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Reassessing Nepotism: *Wederrechtelijk* and *Onrechtmatige Daad* in Indonesian Law

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Abstract

This research examines nepotism as a form of Corruption, Collusion, and Nepotism (KKN), which has significantly undermined social and institutional order in Indonesia. The problem stems from the negative impacts of KKN on community welfare, resource misuse, and the erosion of public integrity and morals. The main goal of the paper is to analyze nepotism from a positive legal perspective by exploring the conceptual differences between "onrechtmatige daad" in civil law and "wederrechtelijk" in criminal law. The study uses a doctrinal approach that integrates conceptual, statutory, and case analysis, focusing on Law Number 28 of 1999 and Constitutional Court Decision Number 90/PUU-XXI/2023 as key case studies. Through evaluative, argumentative, and prescriptive techniques, the research develops arguments concerning the classification of nepotism as either a criminal or civil matter. The findings highlight that while both legal concepts—onrechtmatige daad and wederrechtelijk—serve to protect individual rights and public interests, they are applied differently. The study concludes that nepotism, which has caused systemic harm to fair and transparent governance, should be classified as a criminal act (wederrechtelijk) to ensure legal certainty and maximize the repressive effects of the law, adhering to the principles of lex scripta, lex certa, and lex stricta. As a recommendation, the government and the DPR should revise Law Number 28 of 1999 to strengthen the norms regarding nepotism and submit a material review to the Constitutional Court to align the law with the principle of legality, ensuring optimal protection of the public interest.

A. Introduction

Corruption, Collusion, and Nepotism (KKN) in Indonesia has emerged as a critical social issue, obstructing the nation's aspirations for social justice, prosperity, and independence. The consequences are profound, particularly for vulnerable groups such as the impoverished, the elderly, and neglected children, who increasingly struggle to meet their basic needs.[1] Beyond diminishing public welfare, KKN also facilitates the exploitation of natural resources, leading to environmental degradation, inflated costs for education and healthcare services, and a decline in human resource quality. Furthermore, the erosion of public morality has contributed to a sense of national degradation, leaving the country increasingly reliant on external entities. These conditions serve as stark indicators of the detrimental impacts associated with KKN practices.

Many actions deemed as KKN by political system regulators or critics can essentially be interpreted as "exchange transactions." A prime example of such a transaction is evident in the E-KTP scandal (2011–2013), in which Setya Novanto received a bribe amounting to US$7.3 million and a luxury watch in exchange for facilitating the E-KTP procurement project, underscoring the transactional nature of the relationship between public officials and private entities.[2] The BLBI case (1998) revealed the abuse of Bank Indonesia's loan program, leading to state losses of up to IDR 3.7 trillion through collusion between government officials and financial institutions.[3] The PT Timah Tbk case (2015–2022) exposed alleged abuse of authority in the management of tin resources, resulting in state losses of approximately IDR 300 trillion, again attributed to exchange transactions that benefitted select parties. Similarly, the West Sumatra BPBD case (2012) exemplifies practices of nepotism and collusion, where officials diverted flood preparedness funds totaling IDR 5 billion for personal gain.[4]

Transactions involving Corruption, Collusion, and Nepotism (KKN) create distinct obligations with specific characteristics[5], particularly when state officials are involved. The more frequent these political "transactions" occur, the more likely officials are to act or reverse policies in exchange for bribes.[6] KKN has become pervasive in Indonesia, affecting various aspects of life and presenting a significant challenge as its impact grows increasingly tangible and difficult to control. Perpetrators now often involve multiple parties, carrying out their actions systematically and in an organized manner.

Nepotism, in particular, deviates from norms when individuals are appointed to positions they are not qualified for[7], typically due to personal ties between decision-makers and certain individuals. This misuse of authority for personal or group gain reflects monopolistic behavior. Such decisions are often criticized for being unfair, particularly by those disadvantaged by them.[8]

This article will focus on nepotism, a practice where family or close relatives are prioritized for positions, often disregarding competence. Nepotism is viewed negatively, especially in

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[1] Dwi Martiningsih, "Peran Masyarakat Madani Mewujudkan Clean Government Pemerintahan Yang Bebas Korupsi Kolusi Dan Nepotisme," *Jurnal Pustaka* Vol. 5, No. 2 (2018): 22–47, Hlm. 23. https://doi.org/https://doi.org/10.35897/ps.v5i2.121.

[2] Maulia Indriana Ghani, "Contoh Kasus Korupsi Kolusi Nepotisme Pada Masa Orde Baru - Materi Sejarah Kelas 12," Zenius Education, 2022, https://www.zenius.net/blog/korupsi-kolusi-nepotisme/.

[3] Alisya Alzahrani A, "Korupsi, Kolusi, Dan Nepotisme Di Era Joko Widodo," kompasiana.com, 2024, https://www.kompasiana.com/alisya18377/671fb1ecc925c45d487eff64/korupsi-kolusi-dan-nepotisme-di-era-joko-widodo.

[4] Suntoso, "Korupsi, Kolusi, Nepotisme," Sumbar.bpk.go.id, 2012, https://sumbar.bpk.go.id/korupsikolusinepotisme/.

[5] Ridwan Jamal, "Korupsi, Kolusi Dan Nepotisme Dalam Perspektif Hukum Islam (Problem Dan Solusinya)," *Jurnal Ilmiah Al-Syir'ah* Vol. 7, No. 2 (2016): 1–16, Hlm. 1-2. https://doi.org/10.30984/as.v7i2.44.

[6] Hasbi Sidik, Nursyirwan Nursyirwan, and Abdulahanaa Abdulahanaa, "Nepotisme Gologan Dan Jabatan," *TASAMUH: Jurnal Studi Islam* Vol. 13, No. 2 (2021): 189–216, Hlm. 190. https://doi.org/10.47945/tasamuh.v13i2.401.

[7] Taufan Lazuardi, "Nepotisme Dalam Proses Rekrutmen," *Nepotisme Dalam Proses Rekrutmen Dan Seleksi: Potensi Dan Kelemahan* (Skripsi: Universitas Dippnegoro, 2014), Hlm. 2. http://eprints.undip.ac.id/44711/.

[8] Murtiningsih, "Tuduhan Nepotisme Terhadap Utsman Bin Affan Dan Pengaruhnya Terhadap Kekhalifahan Ali Bin Abi Thalib," *Jurnal Ilmu Agama: Mengkaji Doktrin, Pemikiran, Dan Fenomena Agama* Vol. 19, No. 1 (2018): 159–176, Hlm. 162. https://doi.org/10.19109/jia.v19i1.2385.

