

LAND GRABBING AS UNLAWFUL ACT

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Abstract

Land cases in Indonesia are one of the most common types of cases in Indonesia. The forms of land cases that often arise are related to land grabbing, namely illegal taking of land belonging to other party. An example of a land grabbing case can be seen in the Supreme Court Decision Number 1071 K/PDT/2020 where the Plaintiff is the rightful owner of a piece of land with property rights in Tanjung Jabung Barat Regency, Jambi Province as proven by the Certificate of Ownership, but then Defendant I came to take the land belonging to the Plaintiff by constructing a building on the land without a permit and refusing to move even though it has been given a warning, so that the Plaintiff feels aggrieved. Therefore, the author intends to find out how an act can be classified as against the law and what kind of compensation arrangements are in accordance with applicable regulations. The research method used is normative legal research method and the approach used is law approach and case approach. The results showed that land grabbing done by Defendant I could be classified as an act against the law because all the elements had been fulfilled; while related to losses due to unlawful acts in the form of land grabbing, the most appropriate compensation is the return of the Plaintiff's condition to its original state.

Keywords: Tort; Land Grabbing; Compensation

A. Introduction

Article 1 paragraph 3 of the 1945 Constitution states that, “the State of Indonesia is a State based on Law”. This means that all the behaviour of Indonesian citizens, whether government officials or civilians, are based on the law. However, there are also actions of legal subjects that are against the applicable law and regulations. Such acts generally cause harm and are known as unlawful acts. This act against the law is referred to as a tort, which means an error that results in the appearance of a loss.¹ Meanwhile, the term *Onrechtmatigedaad* is used in Dutch. Originally, this act was interpreted as something that was only contrary to the

¹ Vivienne Harpwood, *Modern Tort Law* (New York: Rutledge, 2009), 1.

articles of regulation. However, over time, the meaning of unlawful acts has increasingly developed.

Not all actions that go outside the legal corridors can be classified as unlawful acts, therefore the act must first be investigated whether it has fulfilled the elements of an unlawful act. Article 1365 of the Civil Code (Indonesian Civil Code) confirms that: “A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore.” Damage is a condition where legal subjects experience a decline or loss of property or enjoyment of life. Damage due to unlawful acts are referred to as loss (*schade*).

The mentioned actions above can occur in various aspects of life, such as in the case of land ownership. Article 33 paragraph (3) of the Indonesian 1945 Constitution states that: “The land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people.” From this verse, it can be concluded that the state’s right of control then becomes the basis for the emergence of various types of land rights. This is reflected in Article 4 paragraph (1) of Law Number 5 of 1960 concerning Undang-Undang Pokok Agraria or Basic Regulations on Agrarian Principles (UUPA) which states that:

“On the basis of the State’s right of control referred to in Article 2, it is necessary to determine the types of rights to the surface of earth, which is called tanah (land), that can be granted to, and held by, persons, either individually, jointly with others as well as bodies corporate.”

Land can be controlled and owned by certain legal subjects while still paying attention to the social function of the land which means that the use of the land must be able to generate benefits for the community.² Individual rights to land consist of: rights to land, rights to land waqf property, guarantee rights to land (mortgage rights), and property rights to flat units. A person’s control over land as regulated in the UUPA provides certain powers and obligations for the right holder to be able to do something about the land he owns.³ It is stated in Article 4

² Kartini Muljadi and Gunawan Widjaja, *Seri Hukum Harta Kekayaan: Hak-Hak Atas Tanah* (Jakarta: Kencana, 2008), 25.

³ Dhoni Yusra, “Penguasaan Hak Atas Tanah Secara Melawan Hukum, dan Implikasinya Bagi yang Menyerobot Tanah” (Article results of thoughts for the purposes of completeness of the elements Implementation of Lecturer Performance Expenses Report research, Esa Unggul University, Jakarta, 2018), 8, Research Paper.

paragraph (2) of the UUPA that the right holder has the authority to take advantage of the land he owns with certain limitations. This right, in addition to giving freedom to the right holder to use the land for the benefit of his life, also gives the authority to be able to apply a legal settlement in the event of a dispute over the land under his control.

In Indonesia, land-related cases occur frequently. From 2015 to 2019 the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (The Ministry of ATR/BPN) reported that there were 9,000 reports regarding land issues and 50 percent of these reports were related to cases of ownership control which were claimed by many parties for different reasons.⁴ The Ministry of ATR/BPN also noted that there were 242 cases of land mafia occurring from 2018 to 2021.⁵ Cases came in various forms, such as land grabbing and document falsification.

