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Criminalizing Civil Law Actions of Default into Criminal Acts of Fraud: A Human Rights Perspective

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Abstract

The terms “Default” and “Fraud” and/or “Embezzlement” are often interchanged without clarity of meaning in many discussion forums, both oral and written. This confusion can be seen from the many court decisions that acquit defendants from prosecution which have permanent legal force. The public often hears that law enforcers carry out criminalization, such as witnesses becoming suspects, suspects becoming defendants and so on by shifting the civil legal action of Default to criminal act of Fraud and/or Embezzlement. Using ‘criminalization’ and ‘criminalized’ in this article is considered inappropriate, so it has been replaced by ‘criminalizing’ and ‘criminalized’. If there is an action to shift the civil legal act of Default into a criminal act of Fraud and/ or Embezzlement, so from a human rights perspective, it is against the law. By using normative legal research methods, this paper examines how to differentiate civil legal acts of Default from criminal acts of Fraud and/or Embezzlement, how to apply civil compensation in cases where there are already criminal legal remedies, and what is the legal and human rights perspective when criminalization occurs. This paper uses a statutory approach and a case approach. The results show: First, there is a real difference between civil legal acts of Default and criminal acts of Fraud and/ or Embezzlement; Second, the application of compensation can be carried out through criminal and civil procedural law mechanisms; Finally, criminalizing civil legal acts into criminal acts is a form of violation of human rights.

Keywords: Breach of contract; Default; Embezzlement; Fraud.

Introduction

In the constitution of the Republic of Indonesia it is stated that Indonesia is a rule of law state,¹ however, the aim of the law as it should be is not yet

¹ Indonesia (1), 1945 Constitution of the Republic of Indonesia. Article 1 Paragraph (3).

realized.² There are still many legal issues concerning justice, legal certainty, and usefulness of the current law.

The public often hear presupposition that investigators from the Police of the Republic of Indonesia (“Polri”) ‘criminalizing’³ a civil case becomes a criminal case on the grounds that there are many court decisions which discharge the Defendant from prosecution (“*ontslag van alle rechtsvervolging*”) which have legal binding force from judicial process.⁴ One of the legal issues that often attracts public attention is the civil case of breach of contract or default which was ‘criminalized’ by Police investigators into a criminal case of fraud. Even though this opinion is incorrect, because a criminal case can be transferred to a judicial institution, it cannot be separated from the intervention of the Public Prosecutor.⁵

There is confusion in society about how to distinguish whether an act is a

² Ahmad Ali, *Revealing Legal Theory and Judicial Prudence, Including Interpretation of Laws (Legisprudence)* (Kencana Prenada Media Group 2009).[183]. The theory of three basic legal values according to the thoughts of Gustav Radbruch, known as ‘basic legal values’, namely: philosophical justice, juridical legal certainty, and sociological benefits for society.

³ The author feels it is more appropriate to use the term or terminology ‘criminalizing’ rather than use the term ‘criminalization’ or ‘criminalized’. This is because etymologically, it comes from English term, namely: criminalization, which consists of the words crime (crime) and -ization (action, or process, or result of an action). The Black Law Dictionary provides a definition of criminalization as follows: “Criminalization: a) The act or an instance of making a previously lawful criminal act, usually by passing a statute; b) The process by which a person develops into a criminal. Bryan A. Graner, *Black’s Law Dictionary* (ed 9th, Thomson Reuters 2009).[431]. Based on the two definitions contained in the Black Law Dictionary, namely: a) the first definition considers that criminalization is an act that makes an action that was previously an act that was permitted to be carried out, but now the act has become a crime; b) the second definition considers that criminalization is a process where a person develops (processes) from previously not being a perpetrator of a crime to becoming a perpetrator of a crime. See also, Nathalina, ‘Dinamika Pengaturan Dan Penerapan Sanksi Administratif Dan Sanksi Pidana Dalam Undang-Undang Administrasi’ (University of Indonesia 2023).[87-88].

⁴ Indonesia (2), Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law, hereinafter referred to as ‘Criminal Procedure Code’. In Article 191 Paragraph (2), which reads: “If the Court is of the opinion that the act charged against the defendant is proven, but the act does not constitute a criminal act, then the defendant is acquitted of all legal charges”.

⁵ Criminal Procedure Code, Article 109 Paragraph (1) reads: “In the event that an investigator has begun to investigate an incident which constitutes a criminal act, the investigator shall notify the public prosecutor of this matter.” Article 110 Paragraph (4) reads: “An investigation is deemed to have been completed if within fourteen days the public prosecutor does not return the results of the investigation, or if before the time limit expires there is a notification regarding this matter from the public prosecutor to the investigator”.

criminal act or a civil act.⁶ Especially in civil cases of breach of contract⁷ with criminal acts of fraud, and/ or Embezzlement.

There has been a grouping in the legal field, namely public law and civil (private) law.⁸ This grouping has occurred since Roman times through a Roman legal expert named Ulpianus, where he divided the Roman legal system into two groups, namely: First, public law relating to the welfare of the Roman state; and second, civil law which regulates people specifically. This grouping of legal fields is because there are matters that involve public interests, and there are also matters that involve civil interests.⁹ The Roman legal system at that time divided public law (*criminal publica*) for crimes that harmed the public interest (society) with criminal sanctions, and private law (*delicta privata*) regulating a person's self or personal property which gave rise to liability for the offense (*obligatio ex delictu*), which gives the injured person a civil claim.¹⁰

Because criminal law is included in the public law group,¹¹ then the difference between criminal law and civil law lies in its application,¹² the criminal

⁶ Satiah and Riska Ari Amalia, 'Kajian Tentang Wanprestasi Dalam Hubungan Perjanjian' (2021) 36 Jatiswara.[134] <<https://doi.org/10.29303/jtsw.v36i2.280>>.

