

From Advocacy to Indemnity: Rethinking Lawyers' Fees as Elements of Civil Compensation

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ABSTRACT

Lawyers' fees often constitute a substantial economic burden for litigants, particularly for parties who perceive themselves as having suffered a violation of their rights due to another's conduct. In practice, there has been a growing tendency to demand the shifting of legal fees to the opposing party as part of a claim for damages in civil proceedings. However, Indonesian legislation has yet to provide explicit regulation on this matter. This legal lacuna has led to divergent judicial interpretations, resulting in a duality of views within judicial practice. This article seeks to analyse the legal standing of lawyers' fees within the framework of civil law as a compensable element of damages, and to identify the legal conditions under which the imposition of legal fees on the opposing party may be justified. Employing a normative juridical method with statutory, conceptual, case-based, and comparative approaches, this study finds that judicial opinions remain divided regarding the recognition of lawyers' fees as recoverable damages, and that no explicit procedural rule currently governs the shifting of such costs. By way of comparison, the article examines the American Rule and the English Rule on cost allocation to highlight contrasting paradigms in the treatment of legal fees. The analysis ultimately recommends the formulation of clearer norms, whether through judicial instruments such as a Supreme Court Circular or through legislative reform, in order to foster legal certainty and ensure the proportional and equitable protection of civil rights.

Keywords: Advocate's Honoraria; Compensation; Civil Lawsuit

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INTRODUCTION

Disputes are an integral part of the dynamics of social, economic, and legal interactions that occur in society. Disputes generally arise as a result of differences in interests, understanding, or interpretation of legal rights and obligations between parties in a legal

relationship.¹ In many cases, these differences cause tensions that require a mechanism for resolving the existing disputes. This mechanism can be pursued through various channels, both non-litigation and litigation, depending on the preferences of the parties. The courts as part of Indonesian state institutions in the judicial field should not be left behind in maintaining services in the modern legal field for people seeking justice.²

Resolving disputes through litigation in court is a method often used by the public, especially when non-litigation mechanisms fail to produce an agreement.³ Litigation has developed into an important pillar of the judicial system in Indonesia, as reflected in the high number of cases filed each year. For example, based on the 2024 Annual Report of the Supreme Court of the Republic of Indonesia, a total of 9,085 civil cases, including general civil, special civil and religious civil cases,⁴ were filed with the Supreme Court. This data shows that civil cases are still one of the most dominant types of disputes in Indonesia.

In the Indonesian civil procedure law system, there is a principle known as *onverplichte procureurstelling*, which gives the parties the freedom to choose whether or not to be represented by legal counsel in court proceedings.⁵ Thus, civil procedure law in Indonesia does not adhere to the principle of *verplichte procureurstelling*, which requires each party to be represented by a lawyer. Consequently, in civil court proceedings, there may be an imbalance in legal representation, where one party is represented by a lawyer, while the other is not⁶. This principle has been confirmed in Constitutional Court Decision Number 89/PUU-XV/2017, which emphasises that the use of lawyers in civil cases is a matter of choice for each party, not an obligation. However, in modern practice, the complexity of legal issues has encouraged parties in civil disputes to use the services of lawyers. The use of lawyers is no longer an option, but has become a practical necessity to ensure that civil rights are optimally protected. This is due to the characteristics of the court proceedings, which not only require an understanding of procedural law, but also technical skills such as drafting legal documents, developing evidence strategies, and presenting legal arguments in a systematic manner. The presence of lawyers serves as a strategic instrument in avoiding procedural errors that

¹ Pahrudin Azis, Muhamad Kholid, and Nasrudin Nasrudin, "Perbandingan Lembaga Penyelesaian Sengketa: Litigasi Dan Non-Litigasi," *Qanuniya: Jurnal Ilmu Hukum* 1, no. 2 (2024): 11–21, <https://doi.org/10.15575/qanuniya.v1i2.896>.

² Orin Gusta, Mahendra Putra, and Garin Bintang, "The Impact of Covid-19 Pandemic on Effective Electronic Criminal Trials : A Comparative Study" 3, no. 2 (2023): 185–209.

³ Nada Rohani and Rani Apriani, "Efektivitas Negosiasi Sebagai Alternatif Penyelesaian Sengketa Dalam Penerapan Online Dispute Resolution Pada Masa Pandemi Covid-19," *Jurnal Kertha Semaya* 10, no. 11 (2022): 2607–17, <https://doi.org/10.24843/KS.2022.v10.i11.p13>.

⁴ Mahkamah Agung, "Laporan Tahunan 2024," 2024.

⁵ Muhammad Yasin, "Asas Onverplichte Procureurstelling Dan Tuntutan Honorarium Advokat," *Hukum Online*, 2024.

⁶ Constitutional Court Decision Number 89/PUU-XV/2017," 2017.

could harm the client's legal position and in accelerating the effective resolution of cases.⁷

Furthermore, in criminal cases, lawyers also play an important role as legal counsel for suspects, defendants, and victims, especially when facing long and complex legal proceedings.⁸ In this case, the involvement of lawyers from legal aid institutions is an important mechanism to ensure access to justice. The role of lawyers who are independent, autonomous, and responsible professionals is an essential part of a fair and impartial judicial system.

The presence of lawyer generally requires relatively large fees. These fees may include lawyer's fees, operational expenses, and success fees, the amount of which is typically determined based on the complexity of the case and the contractual agreement between the client and the lawyer. These costs components often become a significant economic burden on litigants, particularly for justice seekers who come from economically disadvantaged groups.⁹ This condition makes legal costs one of the factors that potentially hinder full access to justice.

