**Journal Equity of Law and Governance**
Volume 7, Nomor 2, Page: 110-115
https://ejournal.warmadewa.ac.id/index.php/elg/index

Online ISSN 2776-5121
Print ISSN 2775-9512

https://doi.org/10.22225/elg.7.2.2025.110-115

# Legal Construction of Parameters Determining Default and Fraud in an Agreement

Tajuddin Noor[1]

1. Universitas Islam Sumatera Utara

Coressponding author;
Tajuddin Noor, Universitas Islam Sumatera Utara
Email: tajuddin.noor@fh.uisu.ac.id

**Abstract.** Legally made agreements are binding for the makers. However, in practice, contractors who do not perform their obligations are often prosecuted through criminal law based on Article 378 of the Criminal Code, giving rise to the perception of overlap between default and fraud. This pape analyzes the legal parameters to distinguish between default and fraud based on a normative juridical approach. This research uses secondary data consisting of primary, secondary, and tertiary legal materials. The results of the analysis show that default is born from contractual obligations based on agreements with indicators of good faith, while fraud is rooted in criminal acts based on malicious intent (mens rea) with indicators of a series of lies. This research recommends a strict separation between the civil and criminal domains to realize legal certainty

**Keywords:** agreement; civil law; criminal law; default; fraud; legal parameters

## INTRODUCTION

Aristotles referred to humans as social creatures with the term Zoon Politicon, which means that humans are social creatures, creatures that are always in contact with other humans. Of course, in living a social life, giving rise to a law to regulate that life, this type of law is called civil law (https://www.djkn.kemenkeu.go.id/artikel accessed on June 04, 2025). This causes both parties to become mutually bound by it, thus what all groups do is of course the existence of ties that arise requires rules. Because if there are no clear rules, it will cause a clash of interests that can lead to irregularities in the life of groups (Yahman, 2014). The interaction creates a bond between them, obviously this activity is private (M. Isnaeni,, 2006). For this reason, law is needed to regulate the interaction of fellow humans in social life. According to Sudikno Mertokusumo (2020: 109), the main purpose of law is to create an orderly society, creating order and equilibrium (Mertokusumo Sudikno, 2020). In the study of legal science according to its content, law can be divided into private law (civil law) and public law (state law) (C.S.T. Kansil, 2002). Private law regulates between one person and another, with an emphasis on individual interests6 . In a broad sense, private law includes civil law and commercial law, while in a narrow sense, private law consists only of civil law. Public law is the law that regulates the relationship between the state and its equipment or the relationship between the state and its citizens.

Similarly, Yahman explained that it is not uncommon for the resolution of problems related to breach of promise, which is basically the scope of private law (civil law), to be brought into the criminal realm by using Article 378 of the Criminal Code (hereinafter abbreviated as Criminal Code) on fraud as a settlement of the problem of breach of promise.

In the practice of law enforcement regarding contracts, in order to immediately obtain their rights, a person often looks for shortcuts, one of which is by reporting to the police (Criminal Case). The simple argument put forward is that the opposing party is "afraid" of the imposition of criminal sanctions, and finally the goal of obtaining achievements will be obtained immediately. According to Yahman, this is because people do not understand the law, so every problem that occurs is reported, whether the

problem faced falls into the scope of civil law or criminal law, he still reports it to the Police in the hope that his affairs will be resolved quickly.

One of the cases that caught the public's attention was the First Travel case, which involved an agreement that was taken to criminal law. Some legal scholars argue that the case should have been resolved civilly through a lawsuit, while others believe that the criminal route is appropriate to fulfill the obligations of the debt agreement. According to legal provisions, a person cannot be imprisoned simply for not fulfilling his or her covenant obligations. Therefore, it is necessary to conduct research to determine the difference between default and fraud in criminal law, which is the basis for the importance of this research.

This research is expected to provide legal certainty regarding the difference between default and fraud, so that civil rights can be respected and protected. This scientific work aims to assist legal practitioners in making decisions regarding these two matters. In addition, it is hoped that criminal law enforcement will be used as a last resort, and encourage the settlement of civil cases through mediation.

From the above background, several problem formulations can be drawn, among others:

1. What are the normative characteristics of the act of default and the crime of fraud?
2. What are the determining factors of default and fraud of an agreement?
3. How is the liability of the act of default and the crime of fraud from an agreement?

## METHOD

This research uses a normative juridical approach, which analyzes legal norms deductively. The data used is secondary data, including legal literature, laws, court decisions, papers, and articles from print and electronic media. This data consists of primary, secondary, and tertiary legal materials. The analysis is done qualitatively. Data that has been collected and classified in accordance with the research problem will be analyzed through content analysis. Data interpretation can use authentic, grammatical, or teleological approaches, especially related to the unlawful nature in Article 1243 of the Civil Code and Article 378 of the Criminal Code. From the results of the qualitative analysis, the core meaning of the legal norms studied will be identified, which is then used to answer the problems and draw conclusions from this research.

