

*Research Article***Proof of Element of Unlawfulness Acts in The National Criminal Code****Gusti Muhammad Andre<sup>1\*</sup>, Barda Nawawi Arief<sup>2</sup>, RB Sularto<sup>3</sup>, Faiqah Nur Azizah<sup>4</sup>, Nadia Nabela<sup>5</sup>**<sup>1</sup>Doctor of Law Program, Faculty of Law, Universitas Diponegoro, Indonesia<sup>2,3</sup>Faculty of Law, Universitas Diponegoro, Indonesia<sup>4</sup>Law Institute, RUDN University, Russia<sup>5</sup>Faculty of Law, Universitas Mulawarman**ABSTRAK**

In criminal law, unlawful acts are one of the elements of a crime. Logically, in addition to the acts formulated in the law, the unlawful act must also be proven. If an unlawful act is not proven, then an act cannot be considered a crime. However, the elements of unlawful acts regulated in the old Criminal Code differ from those in the National Criminal Code. This article aims to analyse the law of evidence in relation to unlawful acts in the National Criminal Code, in order to establish the truth of the matter. The research method used is the normative juridical method with a literature study analysis. Proving the essence of formal (written) law in the law of evidence is very easy; however, proving the essence of material law is more difficult, as it requires the judge to explore the sense of legal justice that exists in society. In criminal law, proof of unlawful acts is based on the postulate in criminalibus probantiones bedent esse lucis clariores, which states that in criminal cases, evidence must be clearer than light.

**Keywords:** Unlawfulness; Law of Evidence; National Criminal Code.

**A. INTRODUCTION**

The term 'unlawful act' has many definitions. Some of these definitions mean that unlawful acts are those that are contrary to the law and the rights of others. Unlawful acts result in loss for other parties, and of course, the party that commits the unlawful act must compensate those who have been harmed (Maulidah & Jaya, 2019). Others interpret unlawful acts as those committed outside of one's authority or power. Unlawful acts are also defined as those that violate the values of decency that develop in society, as well as the general principles that apply in the field of law (Wahyuni, 2022).

In a civil context, tort is defined as any act that causes harm and allows the victim to sue the

person who committed the act. This harm can be either material, such as loss due to a car crash, or immaterial, such as anxiety or illness. Through this claim, the victim seeks a civil remedy, such as compensation (Helmi, 2020).

In criminal law, there are three categories of tort: Intentional torts; unlawful acts without fault (i.e. no element of intent or negligence); and wrongful acts due to negligence (Sari, Gita & Lumbanraja, 2019).

With regard to the unlawful acts included in the formulation of Article 2, paragraph (1) of the Law on the Eradication of Criminal Acts of Corruption, as well as its explanation, is one example. Article 2, paragraph 1: 'Any person who carries out an unlawful act to benefit themselves

or another person or corporation that can harm state finances or the state economy shall be punished...' The Explanation of Article 2(1) states that what is meant by 'unlawful' in this Article includes unlawful acts in both the formal and material senses. This means that even if an act is not regulated by statutory regulations, it can still be punished if it is considered reprehensible because it does not comply with the sense of justice or norms of social life.

The Constitutional Court's reasoning regarding unlawful acts, as stated in Decision No. 25/PUU-XIV/2016, is as follows: Firstly, the legislator has clarified not only the element of unlawfulness in Article 2(1), but has also created a new norm that uses measures not formally written into law to determine punishable acts (Irmawati, 2019). Secondly, these actions have led to the adoption of the criteria for unlawful acts (Article 1365 of the Civil Code), known in civil law as 'onrechtmatige daad', as a measure of unlawfulness in criminal law, or 'wederrechtelijkheid' (Angela & Anugerah, 2023). The interpretation of the Constitutional Court therefore expressly states that unlawful acts must cause concrete losses.

