil law and public law, namely; The government prefers to use legal institutions available in the field of civil law with all kinds of variations. This is because with the existing facilities available in the atmosphere of civil law, especially the institution of freedom of contract, there are many possibilities that can be realized than if using public law provisions.

Claims for compensation on the basis of unlawful acts with the term *onrechmatige daad* in Dutch usually have a narrow meaning, which is the meaning used in Article 1365 BW and only relates to the interpretation of the article. While the term "unlawful acts" is applied to laws that generally apply in Indonesia and some of them are customary law.²⁰ Article 1365 BW states: any unlawful act which thereby causes harm to another person, obliges the person whose fault caused the damage to indemnify.

In Indonesian "*onrechmatige daad*" is "unlawful act" not against the law" because the term "against the law" in Dutch is "wederrechtelijk" as stated in Article 362 of the Criminal Code on "theft."²¹ *Onrechmatige daad*, in Roman law and Old Dutch law, is not yet known to be based on *onrechmatige daad*. But in French legislation, Civil Code (C.C) Article 1382 "Tout fait quelconque de l'homme qui cause a autrui un dommage, oblige celui par la faute de wuell it est arrive a le reparer."²²

The article was taken by the Dutch expert and included in BW Article 1401. The article was not only copied by Letterlijk, but also referred to "onrechmatige" in front of the "daad" recommended by Caret Asser, an Editorial Commission of the National Law of the Netherlands. The 1924 bill was fronted by the term "daad" and placed the term "wederrechtelijke" by some members of Tweede Kamer. Later the term "wederrecitelijk" was changed to "onrechmatige". According to the Hoge Raad (H.R) Arrest of 1863 gave the definition of "onrechmatige" as an act contrary to statutory obligations. Then in 1883, the H.R judgment of 1863 added in the words "acts that infringe the rights of others according to law (inbruek op eens onders geschreven rech, so onrechmatige is:

- 1) acts that violate statutory obligations, and
- 2) acts that violate the rights of others in the law.

Unlawful acts in Indonesia normatively always refer to the provisions of Article 1365 BW. Mariam Darus Badruzama in the Draft Law (RUU) Perikatan tries to formulate as fully as follows:²³

- (1) An unlawful act resulting in harm to another person, obliges the person who, by mistake or negligence, publishes the damage, to compensate for the damage;
- (2) Unlawful is any act that violates the rights of others or is contrary to the propriety that must be heeded in social association with the person or property of others; and
- (3) A person who deliberately does not do an act that he is obliged to do is equated with a person who commits a forbidden act and therefore violates the law.

This concept of the notion of against the law becomes not only interpreted as against the law to be not only interpreted as against the law (written law) but also contrary to the propriety that must be heeded in the association of society (unwritten law).

The form of liability according to Article 1365 BW is a form of liability that emphasizes the factor of fault (*liability based on fault*), so that if this article is used as the basis for a lawsuit, then the injured party has the obligation to prove the existence of a fault that caused the loss. In unlawful acts, the requirement applies that in general the plaintiff must be able to prove that the losses suffered are the result of unlawful acts committed by the defendant. This is in line with the provisions of Articles 163 HIR, 283 Rbg and 1865 BW.

The provisions of Article 1365 BW, in this case a person must be liable for the loss of another person, if:

(1) The existence of an act

An unlawful act is preceded by an act of the perpetrator. It is generally accepted that by doing here is meant, either doing something or not doing something, for example not doing something, is meant, either doing something, even though he has a legal obligation to make it which obligation arises from the provisions of the applicable law. Therefore, for unlawful acts, there is no element of "consent or agreement" nor element of "causa" allowed" as contained in the contract.²⁴

(2) The act is unlawful

The act must violate the law. As has been explained, unlawful acts not only violate written legal provisions, but also unwritten provisions. This includes: 1) Violating the rights of others; 2) Contrary to the offender's legal obligations; 3) Contrary to decency; 4) Contrary care that must be observed in the traffic of society towards self and the goods of others.

(3) Loss to other parties

The existence of a loss (*schade*) for the victim is also a condition for a lawsuit under 1365 BW to be used. Unlike losses caused by defaults which only recognize material losses, then losses due to unlawful acts in addition to material losses, jurisprudence also recognizes the concept of immaterial losses, which will also be valued in money.²⁵

(4) The harm arises as a result of the act (causal relationship):

The condition of the causal relationship between the unlawful act and the loss, to determine whether between the unlawful act and the loss there is a condition of causal relationship, the following procedure can be performed, namely:²⁶

- 1) It must first be investigated whether the act in relation to the loss can be assessed as such a condition, so that no harm will arise (*conditio sine qua non*);
- 2) Then it must be ascertained whether the loss is considered to be a reasonable result expected from the unlawful act (*adequate relationship*). If between the two conditions above, one of them can be proven, then there is a sufficient causal relationship between the unlawful act and the loss.