In the context of civil cases, parties who believe their rights have been violated often argue that the cost of legal representation should not be their responsibility, but rather be borne by the party that caused the dispute. This perspective is rooted in the belief that such legal expenses would not have arisen if the opposing party had not committed an unlawful act or breach of contract that forced them to seek legal assistance. Based on this reasoning, in practice, it is not uncommon for the aggrieved party to request that lawyer's fee be charged to the opposing party as part of a compensatory damages claim in civil proceedings. Thus, in this context, the legal fees are perceived as a form of actual loss incurred as a direct consequence of the harmful actions, and therefore may be justifiably claimed as recoverable damages.

Although such practice is often found in civil cases, there is currently no explicit provision in Indonesian law that determines whether lawyer's fee may be classified as compensable damages. The absence of explicit legal norms in national legislation, whether in the *Herzien Indonesisch Reglement (HIR)*, *Rechtsreglement voor de Buitengewesten (RBg)*, or other legal instruments, has created a legal vacuum (*rechtsvacuum*) in judicial practice. This normative gap contributes to legal uncertainty and results in divergent interpretations among judges. Consequently, a dualism of views

⁷ Teguh Dwi Cahyadi and Adi Gunawan, "Reasons for People in Law Bringing an Attorney and Their Roles in Accompanying Clients: Case Study of Marriage Cases in Jember Religious Court," *Al-Usariyah: Jurnal Hukum Keluarga Islam* 1, no. 2 (2023): 134–48, <https://doi.org/https://ejournal.stdiis.ac.id/index.php/al-usariyah/article/view/396>.

⁸ Nurani Ajeng Tri Utami, "Toward Equal Access to Justice: Can Regulating Attorney Fees Ensure Fairness and Broaden Legal Access in Indonesia?," *Pandecta Research Law Journal* 19, no. 2 (2024).

⁹ Rudi Hartoyo and Sulistyowati Sulistyowati, "The Role Of The Legal Aid Post Is In Providing Legal Assistance To Disadvantaged People In Order To Obtain Justice In The Courts Of The Holy Land," *JIM: Jurnal Ilmiah Mahasiswa Pendidikan Sejarah* 8, no. 3 (2023): 1599–1611.

has emerged concerning whether lawyer's fees may be recognized as part of compensable damages in civil disputes.

The first perspective is based on the provisions of Indonesian civil procedural law, particularly the HIR and RBg, which do not explicitly stipulate that lawyers' fees are losses for which compensation can be sought. This interpretation is reinforced by a number of court decisions, including Constitutional Court Decisions No. 89/PUU-XV/2017, and 77/PUU-XVIII/2020, which emphasise that civil procedural law does not require the parties to be represented by a lawyer, so that the use of a lawyer's services is optional.¹⁰ The Supreme Court, in Decision No. 3557 K/Pdt/2015, also emphasised that lawyer's fees are the responsibility and obligation agreed upon by the Plaintiff, so it is inappropriate to impose them on the Defendants. In fact, the Supreme Court's established jurisprudence through Decision Number 983 K/SIP/1973, and the landmark decision Number 218 K/Pdt/1952 explicitly states that lawyer's fees cannot be charged to the opposing party even if they lose, because there is no legal obligation to use a lawyer in civil cases.¹¹

In contrast to the first perspective, there is also a perspective that grant the request for lawyer's fees as a component of compensation in civil disputes. One example of this is reflected in the Purbalingga Religious Court Decision Number 0326/Pdt.G/2016/PA.Pbg, in which the panel of judges considered that the legal fees of IDR 4,905,000.00 should be granted, even though the amount was not explicitly stated in the agreement, it was still deemed to be in accordance with Article 5 paragraph (2) of the agreement. This consideration reflects a tendency among some judges to broaden the meaning of damages in civil cases to include legal fees incurred, as long as they meet the principles of reasonableness and can be proven.

This dualism of perspectives has led to inconsistencies in judicial practice, resulting in legal uncertainty for parties seeking to assert their rights. When legal protection depends on the subjective interpretation of judges in determining the allocation of legal fees, the principle of legal certainty, as one of the fundamental objectives of law, fails to be achieved.¹² Inconsistency and incoherence in judicial decision-making can erode the authority and legitimacy of a judicial system, as law derives much of its normative force from certainty and predictability.¹³ Excessive variations in interpretation not only

¹⁰ Maria Filfrida De Rinus, "Bantuan Hukum Oleh Divis Hukum Polisi Republik Indonesia Yang Melakukan Tindak Pidana (Studi Putusan Nomor: 372/PID. B/2020/PN. JKT. UTR.): Legal Assistance By The Legal Division Of The Republic Of Indonesia Police Who Commit Criminal Offenses (Study Deci," *AMICUS CURIAE* 1, no. 2 (2024): 893–903.

¹¹ Sophar Maru Hutagalung, *Praktik Peradilan Perdata, Kepailitan Dan Alternatif Penyelesaian Sengketa Edisi Kedua* (Sinar Grafika, 2022).

¹² Jeremy Exaudi Purba and Wilma Silalahi, "Judicial Inconsistency and Its Implications for Trademark Protection in Indonesia," *JJHK* 7, no. 2 (2026): 1054–67, <https://doi.org/10.46924/jjhc.v7i2.369>.