⁷ Indonesia (3), Civil Code (*Burgerlijke Wetboek*), translated by R. Soebekti and R. Tjitro-sudibio, hereinafter referred to as 'Civil Code'. Article 1243 reads: "Compensation for costs, losses and interest due to non-fulfillment of an obligation will only begin to be obligatory if the debtor, after being declared negligent in fulfilling the obligation, continues to neglect it, or if something must be given or made, can only be given or made within a grace period. time has passed." See also Zainudin Hasan, 'Analisis Kerugian Wanprestasi Dalam Kontrak Bisnis Kendaraan Bermotor' (2023) 9 Jurnal Ilmiah Wahana Pendidikan.[700]. <<https://doi.org/10.5281/zenodo.8321794>>.

⁸ Sri Hesti Mulya Dasopang and Shenti Agustini, 'Korelasi Hukum Perdata Dalam Kaidah Hukum Pidana' (2023) 6 Jurnal Ilmu Hukum Pidana.[159] <<https://ejournal.penerbitjurnal.com/index.php/hukum/article/view/130>>.

⁹ R Soeroso, *Perbandingan Hukum Perdata* (5th edn, Sinar Grafika 2003).[69]. See also, Sri Laksmi Anindita and Eriska Fajrinita, 'Penyelesaian Sengketa Bedrog (Penipuan) Dalam Perjanjian Jual Beli Kayu: Onrechtmatigedaad Atau Wederrechtelijk? (Studi Kasus: Putusan Mahkamah Agung Nomor 449 K/Pid/2001)' (2022) 52 Jurnal Hukum dan Pembangunan <<https://doi.org/10.21143/jhp.vol52.no1.3334>>.

¹⁰ Rachmat Setiawan, *Tinjauan Elementer Perbuatan Melawan Hukum* (Alumni 1982).[1]. See also Muhammad Fazry, 'Persinggungan Hukum Administrasi Negara Dengan Hukum Pidana Dalam Penyelesaian Perkara Korupsi' (2023) 2 SCIENTIA: Journal of Multidisciplinary Sciences. [30]. <<https://doi.org/10.62394/scientia.v2i1.47>>.

¹¹ Randi Aritama, 'Penipuan Dalam Hukum Pidana Dan Hukum Perdata' (2022) 1 SENTRI: Jurnal Riset Ilmiah.[730]<<https://doi.org/10.55681/sentri.v1i3.283>>.

¹² Ayu Syafitri, 'Analisis Yuridis Pelaku Tindak Pidana Penipuan Menjadi Tindak Pidana Penggelapan Menurut Kitab Undang-Undang Hukum Pidana (Studi Putusan 761/Pid.B/2022/PN.LBP)' (2023) 2 Neraca Keadilan.[22] <<https://www.puskapad.co.id/index.php/mp/article/view/39>>.

law applies to regulate individual behaviour in social life in society, while civil law applies to regulate relationships between individuals and other individuals.

Because there are two groups of legal fields, the public law and private law, it is necessary to regulate the procedural law of each legal field in question. Procedural law regulates the mechanisms to remedy the violated rights. The remedy or enforcing the violated rights has the aim of obtaining legal protection from the courts, which is to prevent vigilantism (*eigenrichting*).¹³ The Civil Procedure and Criminal Procedure have their own procedures or mechanisms for implementing law enforcement, which in this article will also discuss the civil procedure and criminal procedure related to the legal issues of the application of compensation for the victims of criminal acts to the perpetrators.

There are various types of criminal acts that depend on the target of the crime, such as crimes against the body (murder, rape, assault); crimes against property (robbery, theft, fraud, embezzlement); crimes against public order (robbery, drunkenness); and crimes against state security.¹⁴ The criminal acts of fraud and embezzlement that will be discussed in this article fall into the category of crimes against property.

The criminal act of fraud regulated in the Criminal Code has a different legal character from fraud contained in Article 1328 of the Civil Code.¹⁵ Fraud in Article 1328 of the Civil Code has relation to the conditions for the validity of the agreement, there shall be a mutual consent as the condition. While it is different from fraud in the Criminal Code which is aimed at property (wealth). Fraud in Article 1328 of the Civil Code results in an agreement being annulled, then fraud in Article 378 of the Criminal Code carries a maximum prison sentence of four years.

Mistakes in determining whether an act is a civil law act of Default or breach of contract (*wanprestasi*) or a criminal law act of fraud will result in different

¹³ Anindita (n 9).[302].

¹⁴ Muhammad Mustofa, *Metodelogi Penelitian Kriminologi* (FISIP UI Press 2005).[47].

¹⁵ Civil Code, Article 1328 reads: "Fraud is a reason for annulling an agreement, if the deception used by one of the parties is such that it is clear and obvious that the other party would not have entered into the agreement if the deception had not been carried out".

sanctions.¹⁶ Although it is possible for an act to have two different legal acts, which is one is a civil act, and the other is a criminal law act. This means that an act may violate two laws at once, those are against criminal law (*melawan hukum pidana*)¹⁷ and violate civil law (*melanggar hukum perdata*).¹⁸ In the event that the understanding of the concept of fraud in the two domains of civil or criminal law is not clarified, and/ or confirmed into a standard form, then the boundaries or borders of civil law and criminal law will continuously be attempted to be blurred by parties who take advantage of the existing confusion.