This article will focus on the discussion of land grabbing, as a form of unlawful act. Land grabbing is an action in the form of occupying a piece of land which belongs to another person without any rights or arbitrarily. There are several tangible forms of land grabbing, such as owning and taking charge of other party's land without rights. Taking charge can be interpreted as ruling, controlling and holding power over something.⁶

Land grabbing is an act against the law as regulated in Government Regulation in Lieu of Law Number 51 of 1960 concerning the Prohibition of Land Use without the Rightful Permit or Proxy, and in other laws and regulations. Article 2 of the Government Regulation in Lieu of Law Number 51 of 1960 states: "It is prohibited to use land without a valid permit or authority". Article 1366 of the Indonesian Civil Code states: "An individual shall be responsible, not only for the damage which he has caused by his act, but also for that which was caused by his negligence or carelessness." This article is also applicable to any party who carries out land

⁴ Yuni Astutik, "BPN: dari 9.000 Laporan Agraria, 50% Terkait Mafia Tanah," CNBC, accessed July 20, 2021, <https://www.cnbcindonesia.com/news/20200121194756-4-131734/bpn-dari-9000-laporan-agraria-50-terkait-mafia-tanah>.

⁵ Nova Wahyudi, "BPN Sebut ada 242 Kasus Mafia Tanah sejak 2018 hingga 2021," CNN, accessed July 20, 2021, <https://www.cnnindonesia.com/ekonomi/20210602203922-92-649671/bpn-sebut-ada-242-kasus-mafia-tanah-sejak-2018-hingga-2021>.

⁶ "Menguasai," KBBI, accessed July 20, 2021, <https://kbbi.kemdikbud.go.id/entri/menguasai>.

grabbing. In the event of land grabbing, there are certainly parties who are harmed where as a result of this the perpetrator can be sued to provide compensation rights for the losses incurred. Secretary General of the Indonesian National Land Agency (Badan Pertanahan Nasional/BPN), Mr. Himawan Arief Sugoto, acknowledged that there are a number of challenges in dealing with land grabbing issues by land mafia syndicates, such as document forgery.⁷

The case study that the authors present in this article is one real example of land grabbing that occurred in the community. In this article, there are 2 (two) core issues that are the focus of discussion, namely: 1) the extent to which land grabbing by Defendant I in the Supreme Court Decision Number 1071 K/Pdt/2020 can be categorized as an unlawful act; and 2) regulation of the form of compensation in cases of land grabbing and its implementation in the field as seen in the case of Supreme Court Decision Number 1071 K/Pdt/2020. This article uses a type of normative legal research. The data used is secondary data, using data collection techniques (methods) in the form of literature study. The author uses the Law Approach and Case Approach, while the data analysis is carried out by qualitative analysis, namely analysis based on literature such as legal theories, opinions of legal experts, doctrine, and formulation of legal norms.

B. Discussion

B.1. Land acquisition as a form of unlawful act

B.1.1. Case summary

The Plaintiff is a legal owner of a plot of land with a Freehold title certificate (*Sertifikat Hak Milik*) 1600 who has controlled the land since 1995. In 2003, a permanent building was established for the cultivation of swallow nests. In mid-2016, Defendant I arrived without permission of the Plaintiff and illegally controlled the land in the Plaintiff's area by constructing a building in the form of two housing units.

⁷ Siswanto, "Korban: Harus Kerja Agresif dan Ringkus Sindikat Penyerobot Tanah," accessed July 21, 2021, <https://www.suara.com/news/2021/02/24/121731/korban-harus-kerja-agresif-bongkar-dan-ringkus-sindikat-penyerobot-tanah>.

The Plaintiff has repeatedly warned Defendant I by informing that the land is the property of the Plaintiff. The Plaintiff has also shown the Certificate of Ownership of the land to Defendant I and asked Defendant I to return the Plaintiff's land and not to sell the land to another party, but Defendant I did not comply. In addition, in the area of land owned by the Plaintiff which is located on the western boundary and is still in the land belonging to the Plaintiff, the rights have also been transferred by Defendant I by selling the land to Defendant II, and on that land by Defendant II was established or built 1 (one) house building units.

Defendant I and Defendant II took control over the land. This was then assessed by the Plaintiff as an unlawful act which resulted in the Plaintiff experiencing a loss.

Based on this, the Plaintiff submitted an application to the Chairman of the Kuala Tungkal District Court to give a decision in the form of granting all the proposed lawsuits starting from legally declaring Defendants I and II guilty of committing an unlawful act, the legal ownership of the Plaintiff over the disputed land, and the granting of the request for compensation. The Panel of Judges in their decision granted part of the lawsuit filed by the Plaintiff on the grounds that the Plaintiff had been able to prove his legal ownership of the land and the Defendants had been proven to have committed an unlawful act in the form of land grabbing as regulated in Article 1365 of the Indonesian Civil Code. However, regarding compensation, the panel of judges refused to grant it with the consideration that the Plaintiff did not detail the losses he suffered in a clear and detailed manner as required by the regulations in force in Indonesia, one of which is the Jurisprudence of the Supreme Court of the Republic of Indonesia dated 28 May 1984 Number 588K/Sip/1983.

B.1.2. Forms of land grabbing

Generally, the term land grabbing is defined as the act of controlling, occupying or taking over land belonging to another person against the law or against rights.⁸ The existence of land control by someone who is not authorized to control it clearly causes losses to those

⁸ Della Rahmaswary, "Perlindungan Hukum Penyerobotan Tanah Hak Milik Dalam Aspek Pidana (Case Study Number:24/G/2013/Ptun-BI)," *Notarius Journal* 12, no. 2 (2019): 737, <https://doi.org/10.14710/nts.v12i2.29012>.

who actually have the right to control the land. Acts like this can be classified as an act against the law.