¹³ Gabrielle McIntyre, "The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court Have Undermined the Court's Legitimacy," *Questions of International Law* 67 (2020): 25–57.

weaken public trust, but also undermine the rule of law itself by creating instability in legal outcome.

This dualism has created substantial unpredictability for litigants, as the absence of clear qualification rules leads to inconsistent judicial outcomes and leaves legal practitioners without reliable standards.¹⁴ In the context of lawyers' fees, the lack of explicit regulation generates uncertainty regarding whether such fees may be claimed as compensatory damages or must be borne personally. This uncertainty affects litigation strategy, risk assessment, and the parties' decisions on whether to pursue judicial proceedings. More broadly, the inability to predict legal costs may hinder access to justice, as parties with valid claims may refrain from litigation due to the financial risks involved. Therefore, this condition highlights the urgency of formulating more explicit and uniform legal norms to ensure legal certainty while providing fair legal protection in civil proceedings in Indonesia.

By way of comparison, in the United States legal system, the Supreme Court in the case of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 in 1975 affirmed the principle known as the American Rule, namely that each party to a case bears its own legal fees. Exceptions to this principle are only recognised if: (1) expressly provided for by statute (*statutory provision*); (2) there is a contractual agreement containing a clause on reimbursement of legal costs; or (3) the losing party acted in *bad faith*, filed a legally unfounded claim, or engaged in litigation that abused the court process (*vexatious or oppressive*).¹⁵ Meanwhile, the English legal system adheres to the principle of English Rule, whereby the losing party is required to pay the costs of the case, including the legal fees of the winning party.¹⁶ A comparison of the two countries shows that the regulation of legal costs is highly dependent on the legal policy framework adopted by each jurisdiction.

Based on this description, it is clear that normative legal clarity is needed to address the dualism of perspectives that have developed regarding the allocation of legal fees. The absence of expressive rules on whether or not legal fees can be claimed as compensation creates a normative gap that leads to ambiguity in civil court practice in Indonesia. This legal vacuum not only makes it difficult for judges to deliver fair and consistent decisions, but also creates uncertainty for the parties involved in the case, particularly in estimating the total losses that can be claimed or must be borne. Therefore, it is imperative to formulate strict and uniform norms in order to ensure legal certainty and the protection of civil rights in a proportionate and fair manner.

¹⁴ Nurhadi Ahmad Juang, Maria Kaban, and Rosnidar Sembiring, "Legal Certainty Regarding the Rules for Qualifying Unlawful Acts and Defaults in the Framework of Civil Law Reform in Indonesia," *Research Horizon* 5, no. 3 (2025): 1019–28, <https://doi.org/10.54518/rh.5.3.2025.593>.

¹⁵ Teresse A. West, "Everybody Pays: Attorney Fees and the American Rule," *monsieur de villefort*, n.d.

¹⁶ "LITIGATION 'Costs Follow the Event,'" A.C. Forde & Co. LLP Solicitors, n.d.

Responding to this normative gap and its practical consequences, this study is designed not only to map and compare foreign cost-shifting models, but to construct an Indonesian normative framework aimed at ensuring justice for both winning and losing parties. To that end, the comparative discussion of the American Rule and the English Rule is positioned as an analytical lens to test the compatibility of fee-shifting with Indonesia's civil law tradition and procedural principles, rather than as an end in itself. In particular, this article evaluates how far those models can illuminate workable criteria for Indonesian courts in recognizing lawyers' fees as a recoverable element of damages without undermining the principle of proportionality, the autonomy of litigants under *onverplichte procureurstelling*, and the broader objective of protecting civil rights. By anchoring the comparison within Indonesia's doctrinal context and jurisprudential dualism, the article seeks to close the existing normative gap and to offer a coherent direction for *ius constituendum* in civil compensation law.

Based on the legal issues above, this article formulates the following research problems: 1. How is the position of lawyers' honoraria within the civil law framework as a recoverable component of compensatory damages? 2. Under what legal conditions can lawyers' fees be shifted to the opposing party? Accordingly, the objectives of this article are: 1. To critically examine the legal status and theoretical justification for lawyers' honoraria as a recoverable component of compensatory damages in civil law tradition. 2. To identify and analyze the legal conditions under which lawyers' fees may be shifted to the opposing party. The formulation of this research problems and objectives is important to address the legal vacuum or *leemten in het recht* in the Indonesian legal system regarding the compensation of lawyer fees, while also providing a conceptual and juridical framework to support legal reform towards a more equitable protection of civil rights.

To ensure the originality of this article, a comparative exposition of previous academic works will be presented to highlight the key differences. *First*, the article by Nurani Ajeng Tri Utami, Tedi Sudrajat, Setya Wahyudi, and Umi Khaerah Pati entitled "Toward Equal Access to Justice: Can Regulating Lawyer Fees Ensure Fairness and Broaden Legal Access in Indonesia?" published in *Pandecta Research Law Journal*, Vol. 19, No. 2, 2024. That article highlights the absence of regulations on lawyer fees in Indonesia and the need for state intervention to ensure equal access to justice. The difference with this article is that this article explores the position of attorney fees as a recoverable element of compensatory damages in civil disputes, as well as the legal circumstances under which such fees may be imposed on the opposing party. Thus, the current article goes beyond the issue of access to justice through fee regulation, by addressing the normative gap regarding the recognition of attorney fees as the basis for a damages claim under Indonesian civil law. *Second*, the article by Haris Munandar and Saifuddin Sa'dan entitled "Analysis of the Application of Advocate Success Fees in Handling Inheritance Dispute Cases According to the Theory of Al-Ji'alah" published in *JURISTA: Journal of Law and Justice*, Vol. 9, No. 1, 2025. This article discusses the position of success fees and the form of success fees as compensation for lawyer's efforts in resolving clients' legal problems. The difference with this article is that it will explain the position of advocate

fees as part of compensatory damages in civil disputes, as well as the legal conditions that allow the imposition of advocate fees on the opposing party.