The principle of freedom of contract is a human right that must be respected and protected. The International Covenant on Civil and Political Rights (ICCPR) states that: “No one may be imprisoned solely on the basis of his or her inability to fulfill an obligation arising from a treaty”.¹⁹ The same thing is also stated in the Law on Human Rights, which states that: “No person may, upon a court decision, be sentenced to prison or imprisonment based on an inability to fulfill an obligation in a debt and receivable agreement”.²⁰

¹⁶ Criminal Procedure Code, Article 21 Paragraph (4) relates to sanctions for criminal acts of fraud and embezzlement which essentially states that: although the threat of punishment for criminal acts of fraud contained in Article 378 of the Criminal Code is a maximum prison sentence of 4 (four) years which is still below The threat of punishment for criminal acts that can be carried out in detention is: 5 (five) years or more, however, the criminal act of fraud contained in Article 378 of the Criminal Code and the criminal act of embezzlement contained in Article 372 of the Criminal Code are criminal acts that are excluded as per Article 21 Paragraph (4) letter b, so that the crime in question can be detained. See also Padan Indra, ‘Pemidanaan Tindak Pidana Penipuan Investasi (Putusan Nomor 1147/PID.B/2020/PN.JKT.UTR Dan Putusan Nomor 365/PID.B/2022/PN.JKT.UTR) (2023) 10 Y’ (2023) 10 USTISI Jurnal Hukum dan Hukum Islam.[286].

¹⁷ The author uses the diction ‘Unlawfulness’ for use in Criminal Law, and the diction ‘Unlawful Acts’ in Civil Law.

¹⁸ LB Curzon, *Basic Law* (Plymouth: Mac Donald and Evans 1981).[113]. Curzon stated that; “The law of tort is concerned with the determination of disputes which arise where one person alleges wrongful conduct against another. It should be noted that some torts, eg assault and battery are torts and crimes”.

¹⁹ The International Covenant on Civil and Political Rights, established by General Assembly Resolution 2200 A (XXI), dated 16 December 1966, is open for Signature, Ratification and Accession in Article 11 reads: “No one shall be imprisoned solely on the ground of inability to fulfill a contractual obligation.” See also Ika Rachmawati Sukarno Putri and Urbanisasi, ‘Tinjauan Yuridis Terhadap Sengketa Penipuan Dalam Praktik Waralaba’ (2023) 9 Jurnal Ilmiah Wahana Pendidikan [318] <<https://doi.org/10.31933/unesrev.v5i4.462>>.

²⁰ Indonesia (6), Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights. At Article 19 Paragraph (2).

Based on the background of the article as mentioned above, the formulation of the problem that are considered appropriate are: first, how to differentiate civil legal acts of Default or breach of contract from criminal legal acts of fraud and embezzlement? Second, how is civil compensation applied if criminal act has already been taken? and third, whether criminalizing civil law acts leads to human rights violation?.

This paper uses normative legal research methods. The research approach used is a statutory approach and a case study approach. Data collection was carried out by collecting secondary data. Secondary data used in this research includes primary legal materials, namely: legal materials that are authoritative, or that have authority, such as: legislation and court decisions.

Difference between Default and the Crime of Fraud and Embezzlement

Before distinguishing between criminal acts of fraud and Default, firstly distinguish between criminal acts of embezzlement and criminal acts of fraud.

To differentiate a criminal act of embezzlement from a criminal act of fraud, it can be viewed from three aspects. The first aspect is seen from how the acquisition of the object (transfer of object/right); the second aspect is seen from the object of the criminal act; and the third aspect is seen from the intention.

Obtaining the object (transfer of object) in the crime of embezzlement is obtained legally, whereas in the crime of fraud (transfer of object) it is obtained illegally. The object of the crime of embezzlement is goods and/or money, whereas in the crime of fraud the object is not only money or goods but also writing off receivables or creating debt.²¹ The intention in the crime of embezzlement is deliberation as intent, this kind of intention lies in the matter of time of occurrence, namely when the acquisition has occurred (post-transfer); while the intention in the crime of fraud is also deliberation, however the difference is that the intention

²¹ Criminal Code, Article 378. See also Moody Rizqy Syailendra, [*et.,al.*], 'Penggelapan Harta Waris Menurut Peraturan Perundangan Indonesia (Studi Kasus: 1264/PDT.G/2020/PA.PRA)' (2023) 5 UNES LAW REVIEW.[1740].<<https://doi.org/10.31933/unesrev.v5i4.462>>.

should exist before the transition occurs (acquisition/ transfer of rights has not occurred/has not been carried out).

In a criminal act of fraud, there is motivation to commit such a crime from the perpetrator since the initiation of the act. The perpetrator has intention to realize the consequence of his actions. In the crime of embezzlement, there is no motivation from the initiation of the act. This is because the object is handed over based on the wishes of the victim, so that the perpetrator of the crime of embezzlement does not know the exact time when the object will be handed over to him from the victim.

After knowing the difference between criminal acts of embezzlement compared to criminal acts of fraud, it will become clearer to distinguish criminal acts of fraud from civil legal acts of Default.

The Indonesian legal system which adheres to the Civil Law system,²² it is known as the terminology of Default (wanprestasi), while in the Common Law system it is called 'Breach of Contract'.²³ In Default, it does not contain the element of against the law, but only contains the element of 'against the obligations'.²⁴ The element of 'against the obligation' is attached to an act that is contrary to the rights and obligations arising from the agreement. The nature of unlawfulness in criminal acts applies in general, while 'against the obligations' is a condition or action that

²² Purnama Kurniawan, Helmi and Mispansyah 'Tindak Pidana Penipuan Dalam Kaitan Wanprestasi (Studi Terhadap Putusan No 485/K/Pid/2019/PN.Bjb)' (2023) 8 Jurnal Ilmiah Mahasiswa Pendidikan Sejarah.[2130]<<https://doi.org/10.24815/jimps.v8i3.25618>>.

²³ Likewise with the terminology of 'Unlawful Acts' in the field of civil law. In the Civil Law system adopted by the Indonesian, it is recognized through Article 1365 of the Civil Code, while in the Common Law system the terminology of 'Tort' is used. The definition of the *law of tort* growth and development originates from Judges' decisions which Judges are obliged to follow, thus forming a rule which is not specifically codified (judge makes law). See, Michelle Adams, 'Causation and Responsibility in Tort and Affirmative Action' (2001) 79 Texas Law Review.[19]. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=266213>. See also, David G Owen, 'Deterrence and Desertion in Tort: A Comment' (2001) 73 California Law Review [665].<https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1998&context=law_facpub>. In a broad sense, tort law can be considered to have two functions, those are compensation and punishment. Where loss or damages is the focus of the compensation function, while the focus of punishment is the quality of the detrimental act that has been carried out by the party that caused the loss. See also, Richard W Wright, 'Causation in Tort Law' (73AD) 1985 California Law Review. [1759-1760]. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565095>. Filing a lawsuit based on *tort of law* or *onrechtmatige daad* requires active or passive actions carried out by the Defendant which result in damages for the Plaintiff, where these damages must be legally accountable.