An unlawful act is an act that causes harm to another person where this act is not only against the written law but also against the legal obligations of the perpetrator, the subjective rights of others, decency, and violates propriety, thoroughness, and prudence. Article 1365 of the Indonesian Civil Code regulates acts against the law which states, “A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore.” Any party who grabs a land can be charged with Article 1365 as mentioned above and with other laws and regulations relating to land grabbing.

Based on the case summary above, it can be seen that the land grabbing was carried out by Defendant I by constructing a building in the form of 2 housing units on the land area which is still under the Plaintiff’s jurisdiction. In addition, Defendant I also transferred the rights to the land of the object of dispute to Defendant II through a sale and purchase whereby Defendant II then built 1 unit of house building on the land of the object of the dispute.

In his exception, Defendant I explained that the object of the dispute was a land that he bought from a person named Gani with an underhand agreement and until the time this lawsuit was filed, the payment for the land had not been paid off but the ownership name had been transferred to Defendant I. In an agreement, consent is one of the elements that must be fulfilled where this existing agreement can be poured into the form of an authentic deed or an underhand agreement.⁹ An underhand agreement is an agreement made in front of the parties and not before the authorized official, which in this case should be the Land Deed Official, or also known as Pejabat Pembuat Akta Tanah (PPAT).

⁹ Avina Rismadewi and Anak Agung Sri Utari, “Kekuatan Hukum Dari Sebuah Akta di Bawah Tangan,” *Journal of Legal Studies* 3, no. 3 (May 2015): 3, <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/13169>.

The judge's investigation found the fact that there was not a single documentary evidence showing the basis of Gani's ownership of the land which was traded to Defendant I. In a sale and purchase of land, there are 2 conditions that has to be fulfilled:¹⁰

- a. Material Terms. In order for the sale and purchase of land to be legal, it must be ensured that the buyer is a party who is entitled to buy the land, and the seller has the right to sell the land in the sense that the seller is the rightful owner, and the land in question is not in dispute.
- b. Formal Terms. If the material requirements are met, the PPAT can make a deed of sale by fulfilling the following requirements: 1) If the land is already certified: the original land certificate and proof of payment of the registration fee; or 2) If the land is not certified: a letter which states that the land has not been certified, along with other supporting documents that require confirmation by the village head and the identity of both the seller and buyer.

A land certificate is a strong means of proof regarding the physical data and juridical data contained in it, as long as those data are in accordance with the data contained in the relevant land rights book kept in the land office. This means that as long as it cannot be proven otherwise, the physical data and juridical data contained therein must be accepted as true data.

Buying and selling according to customary law is a "clear and cash" transfer of land rights, which means that the transfer of land rights is carried out before an authorized public official (in this case is a PPAT), in which the payment is made in cash and simultaneously.¹¹ "Clear" can be interpreted that buying and selling is carried out in front of the parties and authorized officials; while "cash" can be interpreted as a form of payment – which at the time of the sale and purchase transaction there is evidence of money in accordance with the agreed

¹⁰ Erfa Meiyani, "Pelaksanaan Pendaftaran Peralihan Hak Milik Atas Tanah Dengan Cara Jual Beli di Kantor Pertanahan Kabupaten Kudus" (Bachelor's Thesis, Faculty of Social Law UNNES, Semarang, 2009), 21, UNNES Lib.

¹¹ Arie S. Hutagalung and Suparjo Sujadi, "Pembeli Beritikad Baik dalam Konteks Jual Beli Menurut Ketentuan Hukum Indonesia," *Journal of Law and Development* XXXV, no. 1 (2005): 37, <https://adoc.pub/pembeli-beitlkad-balk-dalam-konteks-jual-bell-menurut-keten.html>.

price of the parties.¹² The “clear” condition requires the transaction to be done openly, in the sense not secretly. The sale and purchase are carried out in front of and signed by the parties and witnessed by the customary head or village head on customary land, or a PPAT for a certified land.

Article 1868 of the Indonesian Civil Code stipulates that, “An authentic deed is one which has been drawn up in a legal format, by or before public officials who are authorized to do so at the location where this takes place.” The arrangement as mentioned above means that the “clear” conditions in the sale and purchase of land must be proven by the existence of an authentic deed which is manifested in the form of a deed of sale and purchase (Akta Jual Beli or “AJB”) made by the authorized official – in this case is the PPAT. “Cash” terms can also be interpreted as the transfer of land rights from the seller to the buyer with payment made in cash and in full at the time of the sale and purchase.¹³ Buying and selling can be said to be valid if the “clear and cash” conditions have been met.