METHOD

This research is normative legal research that focuses on legal norms in legislation, court decisions, and other legal documents.¹⁷ This research uses a legislative, conceptual, case, and comparative approach. The statutory approach is used to examine the applicable positive legal provisions, both in Indonesia and in countries that regulate lawyer fees as a component of compensation.¹⁸ The conceptual approach is used to analyse the meaning, characteristics, and theoretical basis of the reimbursement of lawyer fees as part of compensatory damages. The case approach is applied by analysing court decisions that award or reject lawyers' fees as compensation. The comparative approach is used to examine the similarities and differences between the Indonesian legal system and the American Rule and English Rule systems.

The data sources in this study were obtained from secondary data consisting of primary, secondary, and tertiary legal materials. Primary legal materials included national legislation and court decisions. Secondary legal materials included legal literature, scientific journals, articles, and relevant previous research results, while tertiary legal materials included legal dictionaries, legal encyclopaedias, and other supporting sources. Data collection was conducted through *library research*, then analysed using legal interpretation and legal construction methods to answer the research questions and formulate fair legal recommendations.

DISCUSSION

Lawyers' Honoraria as Recoverable Components of Compensatory Damages within the Civil Law Tradition

In civil lawsuits, compensation is essential to provide justice for parties whose rights have been violated.¹⁹ In the context of lawsuits for unlawful acts, Article 1365 of the Indonesian Civil Code stipulates that any act that violates the law and causes damage to another person shall be obliged to compensate therefor.²⁰ The element of loss is important because without actual and provable loss, a lawsuit for unlawful acts cannot

¹⁷ Peter Mahmud Marzuki, "Penelitian Hukum," 2005.

¹⁸ Xavier Nugraha, Risdiana Izzaty, and Annida Aqila Putri, "Rekonstruksi Batas Usia Minimal Perkawinan Sebagai Bentuk Perlindungan Hukum Terhadap Perempuan (Analisa Putusan MK No. 22/Puu-Xv/2017)," *Lex Scientia Law Review* 3, no. 1 (2019): 40–54, <https://doi.org/https://doi.org/10.15294/LESREV.V3I1.30727>.

¹⁹ Agus Widyantoro, Moch Marsa Taufiqurrohmah, and Xavier Nugraha, "The Francovich Principle as the Basis of State Responsibility for Laborers Loss Due to Company Bankruptcy," *Yustisia* 12, no. 3 (2023): 219–39, <https://doi.org/10.20961/yustisia.v12i3.79345>.

²⁰ Livya Asifah Magfira Ngabito, Nirwan Junus, and Nurul Fazri Elfikri, "Tuntutan Ganti Rugi Dalam Perbuatan Melawan Hukum Kepemilikan Hak Atas Tanah (Studi Di Desa Pilohayanga)," *Amandemen Jurnal Ilmu Pertahanan, Politik Dan Hukum Indonesia* 1, no. 3 (2024): 54–63, <https://doi.org/10.62383/amandemen.v1i3.246>.

be granted. Loss is one of the elements that must be proven and can be assessed in monetary terms.²¹

In a claim for breach of contract, compensation is regulated in Article 1243 of the Indonesian Civil Code, which states that a party who fails to fulfil their obligations after being declared in default may be required to pay compensation. This article regulates damages to include all costs, losses, and interest (*kosten, schaden en interesten*) arising from the delay or failure to perform the obligations.²² Furthermore, Article 1244 of the Indonesian Civil Code provides an exception if the debtor can prove that their negligence was caused by force majeure (*overmacht*) or a valid legal reason.²³ Thus, both in the context of unlawful acts and breach of contract, the proof of the existence of damages and the causal relationship with the defendant's actions is an absolute requirement for the claim for damages to be granted.

In civil litigation practice, the parties often include lawyers' fees as part of their compensatory damage claims. This is based on the following considerations: 1) The party claiming to have suffered harm due to the unlawful act or breach of contract committed by the opposing party believes that the legal fees would not have been incurred had the harmful act not taken place. Accordingly, there is a direct causal link between the wrongful act and the legal expenses incurred; 2) This claim is submitted in pursuit of full restitution (*restitutio in integrum*), aiming to restore the injured party to their original economic position;²⁴ 3) The recovery of legal fees is also seen as a deterrent effect, intended to prevent the party who committed the violation from repeating their actions in the future.²⁵

The inclusion of Lawyer's fees as part of a claim for damages claim has led to a dualism of perspectives among judges in resolving civil cases. The first perspective rejects the recognition of lawyer's fees as a component of damages in civil disputes. This is reflected in Constitutional Court Decision Number 89/PUU-XV/2017 and Constitutional Court Decision Number 77/PUU-XVIII/2020. In its considerations in Constitutional Court Decision Number 89/PUU-XV/2017, the Court emphasised that civil procedural law in Indonesia does not adhere to *verplichte procureurstelling*, meaning that the parties are not required to be represented by a lawyer. Consequently, it is possible for one party to be represented by legal counsel while the other party is not. Furthermore, in

²¹ Muhammad Rhogust, "Civil Legal Liability for Breach of Contract in Indonesia: Case Analysis and Practice," *Journal of Law, Social Science and Humanities* 2, no. 2 (2025): 429–39.