²⁴ Satiah (n.6).

is contrary to the law that applies specifically, because it is only binding on those who make the agreement.

A criminal act contains an unlawful in nature, thus criminal shall be condemned.²⁵ In contrast to the legal action of Default, it does not contain the nature of being against the law, but only against the contract. Because a breach of promise (default) is against the agreement, the creditor may demand the fulfilment of performance, compensation, fines, and interests.

Criminal law rules are made by the state authorities, while the agreement is only made by the parties who make them. This means that the nature of being against the law in criminal acts contains actions that violate the rules of the authorities, while the nature of ‘against the obligation’ only violates the rules of the parties making the agreement.

Regarding the act of breach of contract (default), whether it should be preceded by a notice of default (*somasi*).²⁶ It will be explained that each engagement is: first to deliver something; second, to do something; and third, not to do something. In the event of a breach of contract (default) not to do something but it turns out that he does something forbidden, then it is very clear that a breach of contract (default) has occurred. When a breach of contract (default) has occurred, what is the point of giving a notice of default to the party who has committed a breach of contract (default). For agreements where the performance is to deliver something, it turns out that he does not deliver something to fulfil the performance, then in such situation a notice of default is needed to the party who does not perform the performance so that he immediately performs the performance. For agreements where the performance of doing something turns out to be that he did not do something, then in this case notice of default is required so that the party who has not performed to do something may immediately carry out the obligations.²⁷

²⁵ Sugirhot Marbun, ‘Perbedaan Antara Wanprestasi Dan Delik Penipuan Dalam Hubungan Perjanjian’ (2015) 3 USU Law Journal 131 <<http://repositori.usu.ac.id/handle/123456789/33366>>. [131].

²⁶ Civil Code, Article 1238.

²⁷ Riduan Syahrani, *Seluk Beluk Dan Asas-Asas Hukum Perdata* (Alumni 1992).[228].

Regarding the ‘defect of consent’ in fraud that occurs in agreements, compared with the defect of consent that occurs in criminal acts of fraud. Fraud contained in Article 1328 of the Civil Code is aimed at consent as a condition for the validity of the agreement, which is not aimed at property (wealth). Fraud as contained in Article 1328 of the Civil Code is a crime against agreement, so that the subjective requirements in Article 1320 of the Civil Code regarding ‘consent’ occur. The aim (*adressat*) of fraud in the Civil Code is ‘agreement’, so that an agreement occurs. An agreement may be invalid due to a ‘defect of consent’, when first, mistake; second, coercion; and third, deception. In the criminal act of fraud there is also a ‘defect of consent’. This defect of consent occurs because, alternatively first, there is the use of a false name; second, there is the use of false dignity; third, there are deceptive acts; and fourth, there are lying words (a series of lying words).²⁸ The consent of the fraud victim is ‘flawed’ due to incorrect data/facts received and/or conveyed by the fraudster to the fraud victim. Fraud in the Criminal Code is a crime against property (wealth), so that the aim (*adresat*) of the criminal act of fraud is the property (wealth) in question, those are the assets (wealth) of the fraud victim transferred to the perpetrator of the criminal act of fraud or to a designated person by the perpetrator of the criminal act of fraud.

Regarding ‘faith’ (*itikad*) in the acts of breach of contract (Default) which are compared with intentions in criminal acts of fraud. In Default, there was good faith when making a contract (agreement), whereas in the crime of fraud there was deliberation of malicious intent (*mens rea*) as the intention before the agreement occurs. To identify malicious intent before the contract occurs, it should be preliminary actions in the form of, for example persuasion with false words, before an agreement (*ante factum*) has occurred, a false situation or a series of false words has occurred.

Regarding sanctions for acts of breach of contract (Default) which are compared with sanctions for criminal acts of fraud. Sanctions for breach of contract

²⁸ Criminal Code, Article 378.

(Default) are: first, the obligation to fulfil the performance; second, fulfilment of compensation; third, fulfilment of costs incurred (already incurred); and fourth, compensation with interest (opportunity costs).²⁹

In Article 378 of the Criminal Code concerning criminal acts of fraud, there are elements that must be fulfilled, which are subjective elements and objective elements.³⁰ The subjective elements are elements related to the perpetrator of the criminal act, that must be first, having the intention to benefit itself or others; second, benefiting itself or other people by violating the law, alternatively: a) using a false name; or b) using false dignity, or position, or false character; c) using deception, or a series of lies (false words); d) persuade others to deliver something to him; or e) to pay debts or write off receivables. While the objective elements are first, convincing or persuading, or moving the will, or influencing other people in a cunning way (exerting influence on other people, where the object being influenced is someone's will); second, what is moved is the person (victim); third, the purpose of the action is to get the victim to hand over objects (property), or to get the victim to pay debts, and/ or write off receivables. This is what makes the crime of fraud called a crime against property (wealth).³¹

Application of Civil Compensation in Cases Criminal Law Efforts Have Been Undertaken

In this section, we will discuss and analyse the mechanism for returning money belonging to victims of criminal acts of fraud based on court decisions that have binding legal force and legal instruments regarding other matters.