Third, Article 28D paragraph (1) of the Constitution recognises and protects the constitutional rights of citizens to obtain legal guarantees and protection. In the field of criminal law, this is translated as the principle of legality contained in Article 1 paragraph (1) of the Criminal Code that the principle is a demand for legal certainty where people can only be

prosecuted and tried on the basis of a written law (*lex scripta*) that has previously existed (Andini et al., 2023). This requires that a criminal offence has an unlawful element that must have been previously enacted in writing which formulates what acts or consequences of human conduct are clearly and strictly prohibited so that they can be prosecuted and punished (Setiawan et al., 2024).

Fourth, the concept of against the law which is formally written, obliges the legislator to formulate as carefully and in detail as possible is a requirement to ensure legal certainty (Sulistiyani, 2019). Fifth, the concept of against material law which refers to the unwritten law in the measure of decency, prudence and caution that lives in society, as a norm of justice, is an uncertain measure and varies from one particular community to another, so that what is against the law in one place may in another place be accepted and recognised as something legal and not against the law, according to the measure recognised as something legal and not against the law, according to the measure known in the life of the local community (Tongat, 2024). By examining the Constitutional Court's considerations in decision No. 25/PUU-XIV/2016, it is clear that the Panel of Judges confused the elements of unlawfulness, the definition of unlawfulness, and the nature of unlawfulness. Furthermore, in one of its considerations, the Panel of Judges seemed to state a distinction between unlawfulness in the context of civil law and unlawfulness in the context of criminal law. However, it is clear that an unlawful act must

cause real harm to the victim (Purnamawati et al., 2024).

In Law Number 1 of 2023 concerning the Criminal Code (KUHP), hereinafter referred to as the National Criminal Code, the definition of a criminal offence is listed in Article 12, paragraph (2), which states that an act threatened with criminal sanctions under statutory regulations must be unlawful or contrary to societal norms. This definition of a criminal offence is explicit and also covers the elements of an offence (Hardinanto, 2016). As Unlawfulness is an element of an offence, it must be proven for an act to be declared a criminal offence. If this element is not proven, the defendant must be acquitted of the criminal charge (Rohmana, 2017). Examining the formulation of Article 12(2), unlawful acts can be categorised into two types: those that contravene formal (written) law and those that contravene material law (i.e. laws applicable in society). The balance of unlawful acts adopted by the Criminal Code has implications for criminal evidence law in the pursuit of substantive justice. For example, the elements of unlawful acts in the crime of corruption are both formal and material (Putri, Irianto & An, 2019).

Based on this description, the problems relating to lawlessness in the National Criminal Code and its implications for criminal evidentiary law can be seen. How is proof of an unlawful act provided for in the National Criminal Code, and how is evidence analysed legally with regard to the nature of law in the Criminal Code?

Previous studies have discussed unlawfulness in criminal law, for example in an article by Indah Sari entitled 'Unlawful Acts in Criminal Law and Civil Law' (Sari, 2020). This study differs from that one because its argumentation is based on the previous Criminal Code. Additionally, other research has been conducted on the unlawfulness of criminal law and the law of evidence associated with the unlawfulness of the crime of corruption (Gunawan, 2020). Unlike this study, that study specifically discusses unlawful acts in corruption crimes, whereas this study discusses unlawful acts in the National Criminal Code. Another study discusses unlawful acts under criminal and civil law (Savitri, 2020). This research differs from the present study in that it specifically discusses unlawful acts under the National Criminal Code.

This study examines the reverse burden of proof in cases of alleged corruption. It looks at the nature of this burden, which places the onus on the defendant to prove their innocence. Unlike other studies, this one focuses on proving unlawful acts under the National Criminal Code (Wiriadinata, 2012). Other research concerns the position of the evidentiary system in criminal law. This research differs in that it focuses on electronic evidence, whereas this study focuses on proving unlawful acts under the National Criminal Code (Siqi et al., 2024). The latest research relates to judges proving criminal unlawful acts related to narcotics cases, as presented by Maria I. Tarigan in her study entitled 'Act of Giving Marijuana to Others as an

Alternative Treatment in the Framework of Unlawful Criminal Acts' (Case Study of Fidelis Arie Sudewarto) (Tarigan & Naibaho, 2020). While the previous study focused on cases of narcotics abuse, this study focuses on unlawful acts under the National Criminal Code.