²² Sandrarina Hertanto and Gunawan Djajaputra, "Tinjauan Yuridis Terhadap Penyelesaian Wanprestasi Dalam Perjanjian Jual Beli," *UNES Law Review* 6, no. 4 (2024): 10368–80, <https://doi.org/10.31933/unesrev.v6i4.1905>.

²³ Christina Bagenda et al., "Analisis Yuridis Terhadap Pembatalan Perjanjian Berdasarkan Keadaan Memaksa (Force Majeure)," *Jurnal Kolaboratif Sains* 7, no. 12 (2024): 4763–68, <https://doi.org/10.56338/jks.v7i12.6569>.

²⁴ Isaac Afunaduula, "THE PRINCIPLE OF RESTITUTIO AD INTEGRUM AND ITS APPLICABILITY TO THE NATURE OF LOSS UNDER A CONTRACT," Victoria University, 2020.

²⁵ Syaiful Badri, Pristika Handayani, and Tri Anugrah Rizki, "Ganti Rugi Terhadap Perbuatan Melawan Hukum Dan Wanprestasi Dalam Sistem Hukum Perdata," *Jurnal USM Law Review* 7, no. 2 (2024): 974–85, <https://doi.org/10.26623/julr.v7i2.9440>.

Constitutional Court Decision 77/PUU-XVIII/2020, the Court emphasised that the use of Article 1365 of the Civil Code as the basis for a lawsuit is the right of every person, including the choice to use or not use the services of a lawyer, as long as it is in accordance with civil procedural law. The assessment of whether or not to grant a claim for lawyer's fees as damages is entirely at the discretion of the judge after considering the course of the trial, the arguments of the parties, the evidence, and the jurisprudence. In line with this, Supreme Court Decision Number 3557 K/Pdt/2015, in its dictum, states that lawyer's fees are the responsibility of the party who appointed them, so they cannot be charged to the opposing party. The Supreme Court emphasised that there is no requirement for the plaintiff to use the services of a lawyer because the plaintiff can file a lawsuit themselves in court. Thus, this view positions the claim for lawyer's fees as a matter of the application of norms by judges, not an issue of constitutionality.

Table 1. Judges' Considerations in Decisions Rejecting Lawyer's Fees as a Component of Damages

Judgment Number	Judicial Considerations
Constitutional Court Decision No. 89/PUU-XV/2017	This is because, to date, the applicable civil procedural law does not adhere to <i>verplichte procureurstelling</i> , which means that the parties are not required to be represented by a legal representative who is a lawyer, so that it is possible for one party in a civil case to be represented by a lawyer while the other party does not use legal representation.
Constitutional Court Decision Number 77/PUU-XVIII/2020	Considering that in court proceedings currently in practice, a person appearing in civil court is not required to use the services of a lawyer (see Constitutional Court Decision Number 89/PUU-XV/2017, dated 14 December 2017). In civil cases where the principal is represented by a lawyer, the question arises as to whether the lawyer's fees paid by that person can be interpreted as losses caused by the actions of the opposing party. Such an assessment remains within the jurisdiction of the judge to determine whether the losses have a causal relationship with the unlawful actions committed by the opposing party to the case. The losses referred to in Article 1365 of the Civil Code can be material or immaterial, but in a civil case, the assessment of such losses

Supreme Court Number 3557 K/Pdt/2015

depends on the evidence presented by the parties and the assessment of the judge hearing the case, as well as in determining whether the lawyer's fees can be considered as losses resulting from unlawful acts or not.

That the costs of the lawyer are the responsibility and obligation agreed upon by the Plaintiff himself, so it is not appropriate to charge them to the Defendants; moreover, there is no requirement for the Plaintiff to use the services of a lawyer/advocate because the Plaintiff can file a lawsuit himself in court.

Source: Author Analysis.

The main points of argument underlying the view that lawyer's fees cannot be classified as a component of damages in civil disputes include: 1) Indonesian civil procedural law does not adhere to *verplichte procureurstelling*, so there is no obligation for the parties to use the services of a lawyer, and therefore the costs arising from the appointment of a lawyer should not be borne by the opposing party;²⁶ 2) there is no *expressive* legal provision governing the imposition of lawyer's fees on the losing party or the party found to have committed an unlawful act; 3) there is the potential for unreasonable or excessive lawyer's fees to be claimed, which could ultimately place a disproportionate burden on the opposing party in the dispute.

In contrast to the first perspective, there is also a perspective that recognises the possibility of including lawyer's fees as part of compensation in civil disputes. One such view is reflected in the Purbalingga Religious Court Decision Number 0326/Pdt.G/2016/PA.Pbg, in which the panel of judges stated in its considerations that the legal fees of IDR 4,905,000 were in accordance with Article 5 paragraph (2) of the agreement. Although this amount was not explicitly stated in the contract, the panel of judges considered that the costs were still within reasonable limits and could therefore be granted. This view reflects the existence of room for interpretation for judges to include lawyer's fees as compensable damages, provided that they can be proven, meet the principle of reasonableness, and are directly related to the actions of the opposing party.