²⁹ Civil Code, Article 1243. See also Merlin Kristin Renwarin, Asmaniar, and Grace Sharon, 'Perlindungan Hukum Bagi Pemberi Gadai Jika Terjadi Wanprestasi Dalam Perjanjian Gadai' (2023) 5 Jurnal Krisna Law.[5]. <<https://doi.org/10.37893/krisnalaw.v5i1.195>>. See also Salsabila Putri Zahra Nasution, [et., al.] 'Penyelesaian Sengketa Wanprestasi Perjanjian Waralaba Melalui Mediasi' (2023) 6 Unes Law Review.[2559]. <<https://doi.org/10.31933/unesrev.v6i1.1017>>.

³⁰ Hari Panri NST and Tri Reni Novita, 'Wanprestasi Dengan Penipuan Dalam Perjanjian Hutang Piutang' (2022) 1 Jurnal Smart Hukum.[49]. <<https://doi.org/10.55299/jsh.v1i1.120>>. See also Ferry Agus Sianipar and Syaifullah, 'Logika Hukum Penafsiran Hakim Dalam Perkara Wanprestasi Dan Penipuan' (2022) 4 Jurnal Pendidikan dan Konseling [999] <<https://doi.org/10.31004/jpdk.v4i5.7832>>.

³¹ Criminal Code, Article 378.

There is a criminal court decision, which at the first instance and appeal, orders the Defendant of a crime of fraud that he must return the money belonging to the victim of a crime of fraud. The two rulings of the courts were reversed by the decision of the Supreme Court which considered that the District Court and High Court should not order for the Defendant of a crime of fraud to return the money to the victim of the crime. That is because both courts have mixed up the criminal and civil cases, so the decisions at both levels of the courts must be annulled.³² To find out more about the conflict between the lower courts and Supreme Court decisions in this case, it will be described and analysed as follows:³³

The Surakarta District Court in Case Decision Number 7/1993/Pid.B/Pn.Ska, dated 23 December 1993, with the ruling held that the Defendant Denguk Nugroho was guilty of committing the crime of fraud, sentenced the Defendant to eight months in prison, with a probation period of six months, with special conditions that the defendant must return the victim's money Rp.43,900,000,- within six months and pay court costs and order the defendant to remain out of detention.

The decision of the Central Java High Court in Semarang in Case Number 40/Pid/1994/PT.Smg, dated 26 March 1994 held that: Revising the decision of the Surakarta District Court, dated 23 December 1993 Number 7/1993/Pid.B/Pn.Ska which declared that the Defendant Denguk Nugroho was proven guilty of committing the crime of fraud, sentenced the Defendant to prison for eight months with a probation period of one year. With special conditions, the Defendant must return the victim Sudarmanto's money amounting to Rp.43,900,000,- within one year.

The Supreme Court at cassation handed down its decision dated 28 August 1997 Case Number 933/K/Pid/1994, with the ruling: Revising the decision of the Central Java High Court on 26 March 1994 Number 40/Pid/1994/PT.Smg only for the criminal punishment that was handed down, declared that the Defendant

³² Supreme Court Decision at Cassation, Case Number 933/K/Pid/1994, dated 28 August 1997.

³³ Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan Yang Lahir Dari Hubungan Kontraktual* (PT Prestasi Pustakaraya 2011).[163-166]. The court decisions from the court of first instance to the court of the last resort in the case in question have been quoted from this source.

Denguk Nugroho was legally and convincingly proven guilty of committing the crime of “fraud”; sentenced the Defendant to imprisonment for 8 (eight) months, with a probation period of 1 (one) year and ordered the defendant to paid the legal cost for cassation at Rp.2,500,-.

Based on the court decisions at each level regarding the return of money from victims of criminal fraud as mentioned above, the author will analyse whether the decisions at all levels of the judicial institution are correct and appropriate?.

In the lower courts decisions, it is stated that the defendant must return the victim’s money in the form of special conditions. If the Special Conditions are not implemented, the Defendant must serve his prison sentence. Special conditions are regulated in Article 14c Paragraph (1) in conjunction with Article 14a of the Criminal Code. Article 14c Paragraph (1) is the implementing rule (subsequential rule) of Article 14a of the Criminal Code. Article 14a Paragraph (1) provides when the defendant was punished with a maximum imprisonment of one year, the judge may order that the said prison sentence does not need to be carried out by the Defendant, with conditions are given a probationary period. If during the probation period it turns out that the Defendant commits another crime, or when the Defendant during the probation period does not fulfil the Special Conditions specified in the verdict, then the prison sentence that has been imposed on the Defendant must be served.³⁴

Article 14a Paragraph (4) regulates General Conditions and Special Conditions. General conditions are when the judge decides that the defendant does not have to serve prison or confinement and replaces it with probation. The replacement of imprisonment or confinement with probation is given on the grounds that the Judge, after careful consideration and convinced that sufficient supervision can be exercised over the Defendant, that the Defendant will not commit a crime during the probation period. Thus, the General Requirement is the Judge’s convincement after assessing the Defendant. The judge’s convincement is fully its discretion. The

³⁴ Criminal Code, Article 14a Paragraph (1).

special requirements are determined by the judge (even though they are contained in the criminal decision). How can a judge impose special conditions on a defendant? During the trial examination, the judge explored and inquired the defendant whether the defendant was able to carry out the 'special conditions', then it determined by the judge later in the decision in accordance to Article 14c Paragraph (1) of the Criminal Code regarding having to compensate all or part of the losses caused by criminal acts committed by the Defendant.³⁵

With the explanation as stated above, in cases where the basis for deciding the case in question is only the Criminal Code (the Criminal Procedure Code does not yet exist and is not in force), it is possible that in the decision there will be a Judge's determination of Special Conditions in the form of: 'compensation for wholly or partly of the loss incurred caused by the criminal act'. On the other hand, when the judge imposes a fine, then Article 14c in conjunction with Article 14a of the Criminal Code does not apply. This means that Article 14c in conjunction with Article 14a of the Criminal Code may apply when the sentence is not a fine.³⁶ In the event that the sentence is a fine, then Article 14c in conjunction with Article 14a concerning Special Conditions cannot be applied. Thus, in the event that the Criminal Procedure Code has not yet come into force (does not exist yet) compensation for losses from criminal acts is permitted based on a court decision in the form of Special Conditions. For General Conditions, a maximum prison sentence of one year or imprisonment can be replaced with a probation sentence of a maximum of two years (except for certain crimes and certain violations, a maximum of three years).³⁷ In the case of a prison sentence of more than 1 (one) year or a fine, there are no General Conditions or Special Conditions.³⁸ This means that claims for compensation for losses from criminal acts where the criminal sentence is more

³⁵ R Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politea 1996). Comments on Article 14c, what are the Special Requirements mentioned? Anything regarding the behaviour and actions of the convicted person, as long as it does not reduce the religious freedom and political freedom of the convicted person.