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government[9], where officials, political figures, and leaders of state-owned enterprises (BUMN)[10] appoint family members to key positions without regard for qualifications.[11]

To comprehend nepotism within the framework of Positive Law, it is essential to reference its definition as outlined in relevant legal provisions. According to Article 1(5) of Law No. 28 of 1999 on State Administrators Free from Corruption, Collusion, and Nepotism, nepotism is defined as an unlawful act by a state administrator that prioritizes the interests of their family or associates over those of the community, nation, and state.[12]

Although nepotism has long existed, the term gained prominence in Indonesia around 1998. During this period, media reports focused on allegations involving former President Soeharto's family and several New Order officials in corruption, collusion, and nepotism (KKN). Amid widespread public protests and demands for reform, the Indonesian people called for the eradication of KKN practices.[13] In response, the Indonesian legislature, together with President BJ Habibie, passed Law No. 28 of 1999.[14]

The issue resurfaced following the Constitutional Court's (MK) ruling that allowed Gibran Rakabuming Raka, son of President Joko Widodo, to run as a vice-presidential candidate in the 2024 elections. Constitutional Court Decision No. 90/PUU-XXI/2023, which lowered the minimum age requirement for presidential and vice-presidential candidates, sparked allegations of ethical misconduct.[15] These allegations were reviewed by the Honorary Council of the Constitutional Court (MKMK), which concluded that Chief Justice Anwar Usman had violated several principles of the Sapta Karsa Hutama, including impartiality, integrity, competence, equality, independence, and appropriateness. As a result, MKMK removed Anwar Usman from his position as Chief Justice.

The Constitutional Court's recent decisions have raised concerns about its neutrality and independence, with suspicions of undue influence from those in power. The public perceives that the party benefiting most from Case No. 90 is Gibran Rakabuming Raka, who is believed to have had an easier path to running as a vice-presidential candidate alongside Prabowo Subianto. Just two days after the Court's controversial ruling on the minimum age requirement for presidential and vice-presidential candidates, which mandates a minimum age of 40 years or prior service as a regional head through direct elections (Pilkada), Gibran, then the Mayor of Solo, announced his readiness to pair with Prabowo.

The decision of the Honorary Council of the Constitutional Court (MKMK), based on one of its petitions referring to Article 17, paragraph 5, can be considered as written evidence of potential nepotism in Case No. 90. Given the familial connection between the former Chief Justice of the Constitutional Court and Gibran Rakabuming Raka[16], the decision is suspected

[9] Dewi Kusuma Fitriani, "Tafsir Makna Kekerabatan Dan Nepotisme Dalam Al-Qur'an" (Skripsi: Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2022), Hlm. 4. https://repository.uinjkt.ac.id/dspace/handle/123456789/60744.

[10] Hasbi Sidik, "Korupsi, Kolusi Dan Nepotisme (KKN) Dalam Perspektif Hadis," *TASAMUH: Jurnal Studi Islam* Vol. 11, No. 2 (2019): 403–425, Hlm. 405. https://doi.org/10.47945/tasamuh.v11i2.169.

[11] Syukron Abdul Kadir Jefrianus Tamo Ama, "Tinjauan Yuridis Peyelenggaraan Pemerintahan Daerah Provinsi Yang Bersih Korupsi, Kolusi, Dan Nepotisme Menuju Good Governance," *Media Hukum Indonesia (MHI)* Vol. 2, No. 3 (2024): 205–216, Hlm. 214. https://doi.org/https://doi.org/10.5281/zenodo.11638036.

[12] Lihat Pasal 1 ayat (5) dalam Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara Yang Bersih Dan Bebas Dari Korupsi, Kolusi Dan Nepotisme," Pub. L. No. 28, JDIH BPK-RI 1 (1999), https://peraturan.bpk.go.id/Details/45345/uu-no-28-tahun-1999.

[13] Jisman, "Praktek Kolusi Dan Nepotisme Dalam Birokrasi," *PARADIGMA : Jurnal Administrasi Publik* Vol. 1, No. 2 (2022): 93–108, Hlm. 99-100. https://doi.org/10.55100/paradigma.v1i2.48.

[14] Tim Kerja Dibawah Pimpinan Prof. DR. Iur. ADNAN BUYUNG NASUTION, "Laporan Akhir Tim Perencanaan Pembangunan Hukum Nasional Kelompok Kerja (POKJA) Implikasi Amandemen Konstitusi Terhadap Sistem Hukum Nasional Dan Demokrasi Di Indonesia" (Jakarta, 2009), Hlm. 9. https://bphn.go.id/data/documents/pphn_pokja_implikasi_amandemen_konstitusi.pdf.

[15] Denty Piawai Nastitie Dian Dewi Purnamasari, "Gugatan Terkait Usia Capres-Cawapres Tak Berhenti, Indikasi Terjadinya Ketidakadilan," *Kompas.Id*, November 16, 2023, Hlm. 1. https://www.kompas.id/baca/polhuk/2023/11/16/gugatan-terkait-usia-capres-cawapres-tak-berhenti-indikasi-terjadinya-ketidakadilan.

[16] Siaran Pers Koalisi Masyarakat Sipil Kawal Pemilu Demokratis, "Putusan MK Tentang Usia Capres-Cawapres Bukan Untuk Anak Muda, Tetapi Jadi Basis Nepotisme & Dinasti, Tanda Kehancuran Demokrasi & Menciderai Pemilu," *Perhimpunan*

to have provided undue advantage to Gibran. This situation raises the question of whether nepotism, in this case, should be classified as an unlawful act within the criminal realm (*Wederrechtelijk*) or the civil realm (*Onrechtmatige Daad*). There is also ongoing debate regarding the appropriate sanctions for nepotism, whether criminal or civil in nature. In this specific case, however, the perpetrator of nepotism was only subjected to an administrative sanction: the removal of Anwar Usman from his position as Chief Justice of the Constitutional Court.

This research explores the classification of nepotism as either criminal or civil from a positive legal perspective and delves into the historical relationship between *wederrechtelijk* and *onrechtmatige daad*. Additionally, it aims to contribute to the discourse in legal academia and practice, offering recommendations for addressing nepotism in Indonesia. The *research* advocates for a judicial review by the Constitutional Court to reconsider the legal provisions concerning nepotism.

This research employs doctrinal research methods, which involve analyzing legal doctrine to address various legal issues. Legal doctrine encompasses principles and perspectives found in laws and regulations, evolving through legal practice over time. Doctrinal research is a comprehensive examination of relevant regulations, cases, and reference sources pertinent to a specific legal doctrine.

As Amrit Kharel states, "doctrinal legal research is the analytical *research* of existing law, related cases, and overall authoritative material on a particular issue." [17] From this definition, it can be concluded that doctrinal research entails a positive legal analysis of relevant laws, cases, and other references to examine the legal issues at hand. This *research* also incorporates multiple approaches, including the conceptual, statutory, and case approaches.

The conceptual approach is employed to explore the diverse views and doctrines within legal studies.[18] It assists in analyzing legal doctrine by connecting it with applicable regulations. The statutory approach focuses on examining relevant legislative provisions[19], offering interpretations of the specific provisions within these regulations.[20] In this case, the statutory regulations under consideration include Law No. 28 of 1999 concerning State Administrators Free from Corruption, Collusion, and Nepotism.