The main argument for the view that lawyer's fees can be classified as a component of compensation in civil disputes is the existence of an agreement between the parties in the contract. Even if the contract does not specifically and expressly mention the

²⁶ Adji Prakoso, "Landmark Decision: Honorarium Advokat Tidak Termasuk Komponen Ganti Rugi Sengketa Perdata," MARINews, 2025.

obligation to bear the lawyer's fees, the judge may interpret the existing clause as including this component, as long as the costs meets the principles of reasonableness, proportional, and have a direct causal relationship with the disputed violation. Furthermore, recognising lawyer's fees as a component of damages is also considered to strengthen the protection of civil rights, because without such compensation, the injured party would bear an additional burden in fighting for their rights.²⁷

Table 2. Dualism in Judges' Views on Lawyer's Fees as a Component of Compensation

View	Basis of Reasoning	Ruling	Judge's Considerations
Cannot be claimed as a component of compensation	1. There is no legal obligation to use a lawyer (<i>no verplichte procureurstelling</i>).	1. Constitutional Court Decision No. 89/PUU-XV/2017	1. Lawyer fees are the responsibility of the party who appointed them.
	2. Not expressly regulated in civil procedure law.	2. Constitutional Court Decision No. 77/PUU-XVIII/2020	2. Procedural law does not require legal representation.
	3. Potential unreasonable costs that burden the opposing party.	3. Supreme Court Decision No. 3557 K/Pdt/201	3. Lawyer's fees cannot be charged to the opposing party.
		4. Supreme Court Decision No. 983 K/SIP/1973	4. Lawyer's fees cannot be charged to the opposing party, as there is no legal obligation to use a lawyer in civil cases.
May be requested as a component of compensation	1. Agreed upon in the agreement.	Purbalingga PA Decision No. 0326/Pdt.G/2016 /PA.Pbg	The lawyer's fees are considered appropriate in accordance with the agreement and propriety, and are therefore justified even though the nominal amount is not explicitly stated in the agreement.
	2. There is a causal relationship with the unlawful act/breach of contract.		
	3. To achieve <i>restitutio in integrum</i> and provide a deterrent effect.		

Source: Author's Analysis.

²⁷ Steve P Calandrillo, Chryssa V Deliganis, and Neela Brocato, "Contingency Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial," *NYUJ Legis. & Pub. Pol'y* 26 (2023): 1.

Legal Conditions Allowing the Shifting of Lawyers' Fees to the Opposing Party

In the American legal system, there is a well-established principle known as the American Rule, which stipulates that in federal litigation, each party must bear their own lawyer's fees, regardless of who wins or loses the case.²⁸ This rule is rooted in the decision of the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This rule was developed as a form of protection for access to justice, with the aim of preventing financial barriers that could prevent someone from filing a claim in court.²⁹ However, the American Rule is not absolute. In practice, several exceptions are recognised by law and jurisprudence that allow the imposition of legal fees on the opposing party under certain conditions. These exceptions include: 1) Clearly stipulated by law; 2) There is a contractual agreement between the parties; or 3) the losing party acts in bad faith or makes unreasonable multiple claims in court (vexatious/invalid or oppressive petitions).³⁰

Unlike the American legal system, which adheres to the American Rule, several other countries apply the English Rule, which stipulates that the losing party in a case must bear all legal costs, including the winning party's lawyer fees.³¹ This rule is considered fairer because the party that is found to be in the right should not be burdened with the costs incurred as a result of the dispute. The application of the English Rule encourages parties to be more cautious in bringing cases to court and increases the tendency to settle disputes amicably before entering the trial stage. This also serves as a filtering mechanism for unfounded claims. In practice, this system also creates strategic incentives, especially for the defendant, to offer a higher settlement if the plaintiff's chances of winning are significant, given the risks that must be borne if they lose in court. Furthermore, imposing costs on the losing party can have an indirect preventive effect, as it encourages individuals to be more cautious from the outset in order to avoid the potential for future lawsuits.³²

As a reference, in international arbitration practice, it is common for parties to include lawyer's fees as a component of their damages. This is possible because the arbitration rules explicitly allow the tribunal to impose these costs on the opposing party. For example, Article 58 of the Singapore International Arbitration Centre (SIAC) Rules 2025 stipulates: "The Tribunal shall have the power to order in the award that all or a part of a party's legal or other costs shall be paid by another party. In exercising its power, the Tribunal shall take into account such circumstances as it considers relevant including the conduct of the parties during the proceedings." A similar provision is found in Article 34.1(d) of the Hong Kong International Arbitration Centre (HKIAC) Rules 2025, which

²⁸ "Justice Manual: Title 4 - Civil," U.S. Department of Justice, n.d.

²⁹ Rebecca Aviel and Wiley Kersh, "The Weaponization of Attorney's Fees in an Age of Constitutional Warfare," *Yale LJ* 132 (2022): 2048.

³⁰ Will Kenton, "American Rule Explained: Definition, Exceptions, and Real-World Example," Investopedia, 2025.

³¹ LSDefine, "Legal Definitions - English Rule," LSD.Law, 2025.

³² Yannick Gabuthy, Emmanuel Peterle, and Jean-Christian Tisserand, "Legal Fees, Cost-Shifting Rules and Litigation: Experimental Evidence," *Journal of Behavioral and Experimental Economics* 93 (2021): 101705.

states that arbitration costs include “the reasonable costs of legal representation and other assistance, including fees and expenses of any witnesses and experts, if such costs were claimed during the arbitration.” Thus, from these two rules, it can be understood that there is a general principle in international arbitration whereby tribunals may award reasonable legal fees as part of the overall costs of arbitration. This strengthens the position of the parties to claim compensation for reasonable legal expenses, while affirming the importance of the principles of fairness and proportionality in dispute resolution through arbitration.

