



## The development of the theory of unlawful acts in civil law regarding gender inequality and social justice values

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### ABSTRACT

*This study examines the development of the theory of unlawful acts (UNL) in Indonesian civil law and its contribution to addressing gender inequality and achieving social justice values. The main focus lies on how civil law, which was initially neutral and individualistic, has undergone a transformation in responding to structural issues such as gender-based discrimination. This study was conducted by tracing various classical to contemporary legal literature, both from national and international perspectives, in order to understand how the concept of UNL has developed in theoretical and applied dimensions. The results of the review show that the UNL theory, which was initially limited to violations of formal legal norms, has experienced an expansion of meaning to include violations of norms of propriety, morality, and basic rights that are socially protected. In the context of gender inequality, it was found that civil law often produces inequality through formally neutral interpretations but ignores the unequal social structural context. Feminist literature and social justice theory then propose a reinterpretation of UNL to be more responsive to violations that are systemic and discriminatory against women. This study concludes that the reconstruction of UNL needs to be directed towards the paradigm of substantive and inclusive justice.*

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### 1. Introduction

Civil law essentially aims to regulate relationships between legal subjects fairly and equally. One important pillar of civil law is the concept of unlawful acts (PMH), which provides legal protection for individuals who suffer losses due to actions that violate legal or moral norms (Sarabdeen, 2022). However, with the development of society and the complexity of social relations, new challenges have emerged to the application of the PMH concept, particularly

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when faced with issues of structural inequality, such as gender-based discrimination (Gilmour et al., 2025).

In practice, the Indonesian civil law system still largely employs a normative approach that is formally neutral (Tuffuor, 2023). This means the law is assumed to apply equally to all parties without considering their social, economic, or gender backgrounds. As a result, social inequality and unequal power relations are not adequately addressed in law enforcement, including in PMH cases involving the rights of women or other vulnerable groups (Behar & Leiser, 2024).

The phenomenon of discrimination against women in the civil legal sphere is not a new issue. Numerous cases demonstrate that women are often victims of injustice due to the law's limited ability to recognize the social context influencing an unlawful act (Hout, 2022). For example, in cases of domestic violence or injustice in the distribution of inheritance and child custody, legal interpretation often favors patriarchal norms over substantive justice for women (Tuffuor, 2023).

Gender inequality within the PMH framework can be seen in how the evidence for harm, the element of fault, and the concept of legal responsibility often disfavor women, who are structurally more vulnerable. This is exacerbated by a lack of gender sensitivity in law enforcement and a lack of progressive legal reinterpretation by judicial officials. Therefore, it is crucial to review PMH theory from a more inclusive and socially just perspective (Yalley & Olutayo, 2020).

Several previous studies have addressed the issue of gender inequality in various branches of law, such as criminal law, family law, and employment law. However, studies specifically examining how PMH theory in civil law can evolve to address gender issues are still very limited. Some feminist legal literature, such as the work of Catharine MacKinnon and Martha Fineman, has criticized legal neutrality as an illusion that actually reinforces inequality (Borras et al., 2020).

Furthermore, critical legal studies and social justice thought, such as those by Rawls, Amartya Sen, and Nancy Fraser, demonstrate the importance of law in correcting social inequality through substantive and redistributive approaches. In this context, PMH as a legal instrument should not only be understood as a tool for individual punishment, but also as a corrective mechanism for collective rights violations and systemic injustice (Wang, 2025).

In Indonesia, the development of jurisprudence on Human Rights (PMH) is beginning to show a shift, for example in environmental, human rights, and corporate cases. However, not many have explicitly addressed the issue of gender inequality. This indicates a gap in legal thought that needs to be bridged through research that conceptually and practically connects PMH theory, gender, and social justice (Fitri et al., 2023).

This literature review is important because it can help reveal how shifts in PMH theory can open up space for more socially just legal interpretations. By examining various legal literature, both classical and contemporary, it is hoped that a new paradigm can be found that views PMH as a tool for social transformation, not simply as a tool for resolving individual disputes (Krupiy, 2020).

The urgency of this research lies in the need to develop a civil legal framework that is responsive to social change, particularly in the area of gender equality. With increasing public awareness of the importance of gender justice, the law is required to adapt and deliver more substantive justice. Therefore, this research offers an important conceptual contribution to the renewal of civil legal theory in Indonesia (McAndrew et al., 2023).