## B. RESEARCH METHODS

This research uses the normative juridical method, which is a form of legal research that treats the law as a system of interconnected norms (Tan, 2021). The literature study examines literature related to the legal policy of the criminal justice system. This study examines secondary data in the form of primary and secondary legal materials (Barus, 2013). This study analyses laws and regulations relating to the Unlawfulness in Law Number 1 of 2023 on the National Criminal Code. The approaches used are the statutory and conceptual approaches. The statutory approach involves reviewing all laws and regulations related to the legal issues being addressed. The result of this review is an argument that solves the issue at hand. The conceptual approach departs from the views and doctrines that develop in legal science in order to generate ideas that give rise to legal notions, concepts and principles in accordance with the issue at hand. The qualitative analysis method is used to analyse the data in this research. Qualitative normative juridical research refers to the legal norms that exist in laws and regulations, court decisions, and societal norms.

## C. RESULTS AND DISCUSSION

### 1. Unlawfulness in Criminal Law and its Implications for the Law of Evidence

In the context of criminal law, Satochid Kartanegara's opinion is that that which is against the law (*Wederrechtelijk*) can be divided into the following:

- a. *Wederrechtelijk* formil, which occurs when an act is prohibited by law and punishable by law; and
- b. *Wederrechtelijk* materieel, which occurs when an act is not expressly prohibited or punishable by law, but is nevertheless considered illegal.

*Wederrechtelijk* Materiil, whereby an act may be considered unlawful even if it is not expressly prohibited or threatened with punishment by law. However, it also incorporates the general principles contained within the legal system (Korompis, 2018).

Andi Hamzah states that 'against the law', as formulated in the definition of a crime, is 'against the law in particular'. Therefore, unlawful acts in general are acts prohibited by criminal law regulations, whereas specifically unlawful acts are acts prohibited by an Article of the Criminal Law (Hamzah, 2017). However, 'against the law' is an element not mentioned in the formulation of the offence, yet it forms the basis for imposing punishment as 'against the law' in general (Putra & Pujiyono, 2022). For example, Article 351 of the Criminal Code. Schaffmeister's opinion is truly applied in Indonesian positive law. One of the elements of a criminal offence is the element of

an unlawful act (Marimin, Setyawan & Sularto, 2022). This element is an objective assessment of the act itself, rather than of the perpetrator. An act is said to be unlawful if it is included in the formulation of an offence as set out in law (Dewangga, 2014).

In German this is called '*tatbestandsmatig*'. In addition to these terms, unlawful acts are also known by the word '*wederrechtelijk*', which according to van Hamel as quoted by P.A.F. Lamintang, is appropriate and has a positive meaning, that it is better than the use of the word '*onrechtmatig*', because the word is suitable to be used as an 'epitheton' or adverb for actions that are prohibited and threatened with punishment, because they are intended to threaten or attack legal interests, both general and specific. Therefore, the use of the word *wederrechtelijk* actually has a strong basis, both grammatically and logically (Witasari & Arif, 2019).

Simon said that van Hamel's view that *wederrichtelijk* had a positive meaning was incorrect. As a reason, he has stated that if people take an example from the wording of Article 378 of the Criminal Code alone, for example, then giving different meanings will give different results (Novita, Riyanto, & Al Ghifari, 2023). From a theoretical and practical perspective, the conception of tort is known in the dimensions of civil law and criminal law. From the etymological and terminological aspects, unlawful acts in the Dutch language are known by the term '*wederrechtelijk*' in the realm of criminal law and

the term '*onrechtmatige daad*' in the realm of civil law (Sari, 2020). However, the definition and terminology of *wederrechtelijk* in criminal law is interpreted as contrary to the law (*in strijd met hetrecht*), or violating the rights of others (*met krenking van eens anders recht*) and there are also those who interpret it as not based on the law (*niet steunend op het recht*) or as without rights (*zonder bevoegdheid*) (Ritonga & Soponyono, 2023). Acts that fulfil the formulation of the offence (*tatbestandsmatig*), are not always unlawful, because there are things that eliminate the unlawfulness of the act, for example: The firing squad, who shoots dead a convicted person who has been sentenced to death, fulfils the elements of the offence in Article 338 of the Criminal Code. Their actions are not unlawful, because they are carrying out legitimate official orders Article 51 paragraph 1 of the Criminal Code (Korompis, 2018).