To facilitate understanding of the above comparison of laws, the table below outlines the allocation of lawyers' fees based on the American Rule, English Rule, and Arbitration Rules.

Table 3. Comparison of Rules on the Allocation of Lawyer's Fees under the American Rule, English Rule, and Arbitration Rules

System/Rule	Main Principle	Exceptions/Notes
American Rule	Each party bears its own lawyer's fees (self-pay).	<ul style="list-style-type: none"> - Established by law. - Existence of a contractual agreement. - If the losing party has bad faith, or makes unreasonable multiple claims in court.
English Rule	The losing party is required to bear all legal costs of the winning party (loser pays).	Generally not applicable, unless the amount of costs is deemed unreasonable (may be reduced by the court).
Arbitration Rules (SIAC & HKIAC)	The tribunal has the authority to impose all or part of the legal costs on the opposing party.	Generally, there are no exceptions, but the tribunal will consider: <ul style="list-style-type: none"> - The reasonableness and proportionality of the lawyer's fees incurred. - Evidence of lawyers' fees

Source: Author's Analysis.

In Indonesia itself, there are no clear regulations regarding the recognition of lawyers' fees as a component of compensation, which has led to a dualistic perspective. The perspective that rejects the recognition of lawyers' fees as a component of compensation in civil disputes is generally based on the argument that the applicable civil procedural law does not adhere to the principle of *verplichte procureurstelling*. In this view, the use of a lawyer's services is seen as a subjective choice of the disputing parties, not a legal obligation. Consequently, the costs incurred as a result of using a

lawyer's services are considered voluntary expenses, so they cannot automatically be charged to the opposing party as part of compensation.

However, the Indonesian legal system also contains provisions that explicitly require the use of a lawyer in certain types of cases. Although Article 106 of the Reglement op de Rechtsvordering (Rv), which previously required the plaintiff to appoint a lawyer, with the consequence that the lawsuit would be invalidated if this requirement was not met, is no longer applicable as positive civil procedural law, the obligation to use a lawyer is still found in other legal instruments. One such instrument is Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, Article 7(1) of which expressly states that some of the applications can only be submitted by a lawyer. This provision normatively makes the presence of a lawyer a formal requirement in the bankruptcy or suspension of debt payment obligations application process, so that the lawyer's fees incurred in the process have legal legitimacy and can be regarded as an integral part of the case costs.

A similar example can also be found in the criminal procedure law system. Article 56 paragraph (1) of the Criminal Procedure Code (KUHAP) explicitly stipulates that in cases where the suspect or defendant is facing the death penalty, or a sentence of fifteen years or more, or for those who are indigent and facing a sentence of five years or more, and do not have their own legal counsel, the relevant official is obliged to appoint legal counsel for them at every level of examination.³³ This provision indicates that under certain conditions, the presence of a lawyer is no longer a right of choice, but rather an imperative legal obligation to protect the rights and justice of the suspect or defendant.³⁴ Thus, in certain criminal cases, the use of a lawyer's services is based on the law, so that the costs incurred can no longer be regarded as a voluntary expense, but as a legal consequence that should be considered as a component of the case costs.

Regulating the position of attorneys' fees as a component of compensatory damages would provide several concrete and systemic benefits for the Indonesian civil justice framework. First, establishing a clear normative basis for the allocation of legal fees would enhance substantive and procedural fairness for the losing party. By providing precise criteria for fee-shifting, such regulation would prevent courts from imposing legal cost arbitrarily, and ensure that fee-shifting only occurs if the costs claimed meet certain criteria. In this way, the losing party is protected from disproportionate or punitive burdens, and judicial discretion is exercised within a clear and predictable legal framework. Second, clear regulation would also serve as a protection mechanism for economically disadvantaged parties who have limited access to justice. Legal certainty regarding when lawyers' fees may be shifted to the opposing party can encourage

³³ Putri Ilmia, Lies Sulistiani, and Agus Takariawan, "Implementasi Pemberian Bantuan Hukum Dalam Pasal 56 Ayat (1) KUHAP Dihubungkan Dengan Hak Atas Bantuan Hukum," *Jurnal Ilmiah Galuh Justisi* 11, no. 1 (2023): 16–30, <https://doi.org/10.25157/justisi.v11i1.9653>.

³⁴ Fathurrahim, "Implementasi Pasal 56 KUHAP Tentang Hak Tersangka Atas Bantuan Hukum Dalam Proses Penyidikan Perkara Tindak Pidana Narkotika," *IBLAM LAW REVIEW* 3, no. 2 (2023): 1–12, <https://doi.org/10.52249/ilr.v3i2.114>.

vulnerable individuals to pursue their claims without the deterrent effect of unpredictable legal expenses. Moreover, clear normative standards would strengthen the operation of legal aid and access to justice mechanisms, enabling judges to assess the compensability of legal expenses incurred by disadvantaged parties with greater legitimacy and consistency.³⁵

On this basis, according to the author, there are several conditions that can form the basis for charging a lawyer's fee as part of compensation, namely: *First*, it is expressly agreed in the contract between the parties. For example, there is a clause in the contract: "In the event of a dispute or legal problem arising from or in connection with the implementation of this agreement, and one of the parties must use the services of a lawyer to resolve the dispute, then the party found to be at fault or negligent, either through final and binding court decision or based on mutual agreement, shall be obliged to bear and pay all legal fees incurred by the party using the lawyer's services, as long as the costs are reasonable and can be legally proven." This principles was applied by the Central Jakarta Religious Court through Decision Number 587/Pdt/G/2022/PA.JP, where the court held that a clause stating "All costs and losses arising from default shall be borne entirely by one of the Financing Recipients (in casu Defendant I)" may constitute a valid basis for allocating lawyers' fees to the breaching party.