Civil law, in principle, aims to regulate relations between legal subjects in a fair and equal manner. One of its main pillars is the concept *Act against the law* (PMH), which provides protection for individuals who suffer losses due to violations of legal or moral norms (Sarabdeen, 2022). However, as social complexity increases, serious challenges arise to the

application of the PMH concept, particularly in the context of structural inequality and gender-based discrimination (Gilmour et al., 2025).

Recent studies show that the Indonesian civil law system still largely uses a legally neutral normative-formal approach, however ignoring the socio-economic and gender context parties (Tuffuor, 2023; Behar & Leiser, 2024). As a result, legal practice often fails to accommodate the injustices experienced by vulnerable groups, particularly women. This is evident in cases of domestic violence, inheritance disputes, and child custody, which often favor patriarchal norms over substantive justice (Hout, 2022).

Theoretically, much feminist literature and critical legal studies—such as that of Catharine MacKinnon, Martha Fineman, and Nancy Fraser—have criticized legal neutrality as an illusion that perpetuates inequality (Borras et al., 2020). They emphasize that law, particularly civil law, must be transformed from merely an individual dispute resolution mechanism into a corrective tool against collective and systemic injustice (Wang, 2025).

In the Indonesian context, PMH jurisprudence has begun to shift through decisions related to human rights, the environment, and corporations. However, not many have explicitly raised the issue of gender inequality as the basis for PMH lawsuits (Fitri et al., 2023). This indicates that gaps in legal research and thinking which need to be bridged through a conceptual and practical approach that unites PMH, gender, and social justice.

#### Contribution of this Study to the Development of Legal Science

This study directly addresses the academic and practical needs of: 1) New paradigm in PMH theory which places substantive justice as the main orientation, not just formal legality. 2) Gender-responsive civil law framework, by recognizing non-material forms of loss such as loss of dignity, trauma, and unequal power relations. 3) Conceptual basis for the renewal of the Civil Code and more inclusive and progressive civil justice practices in Indonesia.

By reviewing classical and contemporary literature, and analysing the gaps in the application of PMH theory to gender issues, this research not only strengthens the theoretical dimension of civil law but also provides a direction for legal reformulation as a tool for social transformation that is fair and equal for all parties, especially vulnerable groups and women.

Based on this background, the formulation of the problem in this study is 1) how the development of the concept and theory of unlawful acts (PMH) in civil law from a historical and theoretical perspective, 2) to what extent the theory of unlawful acts in civil law is able to respond to the issue of gender inequality in Indonesian legal practice, 3) what are the weaknesses and limitations of the formal normative approach in PMH theory in guaranteeing substantive justice for vulnerable groups, especially women, 4) how efforts to reinterpret and reconstruct PMH theory can be directed to support the principles of social justice and gender equality in the civil law system.

This theory is the main foundation in civil law, particularly in Article 1365 of the Civil Code, which states that every unlawful act that causes harm to another person requires the perpetrator to compensate for the loss. The main elements of PMH include: the existence of an act, unlawful, the existence of an error, the occurrence of a loss, and a causal relationship between the act and the loss (Van Hout, 2022). In the development of jurisprudence (for example HR Decision 1919 *Lindenbaum vs Cohen*), the concept of “against the law” not only includes violations of laws and regulations, but also norms of propriety, morality, and a sense of justice in society (Malgieri & Pasquale, 2024).

Referring to the thoughts of John Rawls, especially in his book *A Theory of Justice*, which emphasizes the principle of justice as fairness. According to Rawls, social institutions, including law, must be regulated to provide the greatest benefit to the least advantaged (Lähtenmäki-Uutela et al., 2021). This theory provides the perspective that law is not merely procedurally just but must also guarantee substantively just outcomes. This theory is reinforced by Amartya Sen,

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who emphasizes the importance of *capability* and *functioning* in assessing social justice, as well as by Nancy Fraser who advocates for justice in the form of resource distribution, identity recognition, and political participation (Azeem et al., 2024).

Feminist legal theory observes that seemingly neutral and objective laws often ignore the reality of gender inequality and reinforce patriarchal structures. According to Catharine MacKinnon, laws are often shaped by men's experiences and ignore women's. Therefore, civil law, including cases of sexual violence (PMH), must be reinterpreted to be more responsive to gender inequality, systemic discrimination, and unequal power relations (Gillborn et al., 2022).