## RESULTS AND DISCUSSION

### Normative Characteristics of Default and Fraud

Normative Characteristics of Default

Humans are the most perfect creatures in this world. Human perfection can be understood because he has reason and will. Therefore, humans, by nature, have fundamental rights, namely freedom, the right to life, and personal security. In the reality of human life, these fundamental rights interact with each other; one of which is in the form of a contract (Zulfirman, 2017).

Chantal Mak explains that contracts containing fundamental human rights can be seen from two criteria:

First, from the formal side; Second, from the substance side. Formally, a fundamental right is a right specified in the provisions of the constitution, while in substance, a right is a norm that aims to guarantee human dignity or rights that are fundamental to the protection of personal autonomy. Freedom of contract is the fundamental right of an individual to enter into an agreement that acquires or delivers property, services or alters legal relations. Contractual arrangements as a fundamental human right from a substantial side in Indonesia can be seen in Article 1338 of the Civil Code which contains the principle of freedom of contract. In general, the regulation of contracts or agreements can be found in the Civil Code in Book III title 2.

The words "contract" and "agreement" are the same, in daily practices, the contract is interpreted as a deed daily practices interpret the contract as a deed, but actually the contract is an agreement (H.Mashdui, et.al, 2001). Contracts / agreements are valid if they fulfill the conditions for the validity of the contract. the valid terms of the contract / agreement are regulated in Article 1320 of the Civil Code, namely the agreement of those who make it, the ability to make an agreement, a certain thing and a halal cause. The definition of the agreement of those who bind themselves in question is the consent of both parties based on the approval of their respective wills, meaning that at the time the contract was made there was no coercion, fraud, or error.

The contract/agreement that has been agreed upon contains the principle of pacta sunt servanda. This principle means that every contract that has been made legally, must be obeyed and binds both parties. The principle of pacta sunt servanda is like a law that must be obeyed as Article 1338 paragraph (1) BW, which states: "contracts / agreements made legally shall apply as law." Promises must be kept, keeping promises is human nature. An agreement cannot be separated from the problem of good faith in carrying out the agreement or when making an agreement. Good faith is a subjective element of the legal requirements of an agreement. Good faith or te goeder trouw (Dutch) or in good faith (English) is closely related to decency or justice and this measure of good faith must exist in the parties, both creditors and debtors (Hardijan Rusli, 1993) Good faith in contracts is a legal institution (rechtsfiguur) originating from Roman law which was later absorbed by civil law. In some countries that follow the common law legal system, such as the United States, Australia, New Zealand and Canada (Ridwan Khairandy, 2003).

Khairandy argues that the scope of good faith arrangements in various legal systems generally only covers good faith in the contract execution phase, not yet covering the pre-contract phase.10 . Referring to the opinion of Agung Sujatmiko quoting Yohanes Sogar Simamora who explained the criteria for good faith behavior in the implementation of the agreement, the test is based on unwritten objective norms (Moch.Isnaeni, 2013). Zulfirman argues that good faith applies in the pre-contract phase, as he said:

Coercion, deception, and misrepresentation are normative parameters related to the good faith of someone who will build an agreement; all of them are related to impropriety, dishonesty and injustice in making an agreement. Coercion, deception and misrepresentation are taken over from unwritten objective norms that develop in society and formalized into written legal norms. That is why Article 1338 of the Civil Code no longer specifies good faith as the basis for making an agreement (Zulfirman, 2017).

The principle contained in the contractual relationship is the guarantee of certainty of contract implementation. If there is no balance in the implementation of rights and obligations in contractual relations, there will be a violation of the interests or rights of one of the parties, if this happens, a legal event called "default" arises. Meanwhile, according to Subekti, a debtor's default can be of four types, namely:

a. Not doing what he promised to do

b. Carry out what he promised, but not as promised as promised.

c. Doing what is promised but late.

d. Doing something that according to the agreement he should not do.

M.Yahya Harahap said, in general, default is "the performance of obligations that are not on time or are not carried out according to what is appropriate". From the description above, it can be concluded that the normative characteristics of default are:

1.The subject of the norm in default is an individual with an individual.

2.Default arises as a result of an agreement made by a legal subject in the field of private law.

3.Default is synonymous with non-fulfillment of performance by one of the legal subjects.

4.Non-fulfillment of performance consists of:

a.Not fulfilling the performance at all

b.Late in fulfilling the performance

c.Perform other than what was promised

d.Doing what according to the agreement should not be done

5.Default always begins with the giving of a warning or summons.