The case approach in this research focuses on examining legal norms and rules as they are applied in judicial practice.[21] This is done by analyzing a number of precedent-setting cases, particularly those with final and binding decisions. One such case used in this *research* is Constitutional Court Decision No. 90/PUU-XXI/2023. Emphasis is placed on the judge's reasoning (*ratio decidendi*) in reaching a verdict, as it reflects the application of legal principles in concrete situations.[22]

To analyze the collected legal materials, the researcher employs evaluative, argumentative, and prescriptive techniques. The evaluative technique assesses the relevance and adequacy of legal rules; the argumentative technique constructs logical reasoning based on legal norms; and the prescriptive technique formulates legal recommendations. Through the combination of

Bantuan Hukum Dan Hak Asasi Manusia Indonesia (PBHI), November 5, 2023, https://pbhi.or.id/putusan-mk-tentang-usia-capres-cawapres-bukan-untuk-anak-muda-tetapi-jadi-basis-nepotisme-dinasti-tanda-kehancuran-demokrasi-menciderai-pemilu/.

[17] Amrit Kharel, "Doctrinal Legal Research," Hlm. 4.

[18] Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, Cet. Ke-13 (Jakarta: Pranadamedia Group, 2017), Hlm. 173. https://doi.org/340.072.

[19] Kevin C. McMunigal, "A Statutory Approach to Criminal Law," *Saint Louis University School of Law* Vol. 48, No. 4 (2004): 1285–1296, Hlm. 1290. https://scholarship.law.slu.edu/lj/vol48/iss4/12/.

[20] Tunggul Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* Vol. 4, No. 1 (2023): 1–9, Hlm. 6. https://doi.org/https://doi.org/10.22219/aclj.v4i1.24855.

[21] Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris*, Cet. Ke-3 (Yogyakarta: Pustaka Belajar, 2013), Hlm. 190. https://mh.umy.ac.id/wp-content/uploads/2016/02/Dualisme-Penelitian-Hukum.pdf.

[22] Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris*, Hlm. 190-191.

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these methods and approaches, the research yields findings that are both relevant and focused on the core legal issues.[23]

Building upon the background outlined, this *research* seeks to investigate the essence of nepotism from the perspective of positive law. Two key questions guide the inquiry: **First**, does the concept of *onrechtmatige daad* in civil law bear substantive similarities to *wederrechtelijk* in criminal law? **Second**, under positive law, should nepotism be more appropriately classified as *wederrechtelijk* (a criminal act) or as *onrechtmatige daad* (a civil wrong)?

B. Discussion

1. Aspects of *Wederrechtelijkheid*, *Onrechtmatige Daad*, and Nepotism in Legal Perspective

a. Against the Law in the Context of Criminal Law (Wederrechtelijk)

As legal science and theory continue to evolve, scholars have offered diverse interpretations of unlawful acts, particularly within the Indonesian context, where such acts are termed "*Perbuatan Melawan Hukum*" (*PMH*). These differing views often lead to inconsistencies, making it essential to identify key elements that can serve as benchmarks for determining whether an act constitutes PMH. Clarifying these elements helps foster a shared understanding and ensures legal certainty.[24] According to Djojodirdjo, an unlawful act is any action or omission that causes harm, violates legal obligations, and breaches societal norms of decency and propriety in interactions with others or property.[25]

In criminal law, the concept of "against the law" (*wederrechtelijkheid*) is fundamental, as it appears explicitly in several articles of the Indonesian Criminal Code (*KUHP*)[26], requiring it to be proven in court.[27] However, debate arises when a criminal offense lacks this explicit element: should it still be treated as unlawful? This question gave rise to two legal theories—*formele wederrechtelijkheid* (formal unlawfulness), where the act is clearly prohibited by law, and *materiële wederrechtelijkheid* (material unlawfulness) [28], where an act is deemed unlawful based on unwritten legal principles (*algemene beginselen*).[29] Satochid Kartanegara categorizes these two forms accordingly[30], emphasizing that an act may still be considered unlawful even without express legal prohibition, provided it contradicts fundamental legal values. These distinctions are crucial for interpreting and applying the notion of unlawfulness in both civil and criminal law.

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[23] I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Cet. Ke-3 (Jakarta Timur: Prenadamedia group, 2019), Hlm. 12. https://www.google.co.id/books/edition/Metodologi_Penelitian_Hukum_Normatif_dal/-MpADwAAQBAJ?hl=en&gbpv=1.

[24] Titin Apriani, "Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana," *Ganec Swara* Vol. 13, No. 1 (2019): 43-49, Hlm. 45. https://doi.org/10.35327/gara.v13i1.61.

[25] Tri Baginda K.A. Gafur and Nia Kurniati, "Pertanggungjawaban Perdata Kebakaran Hutan Di Indonesia Antara Perbuatan Melawan Hukum Atau Pertanggungjawaban Mutlak," *Jurnal Kajian Budaya Dan Humaniora* Vol. 4, No. 2 (2022): 270–275, Hlm. 271. https://doi.org/10.61296/jkbh.v4i2.32.

[26] Philipus M. Hadjon, "Istilah 'Melawan Hukum' Digunakan Dalam Tulisan Ini Mengikuti Istilah Undang-Undang Dan Praktik Penegak Hukum, Meskipun Secara Teoritis Dalam Kepustakaan Ilmu Hukum, Istilah "Melawan Hukum" Dinilai Kurang Tepat Karena Hukum Tidak Boleh Dilawan Melainkan hanya boleh dilanggar. Oleh karena itu, Philipus M. Hadjon berpendapat bahwa istilah yang tepat adalah "Melanggar Hukum" bukan "Melawan Hukum" (lihat, Philipus M Hadjon dalam pidato penerimaan Jabatan Guru Besar pada FH Airlangga, 1994). (Surabaya, 1994).

[27] Muhammad Ridwan Lubis, Halimatul Maryani, and Cut Nurita, "Unsur Melawan Hukum Sebagai Suatu Sarana Dalam Delik Pasal 2 Ayat (1) UU Nomor 31 Tahun 1999 Tentang Tipikor," *YUSTISIA MERDEKA : Jurnal Ilmiah Hukum* Vol. 5, No. 1 (2019): 45–52, Hlm. 46. https://doi.org/10.33319/yume.v5i1.29.

[28] Indriyanto Seno Adji, "'Overheidsbeleid' & Asas 'Materiele Wederrechtelijkheid' Dalam Perspektif Tindak Pidana Korupsi Di Indonesia," *Indonesian Journal of International Law* Vol. 2, No. 3 (2005): 563–608, Hlm. 570. https://media.neliti.com/media/publications/39254-EN-overheidsbeleid-dan-asas-materiele-wederrechtelijkheid-dalam-perspektif-tindak-p.pdf.

[29] Indra Gunawan Purba, "Perbuatan Melawan Hukum Dan Menyalahgunakan Wewenang Dalam Tindak Pidana Korupsi," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* Vol. 19, No. 2 (2020): 165–185, Hlm. 173. https://doi.org/10.30743/jhk.v19i2.2390.