Prosecutors detain individuals who are strongly suspected of having committed a crime. They cannot be said to have committed the crime described in Article 333 of the Criminal Code because they are implementing the law contained in the rules of criminal procedure; therefore, there is no unlawful element in Article 50 of the Criminal Code. According to the principle of criminal law *Geen straf zonder schuld* (no punishment without guilt), *actus non facit reum nisi mens sit rea* (the act does not make the person guilty unless the mind is guilty), no one can be punished if they are not at fault. The notion of criminal acts is therefore separate from criminal responsibility (Ali et al.,

2020). A criminal offence refers only to the prohibition of an act and the threat of punishment. Whether or not the person who commits the act is subject to the threatened punishment depends on whether the perpetrator is guilty when committing the act (Wahyuni, 2022).

In most criminal offence formulations, intent (*opzet*) is one of the most important elements (Andre & Setiyono, 2009). With regard to this element of intent, if a criminal offence formulation contains intentional acts, also referred to as '*opzettelijk*' (Hardinanto et al., 2024), then this intentional element takes precedence over all other elements and must be proven. 'Deliberate' also implies the existence of a conscious intention to commit a specific crime (Sudarto, 2018). Therefore, when it comes to proving that an act was committed intentionally, the notion of *willens en wetens* comes into play, meaning 'wanting and knowing'. This means that a person who commits an intentional act must fulfil the requirements of '*willens*' and '*wettens*', meaning they must want to commit the act and be aware of the consequences (Millah & Pujiyono, 2020). In relation to the theory of the will formulated by Von Hippel, it can be said that what is meant by 'deliberately' is the intention to perform an act and to cause its effect or result. If the elements of intention and knowledge in relation to intentionality cannot be clearly proven materially, as it is difficult to prove the intention of a person materially, then the element of intentionality is proven by error (Rifai, 2014).

If someone is suspected of fulfilling the elements of a crime, it is possible that those elements also constitute an unlawful act, although this is not always the case. If an act fulfills both the elements of an unlawful act and a criminal act, both types of sanctions can be imposed simultaneously. This means that the victim can receive civil compensation (based on a civil lawsuit), but at the same time (through criminal proceedings), the perpetrator can be subject to criminal sanctions simultaneously (Anindita & Sitanggang, 2022). Meanwhile, unlawful acts can be divided into:

- 1) The negative function is to recognise the possibility of things outside the law that can remove the unlawfulness of an act that meets the statutory formulation.
- 2) The positive function is to recognise that an act is still a criminal offence even though it is not stated as a criminal offence in the law, if it is contrary to the law or rules that exist outside the law (Arief, 2017).

The unlawfulness of what is expressly stated in the law must be proven. If the unlawful element is considered to have a positive function for an offence then it must be proved (Margono et al., 2024). If the unlawful element is considered to have a negative function then it does not need to be proven.

## **2. Legal Analysis of Evidence Against the Nature of Law in the National Criminal Code**

In criminal cases, evidence is always important and crucial. In the context of the law of

evidence, the formulation of offences in legislation is a manifestation of the fact that being against the law is valuable in proving a case (Latuihamallo, Pujiyono & Cahyaningtyas, 2024). In other words, the elements of the offence as set out in the legislation must be proven by the public prosecutor in court (Sari, 2019). For instance, a person can be considered guilty of theft if their actions are deemed to fall under the remit of Article 476 of the National Criminal Code, which states the following:

'Any person who takes anything which partly or wholly belongs to another, with intent to unlawfully possess it, shall, being guilty of theft, be punished by a maximum imprisonment of five years or a maximum fine of Category V'.