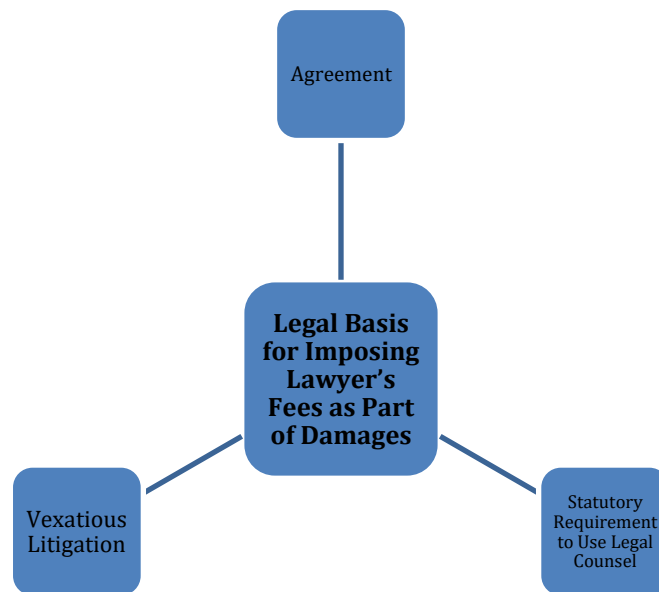
Second, in cases where the use of a lawyer's services is required by law. For example, in bankruptcy cases where the presence of a lawyer is a formal requirement that cannot be ignored when filing for bankruptcy. Similarly, in criminal cases, the Criminal Procedure Code requires the appointment of legal counsel for suspects or defendants who face a sentence of five years or more, or the death penalty. In both types of cases, the legal requirement to use the services of a lawyer means that the costs incurred are not a voluntary choice, but a logical consequence for which compensation can be sought.

Third, in cases where a lawsuit is filed in bad faith (vexatious litigation), the shifting of lawyer's fees may be justified as a form of controlling the abuse of legal processes that harm other parties. Lawsuits submitted with the intent to harass, manipulate judicial proceedings, or without a clear legal basis, should bear the financial consequences of the losses they caused. The imposition of lawyer's fees in this context has a preventive and repressive function as a deterrent mechanism, so that litigation is not used indiscriminately and does not harm parties acting in good faith.

To provide a clearer understanding, the following diagram summarizes the conditions that may justify the imposition of lawyer's fees as part of damages:

Figure 1. Legal Basis for Imposing Lawyer's Fees as Part of Damages

³⁵ Hanna Ostapenko, "The Role of Legal Certainty Principle in Provision of Access to Justice in Ukraine in Wartime," *Access to Just. E. Eur.*, 2023, 27.



Source: Author's Analysis.

To realize a concrete and holistic *ius constituendum*, regulations regarding lawyer's fees as part of compensatory damages in civil disputes must be directed through legal reform strategies, both in the short and long term. In the short term, the Supreme Court can establish guidelines through a Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung / SEMA*) which serves as an internally binding guideline for judges, to provide uniform direction within the judiciary. The SEMA may function as a temporary judicial instrument until legislative reform is carried out.³⁶ In the long term, this regulation must be explicitly incorporated into statutory law through legislative amendment, in order to ensure legal certainty and consistency in its application. The formulation of the norm that can be the basis for the regulation is: "All costs related to the use of legal counsel services shall not be borne by the opposing party, except in the following circumstances: 1) it has been explicitly agreed upon by the parties in the contract; 2) where the applicable statutory provisions explicitly require legal representation by a lawyer ; and/or 3) the lawsuit is filed in bad faith."

CONCLUSION

The legal status of lawyers' fees within the Indonesian legal framework has not yet been regulated (*expressis verbis*) in legislation. This legal vacuum opens a wide margin of interpretation among judges, resulting in dualism within judicial practice. On one hand, there is a perspective that rejects the imposition of lawyers' fees on the opposing party by referring to the principle of *onverplichte procureurstelling*. On the other hand, there is also a view that has begun to accommodate lawyers' fees as compensable loss, as long as the imposition is based on the principle of reasonableness and has a clear legal basis.

³⁶ Suparto and Zulkifli, "Position of Circular Letter of the Supreme Court as a Follow up from the Decision of the Constitutional Court Number 37/PUU-IX/2011," *Jurnal Awang Long Law Review* 5, no. 1 (2022): 225–34.

The burden of lawyers' fees may be charged to the opposing party in the following circumstances: first, if there is a contractual clause that explicitly regulates the imposition of legal costs; second, if in certain types of cases the law explicitly requires the use of legal services; third, if the lawsuit is filed in bad faith (vexatious litigation), as a preventive measure against abuse of the litigation process. The regulations of lawyers' honoraria as a component of compensatory damages needs to be further developed through a SEMA in the short term, and through legislative reform in the long term. This aims to establish legal certainty, prevent injustice, and strengthen the proportional and equitable protection of civil rights.

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