[30] Titin Apriani, "Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana." Hlm. 44.

In the early understanding of formal unlawfulness, an act was considered *wederrechtelijk* (unlawful) if it met all the elements stipulated in a criminal offense provision as written in the law.[31] In contrast, the concept of material unlawfulness evaluates an act not only based on written legal norms but also from the standpoint of unwritten legal principles.[32] Originally, under Dutch legal influence, the material unlawfulness doctrine served a negative function—limiting the application of criminal provisions when justifiable reasons existed. However, over time, its use has evolved into a positive function, allowing for broader interpretation to categorize certain acts as unlawful, even if not explicitly defined as such by statute.

In criminal law, one of the core elements of an offense is the presence of an unlawful act, assessed objectively based on the nature of the act, not the identity of the perpetrator. An act qualifies as unlawful when it fulfills all legal elements of an offense, referred to in German legal theory as *tatbestandsmäßig*. The term *wederrechtelijk* is commonly used to describe such acts.[33] Van Hamel, as cited by P.A.F. Lamintang[34], argues that *wederrechtelijk* is more suitable than *onrechtmatig* in criminal contexts because it better captures acts that are prohibited and punishable, reflecting violations of both public and individual legal interests. Thus, both grammatically and legally, the use of *wederrechtelijk* is well-founded.

The material interpretation of unlawfulness, particularly in corruption-related offenses, aligns with the evolving doctrine of *wederrechtelijk* in Indonesia. This development supports a dual understanding of "unlawfulness"—as a core element in both criminal and civil law.[35]

b. Violating the Law in the Context of Civil Law (Onrechtmatige-Daad)

Before 1919, the *Hoge Raad* narrowly interpreted the concept of unlawful acts (*onrechtmatige daad*). At that time, an action was only deemed unlawful if it directly violated someone else's legal rights or conflicted with obligations explicitly stipulated by law. Under this limited view, a claim for damages could not be filed against actions that merely violated moral or social norms unless they also breached written legal provisions.[36]

In civil law, there are two prevailing interpretations of unlawful acts. The first holds that an act is unlawful only when it violates a person's subjective rights or legal obligations as set out by law, emphasizing a strict link to statutory provisions.[37] According to this perspective, even if an action breaches societal morals or decency, it cannot be considered unlawful if it does not contravene formal legal rules.

A broader perspective was introduced by Molengraff, who argued that an act may be considered unlawful if it is socially inappropriate and causes harm to others. This view was not accepted before 1919, but following a landmark ruling in that year, the broader interpretation gained traction. Nevertheless, debates persist over whether an act must violate legal obligations, subjective rights, or merely moral standards to qualify as unlawful.

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[31] Indah Sari, "Perbuatan Melawan Hukum (PMH) Dalam Hukum Pidana Dan Hukum Perdata," *Jurnal Ilmiah Hukum Dirgantara* Vol. 11, No. 1 (2020): 53–70, Hlm. 60-61. https://doi.org/10.35968/jh.v11i1.651.

[32] Teguh Prasetyo, *Hukum Pidana Edisi Revisi* (Depok: Rajawali Pers, 2017), Hlm. 71-72.

[33] Wendi Muh Fadhli and Siti Anisah, "Legal Responsibilities of Doctors and Pharmacists in The Services of Recipes," *Media Farmasi* Vol. 13, No. 1 (2016): 61–87, Hlm. 78. https://core.ac.uk/download/pdf/295348317.pdf.

[34] Titin Apriani, "Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana." Hlm. 45.

[35] Indriyanto Seno Adji, "'Overheidsbeleid' & Asas 'Materiele Wederrechtelijkheid' Dalam Perspektif Tindak Pidana Korupsi Di Indonesia." Hlm. 564.

[36] M.A. Moegni Djojodirdjo, *Perbuatan Melawan Hukum* (Jakarta: Pradnya Paramita, 1982), Hlm. 25. https://books.google.co.id/books/about/Perbuatan_melawan_hukum.html?id=Hos8ngEACAAJ&redir_esc=y.

[37] Nelvitia Purba Mesdiana Purba, "Perbuatan Melawan Hukum (Wederrechtelijk) Didalam Perspektif Hukum Pdidana Dan Perbuatan Melawan Hukum (Onrechtmatige Daad) Didalam Perspektif Hukum Perdata," *Kultura* Vol. 14, No. 1 (2013): 1-9, Hlm. 6. https://www.academia.edu/28610390/PERBUATAN_MELAWAN_HUKUM_WEDERRECHTELIJK_DI_DALAM_PERSPEKTIF_HUKUM_PIDANA_DAN_PERBUATAN_MELAWAN_HUKUM_ONRECHTMATIGE_DAAD_DI_DALAM_PERSPEKTIF_HUKUM_PERDATA.

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Legal scholars such as Sudikno Mertokusumo[38] and Maria Farida Indrati Soeprapto[39] emphasize that the concept of decency is closely tied to societal standards of propriety, which are often unwritten and thus more flexible and relative. Article 1365 of the *Burgerlijk Wetboek* (BW) encapsulates the principle of unlawful acts, stating: "Every unlawful act which causes harm to another person obliges the person at fault to compensate for the damage."[40]

While the notion of unlawful acts exists in both civil and criminal law, its application in criminal law must be more precise due to the principle of legality, as outlined in Article 1(1) of the Indonesian Criminal Code.[41] This article establishes that no one can be punished for an act that is not explicitly defined as a crime by law—a principle known by the maxim *nullum delictum, nulla poena sine lege poenali*.[42]

c. Nepotism

The term nepotism originates from the Latin word *nepos* or *nepotis*, meaning grandson, nephew, or descendant.[43] It is also derived from the English word nepotism, referring to the practice of granting privileges or advantages to family members or close associates, particularly in relation to positions of power or rank in government. Nepotism typically involves appointing or favoring relatives in government structures.[44]

Kamus Besar Bahasa Indonesia (KBBI) states that nepotism carries several meanings: first, an attitude of excessive preference or partiality toward close relatives; second, a practice that prioritizes or benefits family members, especially in government roles; and third, the act of assigning or selecting family members to hold specific government positions.[45] Over time, the use and meaning of nepotism have expanded beyond the public sector to encompass favoritism in private institutions, such as corporate management or organizational leadership.

In Indonesia's positive legal framework, nepotism is defined as "any unlawful act committed by a State Administrator that benefits the interests of his family and/or cronies above the interests of the public, the nation, and the state."[46] Emotional closeness often plays a significant role in such decisions, influencing recruitment, selection processes, contract awards, and other institutional actions. This practice is frequently motivated by efforts to preserve or expand power within political or economic spheres. As a result, nepotism can lead to monopolies controlled by family networks or inner circles.[47]

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[38] Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar [Edisi Revisi]* (Yogyakarta: Cahaya Atma Pustaka, 2010).

[39] Maria Farida Indrati, *Ilmu Perundang-Undangan Dasar-Dasar Dan Pembentukannya*, Cet. Pertama (Jakarta: Sekretariat Konsorsium Ilmu Hukum Universitas Indonesia, 1996).