(5) The offender is guilty (wrongdoing)

Article 1365 BW requires that the person who caused the damage be liable only if he is guilty. The condition of guilt in Article 1365 BW requires that in addition to the reprehensibility of the act (unlawful nature), the regret of the perpetrator of the act (*wrongdoing*) is a condition for liability.²⁷

An action is considered a condition to contain elements of error, so it must be liable, if it meets the following elements:²⁸ 1. There is an element of misery; 2. There is an element of negligence, *culpa*: and 3. There is no justifying reason or forgiving reason (*recht vaardigingsgrond*).

The above conditions are necessary (*noodzakelijk*) and together are sufficient conditions (*veldoende*) for liability under Article 1465 BW. In BW regarding compensation for actions in Articles 1243 BW to Article 1252 BW related to default.

Indemnity can be in the form of damages, costs, and interest. In addition to these compensations, BW also mentions the provision of compensation for the following:

1. Indemnity for unlawful acts (Article 1365 BW);
2. Indemnity for acts committed by others (Article 1366 BW);
3. Indemnity for animal owners (Article 1369 BW);
4. Indemnity for owners of collapsed buildings (Article 1369 BW);
5. Compensation for the family singled out by the murdered person (Article 1370 BW);
6. Indemnity because the person has been injured or disabled limb (Article 1371 BW); and
7. Redress for acts of contempt (Article 1372 with Article 1380 BW).²⁹

In the provisions of unlawful acts stipulated in Article 1365 BW, it opens the possibility of filing various lawsuits, namely:³⁰

a. Compensation

Usually it is given in the form of a sum of money, but unlike compensation in defaults, the possibility of compensation in other forms is open to the debtor;

b. Legal statement (*verklaring voor recht*)

The plaintiff can demand a legal statement that a particular act violates the law. In this case, it is not implied that there has been an unlawful act and the defendant is guilty or has suffered losses but what is required is that the plaintiff has an interest in the legal statement and there is a real threat that the defendant will commit the unlawful act; and

c. Order or prohibition of the judge.

At the plaintiff's request, the judge may order the defendant to end the unlawful circumstances or prohibit unlawful threats. In this case, the order is based on breach of the obligation to do. While the prohibition is imposed on the violation of the obligation to do. Here too is the prohibition and there is indeed a real threat that the defendant will commit unlawful acts. Claims for compensation due to unlawful acts can be in the form of material damages (real damages have been suffered) or immaterial damages (compensation due to loss of profits to be obtained in the future).

D. CONCLUSION

Liability is widely used to mean *liability*, other terms that are often used are *Responsibility* and *accountability*. The three terms in their use are associated with aspects of their birth, namely; a) *Liability is born from the principle of the rule of law*, b) *Responsibility is born from the principle of democracy*, c) *Accountability is born related to good governance*. The term *liability* is more meaningful to the juridical aspect associated with the court, while *responsibility* is more meaningful to the political aspect, while *accountability* is more meaningful to the moral side. The responsibility of the State and the Government is related to the provision of protection (*rechtbescherming*) to citizens as a result of the exercise of authority by State and Government organs carried out by State Administrative Agencies or Officials.

The government has two positions, namely as one of the organs of the state and as a state administration. As an organ of state, the government acts for and on behalf of the state. Meanwhile, as a state administration, the government can act both in the field of regulation (*regelen*) and in the field of service (*bestuuren*). In order to guarantee and provide a legal basis that government actions (*bestuurshandeling*) carried out by the government as a *legitimate* and justified, accountable and responsible and responsible (*liable*), every government action must be based on just, dignified and democratic laws. Compensation for the following: 1) Compensation for unlawful acts (Article 1365 BW); 2) Indemnity for acts committed by others (Article 1366 BW); 3) Indemnity for animal owners (Article 1369 BW); 4) Compensation for owners of collapsed buildings (Article 1369 BW); 5) Compensation for the family singled out by the murdered person (Article 1370 BW); 6) Indemnity because the person has been injured or disabled limb (Article 1371 BW); and 7) Redress for acts of contempt (Article 1372 with Article 1

Footnote

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