In this case, Gani as the person who sold his land to Defendant I was proven not to be the party entitled to sell the land object of the dispute, which means that the material conditions of sale and purchase were not met. If the material conditions are not fulfilled, the formal requirements are automatically not fulfilled as well, so this sale and purchase can be considered invalid. The main principle of buying and selling land is the existence of inherent rights for the owner, meaning that someone must have legal power as the owner of land rights before buying and selling can be carried out.¹⁴

In addition, the transfer of land rights from Gani to Defendant I through a sale and purchase cannot actually be carried out because the transfer is carried out through a sale and purchase with an underhand agreement without a sale and purchase deed made by an authorized

¹² Desvia Winandra, “Penerapan Asas Terang dan Tunai Dalam Jual Beli Tanah Yang Merupakan Harta Bersama Dalam Perkawinan (Verdict Study Number 1/Pdt.G/2019/Pn.Lbt),” *Adigama Law Journal* 3, no. 2 (December 2020): 5, <http://dx.doi.org/10.24912/adigama.v3i2.10556>.

¹³ Retno Kus and Asmaniar, “Pembatalan Transaksi Hak Atas Tanah Oleh Penjual Dengan Alasan Belum Lunas,” *Legal Binamulia Journal* 9, no. 1 (July 2020): 65, <https://doi.org/10.37893/jbh.v9i1.102>.

¹⁴ Cicilia Putri Andari and Djumadi Purwoatmodjo, “Akibat Hukum Asas Pemisahan Horizontal dalam Peralihan Hak Atas Tanah,” *Notarius Journal* 12, no. 2 (2019): 705, <https://doi.org/10.14710/nts.v12i2.29010>.

official. By law, the transfer of rights to land and buildings cannot be done privately without a deed of sale and purchase.¹⁵ The transfer of land rights through buying and selling can only occur and be registered if it is proven by an official deed made by PPAT as mentioned above, that the authentic deed made by PPAT is a requirement and evidence that legal actions can be carried out on land. AJB can only be made if the payment for the sale and purchase object has been paid in full. After the AJB is signed by the parties concerned, then the transfer of land rights can take place officially.

The sale and purchase transaction on land between Gani and Defendant I definitely did not meet the “clear” requirement because the sale and purchase of the disputed object was not carried out in the presence of an authorized official but was only carried out between the parties or privately. Similarly, the “cash” requirement in the sale and purchase of land between Gani and Defendant I was also not fulfilled because Defendant I had not paid off the sale and purchase price and even though it had not been paid off, the rights had been transferred to Defendant I. Transfer of rights of the land (the object of dispute) from Gani to Defendant I should not have happened because in order to actualize the transfer of rights, an authentic deed made by PPAT is needed, which in this case is a deed of sale and purchase.

The non-fulfillment of the “clear and cash” conditions in this sale and purchase means that the sale and purchase between Defendant I and Gani cannot be considered valid because in order to say that a sale and purchase is valid, these conditions must be met. The transfer of ownership rights to the land from Gani to Defendant I even though the payment has not been paid off can also cause problems in the future. It is important to pay attention to “clear and cash” requirements when carrying out land sales and purchase transactions so that the implementation of the transfer of land rights can avoid problems in the future.

Government Regulation Number 11 of 2010 concerning the Control and Utilization of Abandoned Land defines the Right Holder as the holder of land rights, holders of management

¹⁵ Dian Ekawati, Dwi Kusumo Wardhani, and Dian Eka, “Prosedur Peralihan Kepemilikan Hak Atas Tanah di Indonesia,” *Community Service Journal* 2, no. 1 (2021): 9, <http://openjournal.unpam.ac.id/index.php/JAMAICA/article/view/9169>.

rights, or holders of permits from the competent authorities which form the basis for land tenure. Because the sale and purchase carried out by Defendant I as the buyer with Gani as the seller was carried out not in the presence of an authorized official, Defendant I cannot be said to be the holder of the rights to the object of the dispute. A person who does not have land rights cannot carry out legal actions on the land without the permission of the party entitled to the land, including transferring land rights. Based on article 37 of Government Regulation Number 24 of 1997 concerning Land Registration, the transfer of land rights through buying and selling can only be registered if it is proven by a deed made by the authorized PPAT.

The invalidity of the ownership of Defendant I over the object of dispute from the beginning means that Defendant I actually does not have the right to construct any building on the land without the permission or approval of those who are entitled to the land, therefore, Defendant I – who, without permission controls the land of the object of dispute - can be said to have committed land grabbing.

B.2. Fulfilment of the elements of unlawful act in land grabbing

In general, land grabbing can be viewed from the perspective of criminal law and civil law. From the perspective of criminal law, if there is an intentional act committed by a person who takes possession of another person's land, then it is imposed with Article 167 paragraph 1 of the Criminal Code which states:

“Whoever forces entry into a house, room or closed yard that is used by another person against the law or is there against the law, and at the request of the rightful person or his order does not leave immediately, is threatened with imprisonment. a maximum of 9 (nine) months or a maximum fine of Rp. 4,500, - (four thousand five hundred rupiah).”

Government Regulation Number 51 of 1960 concerning Prohibition of Use of Land without a Permission from the Rightful or Their Proxy also regulates penalty for such action in article 6, which states that whoever uses land without permission from the rightful person can be punished with a maximum imprisonment of 3 (three) months and/or a maximum fine of Rp. 5,000, - (five thousand rupiah).