Based on the wording of the article, its elements are cumulative. This means that, in order for a person to be said to have committed the criminal offence of theft, all of the offence's constituent elements must be proven (Djatkiko, Rahayu & Lateef, 2025). The elements that must be proven in order for a person to be considered guilty of theft are as follows:

1) The element 'every person' means that the perpetrator of the theft is a legal subject burdened with rights and obligations under the law. The person must be capable of legal responsibility. In a court session, proving this element is a formal requirement of the indictment, which contains the defendant's full name, address, place of birth and religion, among other things.

- 2) The element of 'taking goods'. Here, the definition of 'goods' includes both tangible and intangible items.
- 3) The element of 'wholly or partly belonging to another person'. This means that the perpetrator deliberately takes goods belonging to another person, either partially or wholly.
- 4) The element 'with intent to possess'. The words 'with intent' indicate that the offence of theft is intentional. This means that the perpetrator deliberately took the goods with the intention of possessing them. In criminal law, guilt can be either intentional or negligent. Intentionality is based on *wetende en willende* (knowing and willing), while negligence is the perpetrator's lack of attention or consideration of the possibility of being caught.
- 5) The element of 'against the law'. This means that the act of taking the goods is contrary to the law.

Meanwhile, the words 'convicted of theft with a maximum imprisonment of five years or a maximum fine of Category V' are not an element of the offence, but a qualification of the offence and a criminal penalty that can be imposed if the offence has been fulfilled. As a logical consequence of the principle of legality, all elements must be proven (Flora, Thuong, & Erawati, 2023). If there is an element that is not proven, even if it is only one element such as the element of 'against the law' then the act cannot be considered as a criminal act (Widijowati, Pecson, & Kristiawanto, 2025). However, although the National Criminal Code analyzes the

principle of legality, this principle encompasses not only formal legality but also material legality (Harun, Sahid, & Yamin, 2023). Therefore, this principle also has implications for Unlawful Acts, as stipulated in Article 12 of the National Criminal Code, as follows; A criminal act is an act that is punishable by criminal sanctions and/or criminal action. To be declared a criminal act, an act that is punishable by criminal sanctions and/or criminal action by statutory regulations must be unlawful or contrary to prevailing laws in society. Every criminal act is always unlawful, unless there is an acceptable reason.

In the formulation of Article 2 paragraph (2) the phrase 'is against the law or contrary to the law that lives in the community' shows the embodiment of the principle of legality both formal legality and material legality (Wicaksono, Pujiyono, & Cahyaningtyas, 2023). Therefore, this also has implications for the law of evidence, in proving the formulation of crimes, especially the element of unlawfulness, both against formal law and against material law. Proof of the element of a formal unlawful act is as determined in the formulation of regulations, while a material unlawful act is an act that is contrary to the law that exists in society. To analyze how to prove the element of unlawfulness in criminal law, one must use the theory of proof, namely Negative Wettelijk Bewijstheorie (Prasetyo, Ohoiwutun, & Halif, 2018). This theory is generally adopted in the criminal justice system, including Indonesia. The basis of proof is the judge's conviction arising from the evidence in the law in a negative

manner. Therefore, in proving unlawfulness with this theory, the evidence must be balanced, namely, formal and material. In the context of these two types of evidence, formal evidence is present, while the judge's conviction is the judge's subjective judgment in proving material unlawfulness (Prihandono & Yuniarti, 2022).