This theory views law as a product of social and political construction that is not neutral and can reproduce injustice. Thinkers such as Roberto Unger and Duncan Kennedy emphasize that law is often used as a tool to legitimize the interests of dominant groups. Therefore, there is a need for critique and deconstruction of positivistic and formalistic civil law so that law can become a tool for social transformation (Muti & Salvucci, 2024). This research integrates PMH theory as a positive legal framework with social justice theory, feminist law, and legal criticism as corrective lenses. The goal is to evaluate and reconstruct the PMH concept so that it functions not only as an instrument of individual recovery but also as a means to realize gender equality and social justice in the context of Indonesian civil law (Riis, 2025).

## 2. Method

This research uses a descriptive qualitative approach based on a literature review. The primary focus is on an in-depth exploration of relevant legal theories, particularly regarding Unlawful Acts (PMH), social justice, and feminist legal perspectives. Data were collected through analysis of various sources, including law textbooks, scientific journals, court decisions, international legal documents, and relevant national regulations (Sovacool, 2021).

The analysis was conducted critically and interpretively, using a conceptual approach to examine the dynamics of PMH theory's development and its relationship to gender inequality. The analytical technique used was content analysis, which enabled the author to identify patterns of thought and normative gaps in civil law theory. The ultimate goal is not only to describe but also to offer a direction for a more socially just and inclusive reinterpretation of the law regarding gender realities (Nnam et al., 2021).

### 1. Literature Selection Criteria

Literature was selected based on:

Relevance: Focus on civil law, electronic contracts, and digital consumer protection.

Time span: Mainly published between the years 2020–2025, but also includes relevant classical literature.

Source type: Scientific journals, law books, court decisions, international legal documents (such as GDPR), and national regulations (Civil Code, ITE Law, etc.).

### 2. Search and Filtering Strategy

Literature was searched through Google Scholar and Science Direct with specific keywords. The selection process uses a selective approach Customized PRISMA, starting from identification, abstract selection, to content analysis based on legal and gender themes.

### 3. Analysis Techniques and Validity

Data was analyzed using content analysis to identify conceptual patterns and normative gaps in civil law. Validity is maintained through source triangulation, expert discussions (peer debriefing), and recording of the analysis process (audit trail) to maintain objectivity and transparency of interpretation.

### Purpose of Analysis

The ultimate goal is to offer a reinterpretation of civil law that is fairer, more inclusive, and adaptive to digital challenges and gender realities in the platform-based economy.

### **3. Analysis and Results**

#### **3.1 The development of the concept and theory of unlawful acts (PMH) in civil law from a historical and theoretical perspective**

Draft *Act against the law* (PMH) has its roots in Roman law and developed rapidly in continental European legal systems, particularly the Netherlands, and was later adopted by Indonesia through the Civil Code. Initially, PMH was defined narrowly as a violation of statutory provisions. However, in 1919, through a famous jurisprudence *Lindenbaum vs. Cohen*, the Dutch Supreme Court expanded the interpretation of "unlawful" to include violations of societal norms of morality, decency, and good faith. This ruling marked a significant milestone in expanding the scope of civil liability (Pas & Cavanagh, 2022).

In Indonesia, the interpretation of the PMH in Article 1365 of the Indonesian Civil Code still relies heavily on a classical approach. However, various court decisions have begun to show a tendency to use a contextual approach and social values in assessing unlawful acts. Modern legal theories such as utilitarianism, distributive justice theory, and critical legal theory have begun to be used to examine the social dimensions of an act that harms another party. PMH is no longer solely a legalistic matter, but also touches on moral aspects and social justice (Nurisman, 2022).

In a theoretical context, the development of the PMH concept was also influenced by the thinking of legal philosophers such as Hans Kelsen, who emphasized the hierarchical and formal nature of legal norms, and by thinkers such as Gustav Redbrick, who emphasized the importance of justice in law. These developments illustrate that law cannot be separated from its social context. Therefore, PMH theory is required not only to address legal-formal issues but also to address changing social challenges (Fitri et al., 2023).

The development of the theory of Unlawful Acts (IAC) in the context of civil law is inseparable from various recent academic studies that attempt to respond to increasingly complex demands for justice. Halipah et al. (2023) conducted a legal study on the expansion of IAC elements in the context of Indonesian civil law. In their article, they explained that the interpretation of the element of "unlawful" can no longer be limited to violations of written norms, but must also consider violations of norms of propriety and social justice. This study provides an important theoretical basis for the idea that civil law needs to be interpreted more flexibly and progressively (Halipah et al., 2023).