³⁶ Criminal Code, Article 14c Paragraph (1).

³⁷ Criminal Code, Article 14b Paragraph (1).

³⁸ Criminal Code, Article 14a Paragraph (1) in conjunction with Article 14c Paragraph (1).

than one year (in the event that the Criminal Procedure Code is not yet in force), must be resolved before civil court.³⁹

In the event that the Criminal Procedure Code is already in effect, the claim for compensation refers to Article 98 Paragraph (1). The use of Article 98 Paragraph (1) of the Criminal Procedure Code is only limited to material losses (excluding costs and interest),⁴⁰ and a civil lawsuit must be filed before the Public Prosecutor files its prosecution.⁴¹ Reimbursement of costs and interest can be continued in civil cases, after the criminal case reach its final decision. Thus, it can be concluded that the difference between ‘Conditional Criminal Decision’ as contained in Article 14a Paragraph (1) in conjunction with Article 14c Paragraph (1) of the Criminal Code and Article 98 and Article 99 of the Criminal Procedure Code concerning the Merge of Compensation Request, is as follows: **First**, the Conditional Criminal Decision contained in Article 14a Paragraph (1) in conjunction with Article 14c Paragraph (1) of the Criminal Code is a ‘Sentencing Decision’ which is combined with the Main Criminal Decision, which contains the same content as that regulated in Articles 98 and 99 of the Criminal Procedure Code in terms of Special Conditions, namely: to compensate wholly or partly for losses resulting from criminal acts. For decisions regarding the application of Articles 98 and 99 of the Criminal Procedure Code, these are Civil Case Decisions which are decided in the form of a separate decision which is not combined with the Criminal Decision.⁴² This means that it is not a ‘sentencing decision’, even though the civil case examination in question is examined and tried simultaneously with the examination of the main criminal case; **Second**, in the application of the ‘Conditional Criminal Decision’ (Article 14a Paragraph (1) in conjunction with Article 14c Paragraph (1) of the Criminal

³⁹ Criminal decisions that have a final and binding force can still be used as evidence (one of the components of evidence) in the trial of the civil case in question.

⁴⁰ What is mentioned in the article in question is only just a lawsuit for damages. Regarding fees and interest, it is not mentioned in the article in question. Because it is not stated, what can be sued is only in the form of compensation.

⁴¹ Criminal Procedure Code, Article 98 Paragraph (2).

⁴² Sri Laksmi Anindita, *Valuasi Kerugian Akibat Hilangnya Nyawa Manusia Dalam Perkara Perdata* (Doctoral Dissertation, Faculty of Law, University of Indonesia, Jakarta 2019).[132-142].

Code) there is no need for a specific request from the victim of a criminal act to claim compensation partly or wholly for losses incurred as a result of the criminal act, this is because it has become part of criminal punishment. It is different from the application of Articles 98 and 99 of the Criminal Procedure Code,⁴³ where the victim must submit either verbally,⁴⁴ and/or in writing before the court so that the compensation claim can be examined and tried simultaneously with the examination of the main criminal case;⁴⁵ **Third**, in the ‘Conditional Criminal Decision’ as Article 14a Paragraph (1) in conjunction with Article 14c Paragraph (1) of the Criminal Code, the Public Prosecutor acts as the executor of the decision, if the convict does not pay as determined by the Judge, then the convict is obliged to serve his criminal decision. This is different from the application of Articles 98 and 99 of the Criminal Procedure Code, where the Public Prosecutor is not the executor of the Decision in Compensation Cases.

After answering the issues related to compensation in fraud cases based on the case examples as mentioned above, the next step will be to discuss combining compensation claims cases through criminal procedure and through civil lawsuits before civil court.

Claims for compensation for losses arising from violations of criminal law can be resolved through criminal procedure and civil procedure.⁴⁶ The issues regarding claims for compensation in various countries can be submitted to the state in the form of compensation. This is because the state has a responsibility towards its citizens who have suffered losses as a result of criminal violations. This is different

⁴³ M Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP, Pemeriksaan Sisdang Pengadilan, Banding, Kasasi Dan Peninjauan Kembali* (2nd edn, Sinar Graphics 2016).[80].

⁴⁴ In Cassation Decision Number 1457 K/Pid/1991. In criminal cases of abuse, where the lawsuit is submitted verbally but is not filed and the exact time when it is submitted is not known. The Supreme Court refused the request for cassation because there was insufficient evidence regarding the lawsuit and proof of its use for the proposed losses.

⁴⁵ Cassation Decision Number 2107 K/Pid/1987. In the criminal case of abuse, the Supreme Court reversed the lower court decisions which imposed a conditional sentence under Article 14a in conjunction with Article 14c of the Criminal Code in the form of compensation for hospitalization costs incurred by the victim of the crime.