Based on the theory of legal proof, the following is analysed in the law of proof when analysing proof of an unlawful nature:

1. The nature of material law in the negative function is an excuse that can be accepted by rational reasoning.
2. Criminal acts are anti-social, so if there is doubt as to whether the offence is fulfilled, but it is not contrary to society's sense of justice, the defendant must be acquitted.
2. Unlawfulness in its positive function does not contradict the principle of legality because, in modern criminal law, the principle of legality is not only oriented towards legal certainty but also towards justice, thus making it a balanced principle.
3. In the law of criminal evidence, there is a fundamental principle that states 'Actori incumbit onus probandi, actore non probante reus absolvitur', meaning 'to the accuser falls the burden of proof; if it cannot be proven, the defendant must be released'. Strictly speaking, if the public prosecutor.
4. In a criminal case where the elements of the offence charged to the defendant cannot be proven (actore non probante), the defendant must be acquitted (reus absolvitur). Thus, the



prosecutor must consider not only the elements of the written offence, but also prove the elements of the offence in the law as it exists in society, including unwritten criminal law (Hiariej, 2024).

To fully comprehend the proof of the elements of an unlawful act, it is essential to compare it with various countries that share a similar legal framework with Indonesia, specifically the civil law system. The Netherlands defines the term "against the law" (*wederrechtelijkheid*) as having two parts: formal and material. Formally unlawful means that the law clearly says that the act is illegal, while materially unlawful means that the act goes against the values of justice or the legal interests that society protects. The evolution of this meaning is illustrated in the significant ruling of HR 1916 Veearts, wherein the Dutch Supreme Court determined that an act deemed formally unlawful may be regarded as not unlawful if executed to safeguard a superior legal interest, such as preserving a life. This principle demonstrates that criminal law should not be applied inflexibly; it must take into account the societal purpose of the breached norm (Sari, 2020).

The German state mandates that the concept of "unlawfulness" is systematically governed in the *Strafgesetzbuch* (StGB). There are three parts to the structure of a crime: *Tatbestand* (the act that fits the definition of a crime), *Rechtswidrigkeit* (unlawfulness), and *Schuld* (wrongfulness). If an act meets the

requirements for a crime, it is automatically illegal unless there is a justification (*Rechtfertigungsgrund*), such as self-defense (*Notwehr*), an emergency (*Notstand*), or the victim's consent (*Einwilligung*). In the German system, the element of "unlawfulness" not only looks at whether the law was broken, but also whether the act is still morally and legally acceptable (Putra, 2017).

In the French system, which is based on the *Code Penal* and the principle of legality (*légalité des délits et des peines*), the unlawful nature is stressed more in the formal sense, meaning that only acts that are clearly against the law can be punished. French criminal law still recognizes justifications (*causes de justification*), like self-defense (*légitime défense*) or emergency (*état de nécessité*), which can make an act not illegal. This indicates that, notwithstanding the positivistic framework, there remains an opportunity to contemplate moral and humanitarian principles in the enforcement of criminal law (Thenata et al., 2024).

The preceding analysis indicates that the demonstration of the unlawful element in the Indonesian National Criminal Code relies on its explicit inclusion in the statutory definition of an offense. If the element of unlawfulness is explicitly incorporated in the offense's formulation, the prosecution is obligated to substantiate it within the indictment. On the other hand, if the element of unlawfulness is not clearly stated, it is assumed to exist and works in both its positive role (as the

reason for punishment) and its negative role (as a reason for not being liable for a crime).

#### D. CONCLUSIONS

Unlawfulness is a fundamental element of criminal offences and must be proven under the principle of legality set out in the Criminal Code. When it is expressly included in the statutory formulation, it is classified as formal unlawfulness, which requires strict legal proof. Conversely, when not explicitly stated, it is recognised as material unlawfulness within the framework of balanced legality. This principle combines formal legality, which ensures certainty, with material legality, which ensures justice, and recognises the ongoing importance of unwritten social norms.

In evidentiary law, this distinction has significant implications. Formal unlawfulness, being a written element of the offence, must always be proven; meanwhile, material unlawfulness ensures substantive justice positively and functions negatively as a justification or excuse. The maxim 'Actori incumbit onus probandi, actor non probante reus absolvitur' affirms that the burden of proof lies with the prosecutor. Failure to prove either the statutory or societal elements of unlawfulness must result in acquittal, thereby safeguarding both legality and justice in criminal adjudication.

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