Although it is feasible for land grabbing action to be resolved through the mechanism of criminal procedural law, this article draws its focus on the perspective of civil law. From the perspective of civil law, a person who carries out land grabbing can be charged with unlawful acts. It is obvious that in the case of land grabbing, there is a party (rightful owner of the land) who is harmed and wants to claim compensation for the losses they have suffered. Unlawful acts, as described in Article 1365 of the Indonesian Civil Code, is constructed by several elements. A particular act can be said to be deemed unlawful if such elements contained in Article 1365 of the Indonesian Civil Code are fulfilled.

In order to find out whether Defendant I's actions were in the form of land grabbing as an unlawful act, the author will first analyse the elements of an unlawful act.

B.2.1. Action

An act can be active, but can also be passive. Active action means that there is a movement from the perpetrator that causes harm to other parties while passive action is not doing anything when in fact the perpetrator knows that he must do a certain action to prevent harm towards others. Based on this case, it can be seen that Defendant I has committed an active act in which this act caused harm to another party, namely, the Plaintiff, so it can be said that the element of action in this unlawful act has been fulfilled. The action of Defendant I can be said to be an active act because Defendant I has actually and clearly done something, namely, taking the land belonging to Plaintiff I.

B.2.2. Unlawful act

Based on article 1365 of the Indonesian Civil Code, the author categorizes the actions of Defendant I as an unlawful act where the law violated by Defendant I is as follows:

a. Legal Obligations of the Perpetrator

- 1) Article 1365 of the Indonesian Civil Code states, "A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore." The

Defendant has violated Article 1365 of the Indonesian Civil Code because as a result of his actions there was a loss for the Plaintiff.

- 2) Article 2, Government Regulation in Lieu of Law (Perpu) Number 51 of 1960 (51/1960) Concerning the Prohibition of Land Use Without a Permit with the Right or Their Proxy states, “It is forbidden to use land without a permission from the rightful party or its legal proxy.” The ownership of Defendant I to the disputed land is invalid because Defendant I bought the land from a party who actually has no right to sell the land to Defendant I. As Defendant I built a building on land that does not belong to him, Defendant I can be said to be using the land without the permission from the rightful party or his legal proxy and Defendant I should not have taken a legal action on land that is not his right without permission from the legal owner of the land.
- 3) Government Regulation Number 24 of 1997 concerning Land Registration
 - i. Article 32 paragraph (2) states,

“In the event that a certificate of land has been issued legally in the name of the person or legal entity that obtained the land in good faith and actually controls it, then the other party who feels that he has rights to the land can no longer demand the exercise of that right if within 5 (five) years since the issuance of the certificate, does not submit a written objection to the certificate holder and the Head of the Land Office concerned; or do not file a lawsuit to the Court regarding land tenure or the issuance of the certificate.”

In this article’s case it is stated that the Plaintiff’s certificate has existed since 1994. Then, in 2016 Defendant I came with the assumption that he had the right to the land. This is clearly in contrary to what is regulated in Article 32 paragraph (2) as mentioned above because Defendant I should no longer be able to claim the implementation of the rights to the object of the dispute because the time period for filing an objection regarding the control of the land has passed.

- ii. Article 37 states,

“The transfer of land rights and ownership rights to flat units through buying and selling, exchanging, grants, income in the company and other legal acts of transferring rights, except for the transfer of rights through auctions can

only be registered if it is proven by a deed made by the authorized PPAT according to the provisions of the applicable laws and regulations.”

In order to achieve a legal certainty in every transfer of land rights, Government Regulation Number 24 of 1997 has determined that any agreement that intends to transfer land rights must be proven by a deed made by and before the PPAT. This means that in fact the rights have not been legally transferred because the transfer of rights based on article 37 can only be registered if it is proven by a deed made by PPAT, which in this case is a deed of sale and purchase (AJB); while the sale and purchase between Defendant I and Gani was carried out through an underhand agreement, which means it does not involve PPAT. AJB is a form of juridical transfer from the seller to the buyer which is also used as the basis for transferring rights by registering the transfer to the land office. In addition, Defendant I also transferred the rights of the disputed land to Defendant II through a sale and purchase transaction. This also violates the existing regulations because from the beginning the ownership of Defendant I over the disputed land was illegal, therefore Defendant I had no right to carry out any legal action regarding the disputed land without the permission of the legal owner. Moreover, a sale and purchase agreement between Defendant I and Defendant II is not proven by the existence of a deed made by PPAT.

b. Violating the subjective rights of others

Violating the subjective rights of others means that the act is contrary to the rights granted by law to a person specifically to protect him. For example, personal rights (i.e., freedom rights) and property rights (i.e., material rights).¹⁶ The actions of Defendant I have violated the subjective rights of the Plaintiff, specifically the Plaintiff’s property rights in the form of material rights where Defendant I controlled the Plaintiff’s land against the law.

¹⁶ Moegni Djojodirdjo, *Perbuatan Melawan Hukum* (Jakarta: Pradyna Paramita, 1979), 36.

c. Violating morals

Moral norms are norms that apply in social life. The existence of moral norms aims to form good personal ethics in each individual and prohibits humans from doing evil deeds. The meaning of ethics changes over time, what was previously considered bad may now be considered good by society.¹⁷The actions carried out by Defendant I have clearly shown an act that violates ethics. The action of Defendant I who took the Plaintiff's land meant that Defendant I had taken forcibly the rights of another person, namely the Plaintiff.

d. Violating propriety, accuracy, and prudence

In social life, it is expected that everyone is performing good citizenship and not to harm other people. Defendant I should not interfere with or take something that is not his right, such as taking the Plaintiff's land because this is not proper and unreasonable.