[40] Lihat Pasal 1365 BW dalam "Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek Voor Indonesie)" (1847), https://www.dilmil-jakarta.go.id/wp-content/uploads/2018/09/Kitab-Undang-Undang-Hukum-Perdata.pdf.

[41] Lihat Pasal 1 ayat (1) KUHP Nasional dalam Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang Undang Hukum Pidana," Pub. L. No. 1, 1 (2023).

[42] Nazhif Ali Murtadho, "Konsep Asas Legalitas Terhadap Penerapan Living Law Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana" (Skripsi: Universitas Islam Negeri Sunan Ampel Surabaya, 2024), Hlm. 3. https://digilib.uinsa.ac.id/69746/.

[43] Dewi Kusuma Fitriani, "Tafsir Makna Kekerabatan Dan Nepotisme Dalam Al-Qur'an" (Skripsi: Universitas Islam Negeri Syarif Hidayatullah, 2022), Hlm. 30. https://repository.uinjkt.ac.id/dspace/bitstream/123456789/60744/1/11170340000147_DEWI KUSUMA FITRIANI.pdf.

[44] Fatiyah Fatiyah Kresna Azhi Fahlevi, "Mengungkap Mispersepsi Siswa Madrasah Aliyah Atas Tuduhan Nepotisme Terhadap Khalifah Utsman Bin Affan (644-656 M)," *Jurnal Tanjak: Jurnal Sejarah Dan Peradaban Islam* Vol. 3, No. 1 (2023): 1–25, Hlm. 13. https://doi.org/https://doi.org/10.19109/tanjak.v3i1.18177.

[45] Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, Cet. 1 (Jakarta: PT. Gramedia Pustaka Utama, 2008), Hlm. 959. Bandingkan pula dengan Badan Pengembangan dan Pembinaan Bahasa (Pusat Bahasa), "Kamus Besar Bahasa Indonesia (KBBI)," KBBI Daring (Online) Edisi III, 2024, https://kbbi.web.id/nepotisme.

[46] Lihat Pasal 1 ayat (5) dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

[47] Murtiningsih, "Tuduhan Nepotisme Terhadap Utsman Bin Affan Dan Pengaruhnya Terhadap Kekhalifahan Ali Bin Abi Thalib." Hlm. 162.

In terms of terminology, nepotism can be better understood through several expert perspectives. First, J.W. Schoolr defines it as the act of a civil servant appointing family members to public positions or giving them special privileges, often aimed at enhancing the family's reputation, increasing income, or strengthening political influence—despite the obligation to prioritize public over personal interests.[48] Second, Husain Alatas describes nepotism as the appointment of family, friends, or political allies to public positions without regard to competence or broader societal impact.[49] Third, Amien Rais classifies nepotism as a form of corruption, distinguishing it from extortive corruption (coerced bribery) and manipulative corruption (influencing policy for personal gain). In nepotistic corruption, public officials grant special privileges to relatives or close associates to secure mutual benefits.[50]

From these definitions, nepotism can be understood as a practice by public officials—whether civil servants or state administrators—who favor family or close associates in distributing authority and positions. Such practices undermine the principle of meritocracy, which requires that appointments be based on competence, education, experience, and achievement.

2. The Relationship Between *Onrechtmatige Daad* and *Wederrechtelijk* in a Legal Perspective and Their Connection to Nepotism

a. The Concept of Onrechtmatige Daad has Similarities with Wederechtelijk in Criminal Law

In terms of language and terminology, the concept of "act against the law" in Dutch is expressed through two terms: *wederrechtelijk* in criminal law and *onrechtmatige daad* in civil law. In criminal law, *wederrechtelijk* has several interpretations, including actions that are contrary to the law (*in strijd met het recht*), violate others' rights (*met krenking van eens anders recht*), lack legal basis (*niet steunend op het recht*), or are carried out without legal authority (*zonder bevoegheid*).[51]

According to Van Bemmelen, there is essentially no difference in the meaning of "against the law" in both criminal and civil law.[52] This aligns with Pompe's view that unlawfulness extends beyond written legal rules to include unwritten legal norms. While *onrechtmatige daad* in civil law typically refers to Article 1365 of the Burgerlijk Wetboek (BW), and is thus seen as more specific, in a broader sense[53], it parallels the concept of *materiële wederrechtelijkheid* in criminal law.[54]

Van Bemmelen further connects this concept to the landmark Dutch case of Lindenbaum vs. Cohen (January 31, 1919), in which the Hoge Raad held that unlawful

[48] Kresna Azhi Fahlevi, "Mengungkap Mispersepsi Siswa Madrasah Aliyah Atas Tuduhan Nepotisme Terhadap Khalifah Utsman Bin Affan (644-656 M)." Hlm. 13.

[49] Murtiningsih, "Tuduhan Nepotisme Terhadap Utsman Bin Affan Dan Pengaruhnya Terhadap Kekhalifahan Ali Bin Abi Thalib." Hlm. 163.

[50] Kurniati, "Nepotisme Dalam Perspektif Hadis (Kritik Sanad Dan Matan Hadis)," *Al- Daulah* Vol. 4, No. 1 (2015): 116–129, Hlm. 119. https://doi.org/https://doi.org/10.24252/ad.v4i1.1493.

[51] Titin Apriani, "Konsep Perbuatan Melawan Hukum Dalam Tindak Pidana." Hlm. 45.

[52] Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum-Materiil Dalam Hukum Pidana Indonesia : Studi Kasus Tentang Penerapan Dan Perkembangannya Dalam Yurisprudensi*, Cet. 3 (Bandung: Alumni, 2013), Hlm. 33.

[53] R. Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum: Dipandang Dari Sudut Hukum Perdata*, Ke-1 (Bandung: CV. Mandar Maju, 2018), Hlm. 7.

[54] Indriyanto Seno Adji, "'Overheidsbeleid' Dalam Perspektif Tindak Pidana Korupsi Di Indonesia," *Jurnal Keadilan* Vol. 4, No. 2 (2014), Hlm. 11.

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acts include any actions or omissions that contravene legal rules or societal norms[55] This decision marked a turning point in Dutch legal thought, expanding the interpretation of unlawful acts in response to the increasing complexity and dynamism of modern society.[56]

According to van Bemmelen, there is actually no difference in meaning between the term "against the law" in criminal and civil law This opinion is in line with Pompe's view, which emphasizes that the nature of unlawfulness is not only limited to written rules but also includes unwritten legal norms.[57] In Dutch, the term "*onrechtmatige daad*" generally has a more specific meaning, namely as regulated in Article 1365 *Burgerlijk Wetboek* (BW) and is directly related to the interpretation of that article However, when viewed in a broader context, this term has a scope comparable to the concept of "*materiele wederrechtelijkheid*" in criminal law.