⁴⁶ Mudzakkir, ‘Posisi Hukum Korban Kejahatan Dalam Sistem Peradilan Pidana’ (University of Indonesia 2021).[110].

from what is found in Indonesia, where the Indonesian state does not recognize the term ‘compensation’ for material losses caused by criminal acts.⁴⁷

Claims for compensation as stated in Article 99 Paragraphs (1) and (2) of the Criminal Procedure Code are limitative. This means that the claim for reimbursement is only limited to costs/expenses that have actually been incurred.⁴⁸ Apart from demands as stated in Article 99 Paragraph (1) and (2) of the Criminal Procedure Code, they can be filed in separate civil cases.⁴⁹

In joining a lawsuit for compensation, the Defendant in criminal case becomes the Defendant in civil lawsuit. Eventhough the Defendant in criminal case is seated as the Defendant in civil lawsuit, the Defendant cannot file a counterclaim against the victim of the crime. This is because the civil case in question is a combined case with the main criminal case.⁵⁰

Compensation claims that are combined in criminal justice are essentially civil claims, so there must be a plaintiff which is the victim of a crime.⁵¹ Thus, the Judge may not decide more than what is requested by the Plaintiff.⁵² Only victims of the crime are allowed to file a claim for compensation combined with the main criminal case. Other parties who are not directly related cannot submit claims for compensation. In the event that the victim wishes to be represented by their attorney, they must have a power of attorney intended for that purpose, it is a power of attorney to claim compensation for damages which is combined into the criminal case.

⁴⁷ UN Declaration of 1985 Number A/Res/40/34, which regulates the right to obtain compensation as a victim’s right.

⁴⁸ It must be accompanied by evidence and explain its purpose. The judge in his legal considerations will select losses based on evidence of costs that have been incurred directly, the rest will be rejected.

⁴⁹ Cassation Decision Number 976.K/Pid/1988 concerning the criminal case of embezzlement of social gathering money, the Supreme Court refused the application for compensation for losses suffered by the victim of the crime for the profits that would have been obtained from the embezzled money if the money had not been embezzled by the Defendant.

⁵⁰ Cassation Decision Number 296.K/Pid/1987, 15 March 1991. See also Cassation Decision Number 489.K/Pid/1985.

⁵¹ Muklis Suhendro, ‘Gugatan Ganti Kerugian Dalam Perkara Penipuan Melalui Peradilan Perdata’ (2023) 3 Jurnal Res Justitia: Jurnal Ilmu Hukum <<https://doi.org/10.46306/rj.v3i1.54>>.

⁵² The legal principle of *Ultra Petita* is also applied in this case.

Claims for compensation through the mechanism of merging compensation lawsuits are secondary to the main criminal case (*assessor*).⁵³ In the event that the main criminal case has a final and binding force, then the case for a claim for civil damages also has a final and binding force.⁵⁴ In the event that the Defendant files an appeal and cassation, then the case for a claim for compensation will be included also in the appeal and cassation.⁵⁵ The Public Prosecutor and the Defendant are not permitted to file an appeal or cassation only regarding the claim for compensation.⁵⁶

The Defendant in the main criminal case (Defendant in the case of a claim for compensation) is the Convict as an individual. As per the concept of criminal liability, a person who has committed a criminal act will be responsible for the act and other consequences. Criminal liability for perpetrators of criminal acts cannot be transferred to other people, as is the case in civil cases. The concept of criminal liability also applies in cases of combining compensation, so that the obligation to pay compensation that has final and binding force remains the personal responsibility of the convicted person. It will be a problem in if it turns out that the convict is a minor who is not yet an adult or the economic capacity of the convict is limited, even though the defendant's parents have sufficient wealth. Regarding this, this occurred in Indonesian Supreme Court Decision Number 4010 K/Civil/1985, dated 30 August 1990, where the Defendant was a child aged 17 (seventeen) years who had been proven guilty, because his negligence had resulted in injuries to the Victim, and obliged to pay compensation in the amount of Rp.4,991,650,- (four million nine hundred ninety one thousand six hundred and fifty Rupiah), but the convict did not make the payment in question. The victim submitted a 'Conservatory Measure'

⁵³ Criminal Procedure Code, Article 99 Paragraph (3) reads: "Decisions regarding compensation will also have its final and binding force, if the criminal decision also has its final and binding force".

⁵⁴ Criminal Procedure Code, Article 99 Paragraph (3).

⁵⁵ Criminal Procedure Code, Article 100 Paragraph (1) which reads: "If there is a merge between a civil case and a criminal case, then the merge will also take place at the appellate level".

⁵⁶ Criminal Procedure Code, Article 100 Paragraph (2) which reads: "If an appeal is not filed in a criminal case, then an appeal regarding the compensation decision is not permitted. See also, Cassation Decision Number 296.K/Pid/1987. This decision shows that the decision in the main case that is accepted or submitted for appeal or cassation has consequences for the claim for civil compensation.

on the assets of his father and grandmother who lived in the same house as the convict. The Supreme Court refused the application for ‘Conservatory Measure’ and held that the responsibility in criminal law is personal (individual). At the end, the victim’s right to obtain compensation cannot be fulfilled.

Compensation that has been paid in the criminal procedural law mechanism cannot be submitted again when the victim files a civil lawsuit for unlawful acts in civil court.⁵⁷ A criminal court decision that has final and binding force can be an evidence to prove that the Defendant has committed an Unlawful Act.⁵⁸ The amount of compensation in civil cases is not limited,⁵⁹ which is different in the case of a combined claim for compensation in criminal court.⁶⁰ Non-pecuniary losses can also be submitted through civil lawsuit procedures.⁶¹

Criminalizing Civil Law Acts into Criminal Law Acts Viewed from a Human Rights Perspective

In the Law on Human Rights, a distinction is made between the terminology of Human Rights and fundamental human obligations. Human Rights are defined as a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and

⁵⁷ Cassation Decision Number 202 K/Perdata/1992. Damages resulting from criminal cases that have previously been compensated in criminal court must be taken into account as part of compensation payments, therefore they cannot be re-submitted through civil procedures.

⁵⁸ Civil Code, Article 1365 Civil Code. Insurance compensation received by victims of crime is used as a deduction factor that reduces the amounts of losses due to crime.