B.2.3. Error

An action is considered by law to contain an element of error and so they can be held legally responsible if the action meets one of the following three conditions:¹⁸ a) There is an element of intentionality, or b) There is an element of negligence (*culpa*), and c) There is no justification or excuse for forgiveness (*rechtvaardigingsrond*), such as *overmacht*, self-defense, insanity, and others.

The error made by the Defendant includes an error with an element of intent because Defendant I has consciously controlled the object of the dispute by constructing a building on it without a valid proof of ownership. Defendant I obtained the object of the dispute through a private, underhand sale and purchase agreement with Gani where in fact Gani was not the legal owner of the land. Therefore, Defendant I has no right to control the land of the object of

¹⁷ Chriesma Adithia, "Analisa Kasus Perbuatan Melawan Hukum atas Dasar Keadaan yang Mengiringi Terjadinya Pembuatan Perjanjian yaitu Penyalahgunaan Keadaan Ditinjau dari Hukum Perdata Barat di Indonesia" (Bachelor's Thesis, Faculty of Law University of Indonesia, Depok, 2009), 25, UI Lib.

¹⁸ Velliana Tanaya, *Perbuatan Melawan Hukum Informasi Menyesatkan (Misleading Information) Dalam Prospektus Go Public* (Tangerang: Faculty of Law Pelita Harapan University, 2018), 225.

dispute nor to transfer the rights to the land to another party because from the beginning the ownership of Defendant I over the land object of dispute is invalid.

Defendant I, in his proof, only attached documentary evidence in the form of a statement of claim for de facto possession of land, land payment receipts, deposit receipts, identity cards, and family cards, which did not have strong evidentiary power over land ownership when compared to the certificate of ownership of the land owned by the Plaintiff. Defendant I, clearly knows for sure that committing any action on the land without a permit and proof of legal ownership, will surely cause problems in the future and even cause harm to the other parties. This is in line with what Munir Fuady said, which defines an unlawful act of land grabbing as a form of intentional act carried out by people who do not have land rights with the aim of controlling land belonging to other people, or causing people or objects to remain in their possession over the land.

B.2.4. Loss

Losses referred in Article 1365 of the Indonesian Civil Code are losses incurred due to unlawful acts where this loss can be in the form of loss of wealth (material) or loss of an ideal or immaterial nature. Acts against the law not only result in losses in the form of money but can also cause immaterial or ideal losses in the form of fear, surprise, pain and loss of pleasure and enjoyment of life. The action taken by Defendant I is an act that has caused harm to the Plaintiff, both material and immaterial losses. Material loss is the land selling value i.e., the present selling price of vacant land around the object of the case. While the immaterial losses suffered by the Plaintiffs are in the form of the time and costs of the Plaintiffs being exhausted as a result of taking care of the case settlement. Thus, the element of loss in this case has been fulfilled.

B.2.5. A causal relationship between the unlawful act and the loss

The causal relationship in this case is factual, in terms that the loss will never have occurred without any causal action. The actions of Defendant I who seized the Plaintiff's land

by constructing a building on it caused the land to be unusable by the Plaintiff, resulting in a loss. For example, if the land is not seized by Defendant I, the Plaintiff can certainly use the land to generate profits, for example by establishing a place of business or constructing buildings for rent, and so on.

B.3. Compensation Arrangements

B.3.1. Arrangements for land grabbing compensation

Arrangements regarding compensation in the case of unlawful acts can be found in Article 1365-1367 of the Indonesian Civil Code. Any losses that arise must be borne by the party who is legally responsible for it, in other words, the responsible party must provide compensation. Compensation according to the civil law system can be charged to any party who because of his actions, whether negligent or intentionally causing harm to other parties.

Article 1365 of the Indonesian Civil Code names losses due to unlawful acts as *schade* or loss, while losses due to default are called *const*, *scaden*, and *end interesten* (costs, losses, and interest).¹⁹ *Schade* means damage suffered which causes the object to be no longer smooth and cannot be replaced. The main principle of compensation in unlawful acts is restoration to its original state before the loss due to unlawful acts. Compensation in Unlawful Acts is divided into 2 forms.²⁰

- a. **Material Indemnity.** Material loss means loss related to someone's property. Loss of wealth generally includes real losses suffered and profits that are expected to be received so that material losses due to unlawful acts can be divided into real losses and potential losses.
- b. **Immaterial Indemnity.** Immaterial losses are real losses experienced by a person in the form of pain, suffering, emotional stress that does not directly reduce the amount of wealth. Every unlawful act does not only result in material losses but also immaterial losses.

¹⁹ Nurainy Usman, Merry Tojanda, and Saartje Sarah Alfons, "Akibat Hukum Dari Pemutusan Kontrak Secara Sepihak," *Civil Law Review* 2, no. 1 (May 2021): 99, <https://doi.org/10.47268/ballrev.v2i1.561>.