Therefore, the development of the PMH concept from a historical and theoretical perspective demonstrates the need to continually reconstruct our understanding of the elements of unlawfulness, wrongdoing, and harm. This is especially true in the modern era, marked by increased awareness of human rights, gender justice, and social inclusion. PMH must be viewed as a legal instrument that is adaptive and reflective of societal dynamics (Byrd & Sparkman, 2022).

#### **3.2 To what extent is the theory of unlawful acts in civil law able to respond to the issue of gender inequality in Indonesian legal practice**

Conceptually, the PMH theory holds significant potential for addressing violations arising from unequal power relations, including gender inequality. However, in Indonesian legal practice, the use of PMH to advance women's rights remains relatively limited. This is due to the civil law approach, which still bases assessments on normative standards that are not always sensitive to the discriminatory realities experienced by women (Bernadika & Kavita, 2021).

Examples can be found in cases of domestic violence, harassment in employment, or discrimination in childcare. Although women experience substantial harm, proving the

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elements of "unlawfulness" and "fault" often fails to meet formal criteria. Consequently, women do not receive adequate legal redress. This demonstrates that PMH theory in its orthodox form is not fully capable of addressing the structural problems experienced by vulnerable groups (Sean & Id, 2020).

While some progressive decisions using a gender justice approach have begun to emerge, they remain sporadic and highly dependent on judges' sensitivity to social issues. Without a consistent theoretical and interpretive framework, the application of PMH to gender issues risks being inconsistent and unaccountable. Therefore, interpretive courage and normative awareness are needed from law enforcement officials to develop PMH theory as a tool for protecting against gender-based injustice (Fitri et al., 2023).

Furthermore, Roem et al. (2024) explicitly highlight the importance of civil law reform in supporting gender justice. They argue that the civil legal system is still dominated by a formal-neutral approach that often ignores unequal power relations between men and women. In the context of PMH, this is reflected in the weak recognition of non-material losses experienced by women, such as psychological distress, loss of dignity, or structural injustice. This article proposes a reinterpretation of the PMH concept to be more sensitive to women's experiences and to be used as a tool for social correction of gender inequality (Nnam et al., 2021).

Thus, PMH theory can function beyond simply a tool for individual restitution, but also as a tool for social transformation that protects vulnerable groups from systemic discrimination. To achieve this, strengthening gender justice capacity in legal education and regulatory reform are urgently needed.

### **3.3 Weaknesses and limitations of the formal normative approach in PMH theory in ensuring substantive justice for vulnerable groups, especially women.**

The formal-normative approach in PMH theory emphasizes adherence to explicitly written rules. While providing legal certainty, this approach often ignores the social context in which an act occurs. In cases involving women, this approach often fails to recognize the dimensions of power relations, social subordination, and experiences of structural injustice that are not reflected in legal texts (Halipah et al., 2023).

One of the main weaknesses of this approach is its reliance on the principle of formal equality. The law is considered fair when it is applied equally to everyone, without considering that not everyone starts from an equal position. For example, in cases of domestic violence, women are often required to prove material harm, when in reality they experience emotional, psychological, or loss of economic access, which cannot always be formally proven (Azeem et al., 2024).

The formal-normative approach also lacks flexibility in interpreting the element of "unlawful" within the context of dynamic social norms. As a result, many discriminatory and exploitative practices escape legal action simply because they do not violate explicitly written rules. This demonstrates that reliance on legal texts alone can actually hinder the protection of human rights and substantive justice (Atmadja, 2021).

Using an empirical approach, Meliala et al. (2025) examined the effectiveness of civil lawsuits for the losses experienced by female victims of sexual violence. This study sampled real-life cases in the District Court and found that despite the victims' significant losses, many PMH lawsuits were rejected due to inability to prove material losses. This demonstrates the weakness of the formal-normative approach in PMH theory, which still prioritizes physical evidence over psychological and social dimensions. These findings reinforce the urgency of reconstructing PMH theory to better address the need for substantive justice for vulnerable groups.