Pompe interpreted the term *wederrechtelijk as in strijd met het recht* (contrary to the law), a broader concept than in strijd met de wet, which refers solely to statutory violations.[58] He argued that *wederrechtelijk* aligns with the civil law concept of onrechtmatig as found in Article 1365 of the Burgerlijk Wetboek (BW), notably interpreted in the Hoge Raad decision of January 31, 1919.[59] Due to its multiple interpretations, Noyon and Langemeyer (1954) recommended that the meaning of "against the law" be adapted to the type of offence in question, while preserving its core essence to ensure consistency and legal uniformity.[60]

According to Wikipedia, in civil law, an unlawful act (tort) refers to conduct that causes harm, granting the injured party the right to seek legal remedy.[61] Such harm may be material (e.g., vehicle damage from an accident) or immaterial (e.g., psychological or health-related). Victims typically pursue civil claims to obtain compensation. Generally, civil unlawful acts are categorized into three main types:

Unlawful acts can be categorized into three types: first, actions performed intentionally; second, actions occurring without fault, either intentional or due to negligence; and third, unlawful acts arising from negligence.[62] There are fundamental differences between the concept of unlawful acts in civil and criminal law, which can be observed in the legal framework, the nature of the law, and the elements involved. According to the Hoge Raad decision, unlawful acts (onrechtmatige daad) encompass actions or omissions that: first, breach legal obligations; second, harm or infringe upon the subjective rights of others; third, violate societal norms of decency; and fourth, fail to align with the principles of propriety, prudence, and thoroughness.[63]

Komariah Emong Sapardjaja, in her dissertation, provides a detailed comparison of the concept of unlawful acts in civil law, analyzing provisions in several regulations:

[55] Bing Waluyo, "Kajian Terhadap Perbuatan Melawan Hukum Berdasarkan Pada Pasal 1365 Kitab Undang-Undang Hukum Perdata," *Cakrawala Hukum: Majalah Ilmiah Fakultas Hukum Universitas Wijayakusuma* Vol. 24, No. 1 (2022): 14–22, Hlm. 18. https://doi.org/10.51921/chk.v24i1.186.

[56] Sodikin, "Konsep Perbuatan Melawan Hukum Dengan Model Pertanggungjawaban Mutlak (Strict Liability) Dalam Penyelesaian Sengketa Konsumen," *Jurnal Spektrum Hukum* Vol. 20, No. 2 (2023): 99–114, Hlm. 103. https://doi.org/10.56444/sh.v20i2.4420.

[57] Rosa Agustina, *Perbuatan Melawan Hukum* (Jakarta: Program Pascasarjana Universitas Indonesia, 2003), Hlm. 52.

[58] Pompe sebagaimana dikutip dalam P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Cet. 5 (Bandung: Citra Aditya Bhakti, 2013), Hlm. 338.

[59] Ariehta Eleison Sembiring. Shinta Agustina, Roni Saputra , Alex Argo Hernowo, *Penjelasan Hukum: Sifat Melawan Hukum Dalam Kasus Korupsi* (Jakarta: LeIP, 2016), Hlm. 53.

[60] Ariehta Eleison Sembiring. Shinta Agustina, Roni Saputra , Alex Argo Hernowo, *Penjelasan Hukum: Sifat Melawan Hukum Dalam Kasus Korupsi*, Hlm. 53.

[61] Info Hukum, "Apa Itu Perbuatan Melawan Hukum," IH: Info Hukum, 2025, https://fahum.umsu.ac.id/info/perbuatan-melawan-hukum/.

[62] Munir Fuady, *Perbuatan Melawan Hukum : Pendekatan Kontemporer*, Cet. 4 (Bandung: Citra Aditya Bhakti, 2013), Hlm. 3.

[63] Rosa Agustina, *Perbuatan Melawan Hukum*, Hlm. 17. Bandingkan dengan E. Utrecht, *Hukum Pidana I* (Bandung: Penerbitan Universitas, 1967), Hlm. 272.

Article 1382 of the French Civil Code, Article 1401 of the Dutch Burgerlijk Wetboek, and Article 1365 of the Indonesian Civil Code. Article 1382 of the French Civil Code states, "*tout fait quelconque de l'homme, qui cause un dommage, oblige celui par la faute duquel il est arrivé, à le répare*r,"[64] which translates as, "Every unlawful act that causes harm to another person obliges the person at fault to repair the damage" (translated by R. Subekti) .[65] Similarly, Article 1401 of the Dutch Burgerlijk Wetboek states, "*Elke onrechtmatige daad, waardoor aan een ander schade wordt toegebracht, stelt degene door wiens schuld die schade veroorzaakt is in de verplichting om deze te goeden*,"[66] and Article 1365 of the Indonesian Civil Code reads as follows:

"Every act that violates the law, which brings harm to another person, requires the person whose fault it was to cause the loss to compensate for the loss."[67]

A comparison of the three provisions reveals that Dutch law uses the term *onrechtmatige daad*, which is absent from Article 1382 of the French Civil Code. This suggests that the Dutch lawmakers intentionally replaced the phrase *tout fait quelconque de l'homme*—similar in meaning to *wederrechtelijk*—with *onrechtmatig*. This change highlights that not all actions causing harm to others should automatically be classified as unlawful acts. Additionally, Komariah cited Hoffman's view, which identifies the elements of *onrechtmatige daad* as the act itself, a violation of the law, the occurrence of harm, and the presence of an element of fault that can be attributed.[68]

The term *onrechtmatige daad* differs from *wederrechtelijk*, the core element of every criminal act. Vos further divides the concept of *wederrechtelijk* into two categories: formeel *wederrechtelijk*, which refers to violations of written law (positive law), and materieel *wederrechtelijk*, which involves actions conflicting with unwritten legal norms or general principles.[69] Pompe, on the other hand, approaches criminal acts from two perspectives. Theoretically, a criminal act is an action contrary to the law (*wederrechtelijk* or onrechtmatig), committed by someone who can be blamed and deserves punishment to maintain order and protect public interest. In positive law, however, a criminal act is defined as an action explicitly recognized by statutory regulations as subject to sanctions.[70]

The distinction becomes evident when comparing civil and criminal law, such as in the regulations governing the eradication of corruption. In Article 33 of Law Number 31 of 1999, later amended by Law Number 20 of 2001 on the Eradication of Corruption Crimes, both *wederrechtelijk* (criminal law) and *onrechtmatig* (civil law) concepts appear to align.

"In the case of a suspect who dies during an investigation, even though there has been a real financial loss to the state, the investigator immediately hands over the case file resulting from the investigation to the State Attorney or hands it over to the agency that suffered the loss to carry out a civil suit against his heirs."[71]

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[64] Tulisan Eddy O.S. Hiariej dalam Dian Rosita and Sarah Dwita, *Dictum Perbuatan Melawan Hukum* (Jakarta: Lembaga Kajian & Advokasi Independensi Peradilan, 2013), Hlm. 9.

[65] Akhmad Zaenuddin & Partners, "Gugatan Wanprestasi Dan Perbuatan Melawan Hukum," azlaw.co.id, 2021, https://www.azlaw.co.id/consultation-3.html.