²⁰ Sri Laksmi Anindita, "Valuasi Kerugian Akibat Hilangnya Nyawa Manusia Dalam Perkara Perdata" (Dissertation, Postgraduate Study Program, Faculty of Law, University of Indonesia, Jakarta, 2019), 163. UI Lib.

The most appropriate compensation in an unlawful act according to Hooge Raad in his decision is a return to its original state. There are material conditions that must be met to claim compensation in an unlawful act: a) There is an act against the law; b) There is an error; c) There is a loss; and d) There is a causal relationship.

The legal principle in claiming compensation is that there is a direct loss suffered by the Plaintiff as a result of the Defendant's mistake so that the value of the compensation requested by the Plaintiff must be detailed and the value of the loss can be proven. The plaintiff in demanding immaterial compensation is still obliged to describe in what form the loss is, why the loss appears, the details of the amount of the loss and most importantly, the immaterial loss must be proven true.

Several arrangements regarding claims for compensation which are practically regulated are as follows:²¹

- a. Jurisprudence of the Supreme Court of the Republic of Indonesia dated 31 September 1983 Number 19 K/Sip/1983 states,
“Considering, that because the claim for compensation is not detailed and has not been examined by the *judex factie*, the claim for compensation is declared inadmissible”.
- b. Jurisprudence of the Supreme Court of the Republic of Indonesia dated 28 May 1984 Number 588 K/Sip/1983 states,
“Every claim for compensation must be accompanied by details of the loss in what form the claim is based on. Without these details, the claim for compensation must be declared unacceptable because the claim is unclear/imperfect”.
- c. Jurisprudence of the Supreme Court of the Republic of Indonesia Number 610 K/Sip/1968 dated 23 May 1978 states,

²¹ Heri Hartanto and Anugerah Adiausti, “Mekanisme Penentuan Ganti Kerugian Terhadap Kerusakan Lingkungan Hidup,” *Journal of Civil Procedure Law* 3, no. 2 (July-December 2017): 227, <https://doi.org/10.36913/jhaper.v3i2.53>.

“Although the claim for compensation is deemed inappropriate, while the plaintiff absolutely demands that amount, the judge is authorized to determine how much should be paid.”

Types of compensation for unlawful acts can be divided into:²²

- a. Nominal Indemnity. If the unlawful act contains an element of intent but the loss incurred is not real for the victim, then the victim can be given a certain amount of money in accordance with a sense of justice without calculating the actual amount of the loss.
- b. Compensation Indemnity. Compensation is a reimbursement, which is a payment to the victim for and in the amount of the loss that has actually been experienced by the victim from an unlawful act. Therefore, this kind of compensation is also known as actual compensation. For example, compensation for all costs incurred by the victim, loss of salary benefits, illness and suffering, including mental suffering.
- c. Punitive Damages. Punishment compensation is a compensation in a large amount that exceeds the actual amount of loss. The amount of compensation is intended as a punishment for the perpetrator. This punitive compensation is applied to serious cases such as severe mistreatment of a person without humanity.

In addition, from the perspective of criminal law, Government Regulation Number 51 of 1960 concerning Prohibition of Use of Land without a Permission from the Rightful or Their Proxy also regulates penalty. In article 3 of the Regulation, it is explained that regional chiefs can take actions to resolve land grabbing cases, moreover in article 4 it is explained that regional chiefs have the authority to order land clearing. As for the sanction according to article 6, whoever uses land without permission from the rightful person can be punished with a maximum imprisonment of 3 (three) months and/or a maximum fine of Rp. 5,000, - (five thousand rupiah).

²² Namira, “Perbuatan Melawan Hukum Atas Tindakan Tidak Mengakui Anak Luar Kawin Oleh Ayah Biologis” (Bachelor’s Thesis, Faculty of Law, University of Indonesia, Depok, 2010), 71. UI Lib.

B.3.2. Compensation in Supreme Court Decision Number 1071 K/PDT/2020

In order to be able to state that someone must compensate, it must first be proven that the perpetrator's actions have fulfilled the elements of an unlawful act. Therefore, in this case the Defendant has been proven to have complied to the elements of unlawful acts as described above, therefore the Defendants are obliged to compensate for the losses suffered by the Plaintiffs in accordance with Article 1365 of the Indonesian Civil Code.

The material loss suffered by the Plaintiff was in the form of the sale value of the land that should have been obtained by the Plaintiff if the land was still empty. As for immaterial losses, the Plaintiff stated that the Plaintiff had lost a lot of time trying to resolve the dispute. In addition to losing a lot of time, the Plaintiff has also spent money to take care of the problem, therefore the Plaintiff is demanding compensation for immaterial losses.

The material conditions so that an act can be requested for compensation have been fulfilled in this case where this is reflected in the elements of unlawful acts that the author has described above. The compensation in this case can be said to be included in the reimbursement compensation because the Plaintiff has lost the profits that should have been obtained if this land grabbing did not occur. However, the judge refused to grant the Plaintiff's request for compensation with the consideration that the Plaintiff did not detail all the losses properly. In addition, the claim is also not supported by evidence, both letter evidence and witnesses as required by law.