⁵⁹ Paul H Rubin, ‘Tort Reform and Accidental Deaths’ (2007) 50 *Journal of Law and Economics* 7 <<https://www.jstor.org/stable/10.1086/521738>>.[7].

⁶⁰ Damages resulting from a decrease in the price of goods due to crime cannot be claimed as losses, for example; in the case of a collision between a bus and a taxi. See Cassation Decision Number 3679 K/Perdata/1987 which contains compensation for costs or expenses that have been incurred in cases of losses incurred as a result of criminal acts.

⁶¹ Cassation Decision Number 1226 K/Sip/1977, in a civil case. Because the collision crime resulted in the death of a vocational school student, the non-pecuniary compensation that can be assessed is IDR 10 million, plus 6% per year calculated from the time the lawsuit is submitted to the District Court. See also Cassation Decision Number 1265 K/Perdata/1984, in a civil case regarding defamation through the press (magazines). Where non-pecuniary compensation is assessed in the amount of IDR 100 thousand which the judge considers appropriate and fair. See also Cassation Decision Number 2559 K/Perdata/1986, regarding losses resulting from criminal acts, a collision that resulted in the victim’s death. In this case, the losses sued for are pecuniary and non-pecuniary damages.

protected by the state, law, government and every person in the interest of the honour and dignity of the human,⁶² while fundamental human obligations are a set of obligations which, if not implemented, will not enable the implementation and upholding of human rights.⁶³

In connection with the issue of the Indonesian's point of view on human rights, the Decree of the People's Consultative Assembly Number XVII/MPR/1998 concerning Human Rights declares that:⁶⁴

1. Human Rights are the basic rights of all human beings without any differences. Considering that fundamental rights are a gift from God Almighty, the definition of Human Rights is a right as a gift from God Almighty which is inherent in humans, is natural, universal and eternal, related to human dignity and honour;
2. Every human being is recognized and respected as having equal human rights regardless of gender, colour, nationality, religion, age, political views, social status, and language and other statuses. Neglect or deprivation of it results in a loss of dignity as a human being, resulting in less ability to develop oneself and one's role as a whole.

Regarding a civil case of Default which is criminalized into a criminal case of Fraud, and/or Embezzlement by Law Enforcement Officials is an act that is against the law. The act of criminalizing a civil case into a criminal case is a form of violation of human rights, where law enforcement officials, who are an extension of the state, law and government, are obliged to protect their citizens so that their human rights can be maintained.⁶⁵ As stated in the Law on Human Rights in Article

⁶² Indonesia (6), Law on Human Rights. Article 1 point 1. See also Ihsania Karin Azzani, Susilo Adi Purwantoro and Hikmat Zakky Almubaroq 'Urgensi Peningkatan Kesadaran Masyarakat Tentang Kasus Penipuan Online Berkedok Kerja Paruh Waktu Sebagai Ancaman Negara' (2023) 19 NUSANTARA: Jurnal Ilmu Pengetahuan .[3557] <<http://dx.doi.org/10.31604/jips.v10i7.2023.3556-3568>>.

⁶³ Indonesia (6), Law on Human Rights, Article 1 point 2.

⁶⁴ People's Consultative Assembly of the Republic of Indonesia, Decisions of the People's Consultative Assembly of the Republic of Indonesia Results of the 1998 Special Session.[90]. Chapter I, Sub Chapter D, concerning Understanding Human Rights for the Indonesian Nation.

⁶⁵ Rosyadah Novia Permata Sari, 'Perlindungan Hukum Terhadap Korban Penipuan Yang Mengatasnamakan E-Commerce' (2023) 4 Journal Transformation of Mandalika.[541] <<https://ojs.cahayamandalika.com/index.php/jtm/article/view/1669>>.

1 point 1 that an ignoring the human rights of citizens by the state is a deprivation of the dignity of citizens as human beings, this statement is also consistent with the Decree of the People's Consultative Assembly ("MPR") Number XVII/MPR/1998 concerning Human Rights.⁶⁶

Freedom of contract in agreements that occur because agreements must be respected and protected by the state,⁶⁷ this is in accordance with the International Covenant on Civil and Political Rights,⁶⁸ which is also in line with the Law on Human Rights.⁶⁹ In the event that the state is unable to protect the freedom of contract of its citizens, the state is deemed to have failed to enforce the law in the field of human rights.

Conclusion

The difference between the criminal act of Fraud and the civil law act of Default lies in the time of intention or faith (*itikad*), namely the bad faith (*mens rea*-Latin) or good faith (*te goeder trouw*-Dutch, *de bonne foi* -French). In the event that there is malicious intent before the engagement occurs, then this is a criminal act of fraud. While, *vice versa*, in the event that before the agreement occurs there are good intentions of the parties making the agreement and then after the agreement has occurred it turns out that one of the parties later fails to fulfil its obligations, then this is a breach of contract (default). Claims for compensation in the event of a criminal act can be made in two ways, first the claim for compensation is combined with the main criminal case; and second, after there is a decision that has final and binding force in the main criminal case, it can be continued with a civil lawsuit for compensation on the basis of unlawful act. In the event that there are 'unscrupulous' Law Enforcement Officials who criminalize civil legal acts of Default (breach of

⁶⁶ Satya Arinanto, 'Hak Asasi Manusia Dalam Transisi Politik: Upaya Pencarian Konsepsi Keadilan Transisional Di Indonesia Dalam Era Reformasi' (Universitas Indonesia 2003).[63].

⁶⁷ Civil Code, Article 1338. See also

⁶⁸ Indonesia (5), Law on the Ratification of the International Covenant on Civil and Political Rights. In Article 11.

⁶⁹ Indonesia (6), Law on Human Rights, Article 19 Paragraph (2).

contract) into criminal acts of Fraud, and/or Embezzlement, then this is an unlawful act from a Human Rights perspective.

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