[66] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Revisi*, Cet. Ke-2 (Yogyakarta: Cahaya Atma Pustaka, 2016), Hlm. 249-250.

[67] Lihat Pasal 1365 dalam Kitab Undang-undang Hukum Perdata (*Burgerlijk Wetboek voor Indonesie*).

[68] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, Cet. 1 (Depok: Rajawali Pers, 2024), Hlm. 236.

[69] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Revisi*, Hlm. 250. Bandingkan dengan Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, Hlm. 236.

[70] Utrecht, *Hukum Pidana I*, Hlm. 253-254.

[71] Lihat Pasal 33 UU 31/1999 dalam Undang Undang Republik Indonesia, "Undan-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi," Pub. L. No. 31, 1 JDIH BPK-RI 25 (1999), https://doi.org/10.21143/jhp.vol13.no6.1001.

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In such cases, Article 1365 in the Civil Code can be directly applied because this article regulates *onrechtmatige daad* or actions that are contrary to the law.

Another difference lies in the terms used where in civil law, it is known as *onrechtmatige daad*, while in criminal law, it is called *wederrechtelijk*. In the context of criminal law, an act is categorized as unlawful if the act threatens or harms the interests of society at large. In contrast, in civil law, legal violations focus more on actions that harm individual rights or interests.[72] Munir Fuady's statement stated:

"*The only difference between criminal (unlawful) acts and (civil) unlawful acts is that in accordance with their nature as public law, with criminal acts, there is a public interest that is violated (besides perhaps also individual interests), whereas with (civil) unlawful acts only personal interests are violated*."[73]

In criminal law, an act is considered unlawful if the act clearly violates the provisions of the law, is carried out without authority or rights, and is contrary to basic principles in the law. Meanwhile, in civil law, the elements that must be fulfilled include the existence of an action, a violation of the law, a mistake on the part of the party committing the action, a loss experienced by another party, and the existence of a causal relationship (causality) between the action and the loss that arises.[74]

b. Nepotism in a Positive Legal Perspective: Criminal Violation (Wederechtelijk) or Unlawful Act (Onrechtmatige Daad)?

Nepotism, as defined by Kamaruddin Hidayat, is a violation of the law committed by state officials who prioritize familial interests over those of the community, nation, and state. It can be understood as a personnel management system where recruitment, placement, promotion, and appointments are based more on family ties, kinship, or friendship than on competence.[75] In practice, nepotism occurs when a state official appoints a family member, relative, or close friend to a position without regard to their skills or qualifications. Nepotism is often linked to the broader concept of KKN (Corruption, Collusion, and Nepotism), where these issues are intertwined.

The negative impacts of nepotism on the government system include fostering loyalty conflicts, reducing morale and motivation, and creating the perception that positions or jobs are awarded based on personal relationships rather than merit. This ultimately leads to a decline in the quality and competitiveness of human resources. The problem of KKN has been a long-standing challenge in Indonesia. To address this, the government enacted Law No. 28 of 1999, which aims to ensure that state administrators are clean and free from corruption, collusion, and nepotism.

Prior to the enactment of this law, particularly during the New Order period, KKN practices were widespread. The introduction of this law marked a strategic effort to combat these issues. Article 5 of the law stipulates that state officials must refrain from engaging in acts of corruption, collusion, or nepotism. As a preventive measure, the president established an audit commission, directly accountable to him, to oversee and minimize KKN practices. Additionally, every candidate for office must take an oath in accordance with their beliefs, typically during their inauguration or official oath-taking ceremony.

Violating the provisions outlined in Article 5 of Law No. 28 of 1999 can result in imprisonment, with a minimum sentence of two years and a maximum of twelve years.

[72] Indah Sari, "Perbuatan Melawan Hukum (PMH) Dalam Hukum Pidana Dan Hukum Perdata." Hlm. 55.
[73] Irsan Arief, *Pertanggungjawaban Atas Kerugian Keuangan Negara Dalam Perspektif Hukum Administrasi, Perdata/Bisnis, Dan Pidana/Korupsi* (Jakarta: Mekar Cipta Lestari, 2023), Hlm. 11. https://www.google.co.id/books/edition/Pertanggungjawaban_Atas_Kerugian_Keuanga/ruKwEAAAQBAJ?hl=en&gbpv=0.
[74] Indah Sari, Hlm. 55.
[75] Himatika UIN Bandung, "Nepotisme Dalam Dunia Pendidikan," himatikauinbandung.blogspot, 2015, accessed January 01, 2025. https://himatikauinbandung.blogspot.com/2015/01/nepotisme-dalam-dunia-pendidikan.html.

Additionally, the official may face fines ranging from a minimum of IDR 200,000,000 (two hundred million rupiah) to a maximum of IDR 1,000,000,000 (one billion rupiah).[76]

The decision of the Constitutional Court (MK) in Case Number 90/PUU-XXI/2023, which involved a judicial review of the minimum age requirement for presidential and vice-presidential candidates, led to allegations of ethical violations. These allegations were investigated by the Honorary Council of the Constitutional Court (MKMK), which concluded that Chief Justice Anwar Usman had violated several principles outlined in the Sapta Karsa Hutama, including impartiality, integrity, proficiency, equality, independence, and appropriateness and politeness. As a result, MKMK imposed sanctions, removing Anwar Usman from his position as Chief Justice.

From a legal standpoint, this case can be analyzed through systematic and grammatical interpretation. The lawsuit challenging Article 169 letter q of the Election Law, which sets the minimum age of 40 for presidential and vice-presidential candidates, was filed by a student from the Faculty of Law, Sebelas Maret University, Solo. The student cited his admiration for Gibran Rakabuming Raka as the basis for the legal action. However, if the lawsuit is rooted merely in admiration, it raises a fundamental legal question: how does this student's constitutional right as a citizen who feels disadvantaged by this provision justify the judicial review? Upon objective analysis, neither the judge's decision nor the content of the ruling in Case Number 90 suggests that any constitutional rights were violated. Therefore, the key question to address is the genuine interest of the Sebelas Maret University law student in submitting a material review of this legal provision.

Political and legal observer Bivitri Susanti[77] argues that Gibran Rakabuming Raka is the primary beneficiary of Constitutional Court Decision Number 90. This suspicion is reinforced by the timing of the decision, which revised the minimum age requirement for presidential and vice-presidential candidates from 40 years to either 40 years or having prior experience as a regional head through general or regional elections. Just two days after the ruling, Gibran, the Mayor of Solo and President Joko Widodo's eldest son, was announced as Prabowo Subianto's vice-presidential candidate.

Does the decision to dismiss the Chief Justice of the Constitutional Court automatically preclude the possibility of legal proceedings for alleged criminal acts against him? According to Article 17, paragraph (5) of Law Number 48 of 2009 on Judicial Power, a judge or clerk must recuse themselves from a case if they have a direct or indirect interest in it. This recusal can occur voluntarily or at the request of a party involved in the case. The Honorary Council of the Constitutional Court's (MKMK) decision to dismiss the Chief Justice was based on this provision, and it could serve as evidence to investigate potential criminal acts, such as nepotism, in the handling of Case Number 90.