In the author's opinion, if the unlawful act committed by Defendant I had never occurred, then the land can be used by the Plaintiff to generate profits - for example by establishing a place of business or constructing a building for rent, and so on. However, because the Defendant had unlawfully and without permission seized the Plaintiff's vacant land and erected a building on it, the Plaintiff had lost the opportunity to obtain this benefit. Because the Plaintiff has suffered a loss, it is certainly proper for the Defendants to provide compensation to the Plaintiff as requested by the Plaintiff. However, in order for compensation in an unlawful act to be granted, the Plaintiff must be able to prove his loss. Although the Plaintiff has tried to

elaborate all the losses he suffered, the details are considered incomplete and not sufficiently supported by strong evidence.

Based on article 15 of the UUPA, everyone who has a legal relationship with a land is obliged to maintain the land. Maintaining means that the Plaintiff is supposed to manage and care for his land as much as possible. Indeed, in the decision it was stated that the land was not empty but on the land a building was built for the swallow cultivation business but the Plaintiff should have been more active in managing, utilizing, and maintaining the land regularly, especially the land is located in an area different from the domicile of the Plaintiff so that it is proper and reasonable for the Plaintiff to be more careful.

The Judge's refusal of the request for immaterial compensation is in line with what is stated in the Jurisprudence that the author has mentioned above, which requires more detailed and strong evidence if the Plaintiff wishes to claim immaterial compensation. The plaintiff must be able to provide details in what form is the basis of his claim, why the loss occurred, the details of the amount of the loss and most importantly the plaintiff must be able to prove the truth of the loss. Moreover, in the Supreme Court of the Republic of Indonesia in the decision of the case review no. 650/PK/Pdt/1994 published guidelines which contain,

“Based on Articles 1370, 1371, 1372 of the Indonesian Civil Code, immaterial compensation can only be given in certain cases, such as cases of death, serious injury, and humiliation.”

Considering that the case in this article is not included in such serious cases such as death, serious injury, and humiliation but in the form of land grabbing which does not have a direct impact on a person's physical or psychological state, it is natural and appropriate if the Judge does not grant the request of compensation filed by the Plaintiff.

The Plaintiff in his petition has asked the Judge to punish the Defendants by surrendering the object of the case in an empty state and free from anyone's property rights. This application was granted by the Judge and according to the author, this is tantamount to the fulfilment of the application for material and immaterial compensation submitted by the Plaintiff because the restoration of the land in an empty condition and free from any property

rights means that the Plaintiff can freely own, control and use his land again without any obstacles. The granting of this application is tantamount to returning to its original state and based on the Hoge Raad decision, returning to its original state is the most appropriate payment of compensation.

C. Conclusion

Land grabbing by Defendant I in the Supreme Court Decision Number 1071 K/Pdt/2020 can be categorized as an unlawful act because the elements of an unlawful act have been fulfilled in the act of taking land by Defendant I. First, the element of action has been fulfilled where the action of Defendant I was consciously and clearly done, namely taking the Plaintiff's land. Second, the element of unlawful acts where in this case the action of Defendant I who took the Plaintiff's land has violated the legal obligations of the perpetrator, the subjective rights of others, decency, and propriety. Third, the element of error in this case is that Defendant I consciously controlled the Plaintiff's land, which according to Defendant I the land belonged to him without the permission of the Plaintiff even though Defendant I did not have strong evidence to prove his ownership of the land. Fourth, the element of loss is fulfilled because the actions of Defendant I who took the Plaintiff's land clearly caused both material and immaterial losses to the Plaintiff. Fifth, there is a factual causal relationship where the actions of Defendant I have a direct impact on the losses suffered by the Plaintiffs; that is, if it were not for Defendant I who took over the Plaintiff's land, then the Plaintiff would not have suffered a loss of time, energy, thought and even material. The fulfilment of the five elements of unlawful acts above, it can be said that land grabbing by Defendant I is an unlawful act.

The regulation of the right form of compensation in land grabbing can be seen in the Indonesian Civil Code because land grabbing is an unlawful act in the form of taking other people's rights without heeding the law. Compensation in the civil law system can be charged to any party whose actions cause harm to other parties. The most appropriate compensation in an unlawful act is a return to its original state and because land grabbing is included in an unlawful act, the most appropriate compensation is to return the Plaintiff's condition to its

original state as happened in the case of the Supreme Court Decision Number 1071 K/Pdt/2020, where the judge refuses to grant the Plaintiff's request for compensation but the judge grants the Plaintiff's request requesting that the Defendants return the disputed land in an empty state and free from the Defendants' property rights or other property rights obtained from the Defendants.

Therefore, land owners whose land is not yet certified, it is recommended to carry out land registration to ensure legal certainty and protection. The registration of land rights allows land owners to have strong evidentiary powers (in the form of land rights certificates). Land owners are also advised to always control and maintain their land properly, as well as put up boundary signs on their land. Land owners need to know clearly what their rights and obligations as land rights holders are. Lastly, legislators need to specify terms of compensation in the case of land grabbing in the form of a Government Regulation so that legal certainty is more guaranteed.

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