Therefore, it is crucial to shift the paradigm of law enforcement from formal certainty to substantive justice. This means that judges, advocates, and policymakers must be more courageous in adopting progressive interpretations in PMH cases, especially when they concern

vulnerable groups. Without this, the law will continue to lag behind in addressing real inequalities in society (Aurelie et al., 2022).

### **3.4 Efforts to reinterpret and reconstruct PMH theory can be directed to support the principles of social justice and gender equality in the civil law system.**

Reinterpreting PMH theory does not mean rejecting the basic principles of civil law, but rather enriching the legal substance to adapt to ever-changing social realities. One approach that can be used is to integrate the values of social justice and gender equality in assessing the element of "unlawfulness." This means that the law is not only assessed in terms of legality but also in terms of its support for marginalized groups (Nnam et al., 2021).

In this context, the application of the principle *substantive equality* or substantive equality is essential. This principle emphasizes the need for legal treatment that takes into account the specific circumstances of individuals or groups, including social, economic, and cultural vulnerabilities. With this approach, PMH can be interpreted as a violation not only of written law but also of social norms that guarantee the dignity and equality of every person (Pas & Cavanagh, 2022).

Furthermore, the reconstruction of PMH theory needs to be carried out through reforming the legal education curriculum and increasing the sensitivity of judges and law enforcement officials to issues of gender and social justice. Legal education oriented toward transformative justice will produce legal professionals who are not only proficient in positive law but also sensitive to the realities of inequality (Nurisman, 2022).

Meanwhile, Aurelie et al. (2024) offer a new perspective by discussing forms of gender-based violence (PMH) in digital spaces, particularly during the pandemic. This study highlights various forms of online gender-based violence, such as doxing, cyber harassment, and the non-consensual distribution of intimate content. In many cases, the victims are women who lack adequate legal protection. This article recommends broadening the interpretation of the elements of "harm" and "wrong" in PMH to include actions that damage the victim's reputation, psychological integrity, and sense of security (Aurelie et al., 2022).

Ultimately, this effort not only contributes to the development of legal science, but also strengthens the function of law as a tool for social change (*law as a tool for social change* By reinterpreting and reconstructing PMH theory from a gender and social justice perspective, civil law can become more relevant and just in responding to the challenges of the times (Azeem et al., 2024).

## **4. Conclusion**

Based on the results of the analysis, it can be concluded that 1) Theory *Act against the law* has evolved from a classical legalistic approach to a broader and more contextual interpretation, encompassing norms of propriety, morality, and a sense of social justice. This development reflects the need for civil law to address not only legal certainty but also substantive justice in modern social dynamics. 2) Despite its potential to be a corrective instrument against discrimination, PMH theory in Indonesian legal practice has not been consistently used to address gender inequality. The non-material losses experienced by many women, such as psychological distress and loss of dignity, are still often not legally recognized within the civil framework. 3) The positivistic and formalistic approach to civil law has proven incapable of guaranteeing justice for vulnerable groups, especially women. The weakness lies in legal assessments that are solely based on material evidence and formal legality, without considering the structural dimensions of injustice experienced by victims. 4) Reconstructing PMH theory by integrating the principles of social justice and gender equality is a strategic step to strengthen the function of civil law as a tool for social transformation. With this approach, the law not only enforces rules but also fights for the value of justice for all levels of society, especially

marginalized groups. This research makes an important contribution to the development of theory. *Unlawful Acts (PMH)* by emphasizing the need for a more holistic approach contextual, socially just, and sensitive to gender issues. PMH theory is no longer sufficient if it is based solely on material losses and formal legality, because social realities especially those experienced by women often reflect forms of structural injustice that are invisible to conventional law. This article asserts that: 1) PMH theory should be expanded to accommodate non-material losses such as loss of dignity and psychological distress. 2) Civil law needs to transform from a positivistic approach to a tool for substantive justice. 3) A gender perspective must be included in legal considerations so that the law truly protects vulnerable groups. Concrete Recommendations: For Policy Makers: 1) Revise the Civil Code to recognize non-material losses and include the principle of equality. 2) Create digital consumer protection regulations that Favor vulnerable groups, including women. 3) Issue judicial guidelines that encourage judges to consider the social context in PMH cases. For Academics: 1) Develop a critical civil law curriculum with a social and gender perspective. 2) Conduct empirical research on PMH decisions related to inequality and discrimination. 3) Encourage cross-disciplinary studies to strengthen more responsive legal reformulation.

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