Nepotism, as defined by Article 1, number 5 of Law Number 28 of 1999 on State Administrators who are Clean and Free from Corruption, Collusion, and Nepotism, refers to actions by state officials that unlawfully provide benefits to their family or close associates at the expense of the public, national, and state interests.[78] In the context of Case Number 90, the alleged practice of nepotism gains credibility due to the fact that the former Chief Justice was the uncle of Gibran Rakabuming Raka, who ultimately benefited from the decision as Mayor of Solo.

[76] Lihat Pasal 21 UU 28/1999 dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

[77] Icha Rastika Syakirun Ni'am, "Pengamat: Gibran Diuntungkan Putusan MK, Benturan Kepentingan Sangat Terang," Kompas.com, 2023, https://nasional.kompas.com/read/2023/10/17/11142301/pengamat-gibran-diuntungkan-putusan-mk-benturan-kepentingan-sangat-terang?page=all.

[78] Lihat Pasal 1 angka 5 UU 28/1999 dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

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Article 5, number 4 of Law No. 28/1999 mandates that state officials avoid involvement in corruption, collusion, and nepotism.[79] Article 20, paragraph (2) further elaborates as follows.

"*Every state administrator who violates the provisions as intended in Article 5 point 4 or 7 will be subject to criminal sanctions and/or civil sanctions in accordance with the provisions of the applicable laws and regulations*."[80]

Furthermore, Article 22 explains, "*Every state administrator who commits nepotism as intended in Article 5 point 4 shall be punished with imprisonment for a minimum of 2 (two) years and a maximum of 12 (twelve) years and a fine of at least IDR 200,000,000 and a maximum of IDR 1,000,000,000*."[81]

Upon closer analysis, Articles 20, paragraph (2) and 22 of Law No. 28 of 1999 exhibit differing legal implications. Article 20, paragraph (2) establishes an alternative-cumulative approach, meaning that a state official involved in corruption, collusion, or nepotism (KKN) may face civil, criminal, or both types of sanctions. In contrast, Article 22 exclusively stipulates criminal penalties. This distinction creates legal ambiguity (*vage norm*) and risks confusion in interpreting the applicable provisions.

In legal discourse, three primary issues often arise: the absence of legal rules (*nulla vanormen*), unclear norms (*vague van normen*), and conflicts between legal norms (*conflicten van normen*).[82] A norm vacuum occurs when no legal provisions exist to address a particular issue, while norm uncertainty arises when existing rules are ambiguous or open to multiple interpretations. A conflict of norms occurs when regulations contradict or fail to align with other legal provisions.

As a researcher, the author highlights the problem of nepotism due to uncertainty in the provisions of Law No. 28 of 1999 concerning State Administrators who are Clean and Free from Corruption, Collusion, and Nepotism. The ambiguity arises regarding the legal classification of nepotism—whether it constitutes a criminal or civil offence. Consequently, Articles 20 and 22 of the law create vague norms, as their meanings are unclear, subject to varying interpretations, and may lead to confusion in their application.

The author argues that nepotism, particularly within government or public sectors, should primarily be categorized as a criminal offense due to its inherent nature of power abuse, violation of justice principles, and disregard for equality before the law. Acts of nepotism often undermine government structures and public institutions, damaging public trust and violating the principle of legality. Given these considerations, such acts should be subject to criminal sanctions under anti-corruption laws or other relevant government governance regulations.

In contrast, in private or contractual settings, the effects of nepotism may lead to civil liability, particularly when there is a breach of contract or fiduciary duty that causes harm to another party. However, from a legal principles perspective, nepotism that disrupts the public interest and undermines meritocratic systems should more appropriately be processed through the criminal justice system. Legal scholars support this view, asserting that violations of decency and propriety, especially in public services, must be penalized severely to maintain public trust and uphold the integrity of the legal system.

[79] Lihat Pasal 5 angka 4 dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

[80] Lihat Pasal 20 ayat (2) dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

[81] Lihat Pasal 22 dalam Republik Indonesia, Undang Undang Republik Indonesia Nomor 28 Tahun 1999 Tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.

[82] Philipus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, Cet Ke-8 (Yogyakarta: Gadjah Mada University Press, 2017), Hlm. 10.

The author raises important questions about the classification of nepotism in Article 1, number 5 of Law No. 28/1999 and the lack of clear regulations or assessment parameters for its legal categorization. The absence of civil sanctions for nepotism in the law, particularly in Article 20, further complicates the issue. Civil sanctions typically involve compensation for losses and are suited for disputes between parties regarding civil rights and obligations. However, nepotism, being a violation that harms the public at large, calls for a more repressive response. While civil cases focus on compensation, criminal sanctions aim to deter and punish the perpetrator, which aligns more effectively with the nature of nepotism.

Therefore, applying Article 22, which provides clear and firm criminal sanctions—ranging from imprisonment (2 to 12 years) to substantial fines (Rp. 200,000,000 to Rp. 1,000,000,000)—would be more appropriate for addressing nepotism. These sanctions are easier to implement, reducing the risk of misuse. Although Article 22 satisfies the principle of lex scripta (written rules), it still does not fully meet the principles of lex certa (clear rules) or lex stricta (strict rules), indicating that further refinement is needed for a more precise legal framework.

The author argues that Articles 20 and 22 of Law No. 28 of 1999 lack clarity, failing to meet the *Nullum Crimen, Nulla Poena Sine Lege Certa* [83] (no crime, no punishment without a clear law) and *Lex Certa* principles. This ambiguity raises questions about whether nepotism should be classified as a civil, administrative, or criminal offense. The author suggests that these provisions should undergo a material review by the Constitutional Court to align the law with the principles of legal certainty and clarity. This review would ensure clearer definitions of nepotism and enhance the application of the law, removing ambiguities and improving legal interpretation.[84]

C. Conclusion

The concepts of "against the law" in civil law (*onrechtmatige daad*) and criminal law (*wederrechtelijk*) share similarities but differ in their application. Civil law focuses on actions that cause harm with fault and causality, while criminal law targets actions contrary to the law, whether written or unwritten, and without legal authority. The main difference lies in the protection of individual vs. public interests.

Nepotism, as part of KKN practices, is a violation that harms public interests and damages state integrity, especially when committed by public officials for personal gain. Articles 20 and 22 of Law No. 28 of 1999 create ambiguity in sanctioning nepotism, offering both civil and criminal options. This dualism creates confusion over whether nepotism should be addressed in civil, administrative, or criminal law. Given its systemic impact, the author suggests that nepotism should be treated as a criminal act under the *wederrechtelijk* category, ensuring repressive punishment that adheres to the principles of clarity and certainty in criminal law. To ensure legal certainty and protect public interests, a material review of these articles by the Constitutional Court is recommended to align them with the principle of legality.

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