Normative Characteristics of Fraud

It has been discussed above that humans in carrying out interactions with other humans do not always run smoothly. Sometimes the bonds reached in an interaction relationship are not fulfilled by one of the parties. One of the reasons for not achieving the agreed bond is due to fraud. The concept of fraud in the Civil Code can be found in Article 1328, namely: "Fraud is a reason for the cancellation of an agreement, if the deception, used by one party, is such that it is clear and obvious that the other party would not have made the agreement if the deception had not been made. Fraud is not presumed, but must be proven. "

The legal institution of Article 1328 of the Civil Code on fraud in civil law is the same as Article 378 of the Criminal Code on fraud in criminal law. The concept of fraud contained in Article 1328 of the Civil Code is the existence of a defect of will. The defect of the will is caused by the existence of: mistake or negligence, coercion and fraud. Then the concept of fraud in Article 378 of the Criminal Code, namely the existence of a series of false words, deceit, false circumstances, false dignity. These two legal corridors can be taken or used as the basis for someone who is harmed by one of the parties in closing a contract or agreement to file a criminal complaint or claim for compensation.

Fraud in criminal law is an occupation. This means that the fraudster is his job (R. Susilo, 1976). The occurrence of fraud in criminal law is a legal relationship that always begins or is preceded by a contractual relationship (characteristics of fraud has always started with a contractual relationship).

## Factors Determining an Agreement as an Act of Default or a Crime of Fraud.

In the practice of law enforcement with regard to contracts, to immediately obtain their rights, a person often looks for shortcuts, one of which is by reporting to the police (Criminal Case). The simple argument put forward is that the opposing party is "afraid" of the imposition of criminal sanctions, and finally the goal of obtaining achievements will be obtained immediately.

The implementation of legal certainty is not well reflected in practices related to the problem of agreements, so it is necessary to examine the parameters that determine default and fraud in order to achieve legal certainty for each party to the agreement.

Based on the description of the normative characteristics of default and fraud that have been analyzed in the sub-chapters above, it can be observed that default and fraud have normative characteristics that are different from one another, from the differences in normative characteristics, parameters can be analyzed to determine the difference between default and fraud.

By adhering to the results of the analysis in the sub-chapters above and comparing each of the sub-chapters, it can be stated that the determining parameters between default and fraud can be as follows:

Default is closely related to the agreement as a legal relationship between individuals. The agreement itself is born of an agreement as referred to in Article 1320 of the Civil Code which implies that the parties mutually declare their respective wills to make a will; one party's statement has been approved by the other party. Strictly speaking, the act of default is a violation of the law that they themselves gave birth to. Here the content of the subject norm is individual with individual. Meanwhile, fraud is a provision of the law governing crimes against property. So the parameter determining default is a violation of the promise or law made by the parties in an individual relationship. Here the subject of the norm is the state dealing with individuals. The parameter to determine a criminal offense of fraud is a crime (mens rea) against a person's property, which is carried out by deceitful means or through lies so that a person surrenders goods or objects not voluntarily. Criminal fraud regulated in the Criminal Code has a different legal character from fraud as a condition for the validity of an agreement. Fraud here is aimed at the agreement as a condition of the validity of the agreement, not aimed at property as determined in fraud in the Criminal Code. Clearly, fraud is related to the validity of the agreement, the

agreement concluded in an agreement gives a defect in the will, because one party misleads the other party in providing a description of the agreement. so that in fraud the position between one party and the other is not balanced.

Default is an act of violating personal obligations that arise from legal relations made by the parties through an agreement. Meanwhile, fraud is an act committed unlawfully against someone's property.

With the inclusion of provisions as contained in Article 1 paragraph (1) of the Criminal Code, then anyone who is proven to have violated a criminal provision, formally the act in question is against the law because the intended action has violated a prohibition included in the Criminal Law (R.Achmad S.Soema, 1983). The unlawful nature of an offense is one part of the general understanding of a criminal offense so that in his opinion, in the event that it is not contained in the formulation of the offense, the part is always considered to exist. S. R. Sianturi formulated the definition of a criminal offense as an action at a certain place, time, and condition, which is prohibited (or violates the obligation) and threatened with punishment by law and is against the law and contains elements of guilt committed by someone who is capable of being responsible.

Through the above understanding, it can be observed that "unlawfully" referred to in Article 378 of the Criminal Code is concretely characterized by using a false name or false dignity, by deception, or a series of lies, moving others to hand over something to him, or to give debts or write off receivables.

Default is motivated by the principle of good faith. This means that the debtor has an effort to fulfill the performance according to what was agreed upon even though in practice it ends in bad performance. Article 1338 point 3 which states: "An agreement must be carried out in good faith." Meanwhile, in fraud, motivated by malicious acts (mensrea), this can be seen from the subjective elements of the crime of fraud, namely: with the intention of benefiting oneself or others, there is an element of intent (dolus / opzet), not in the form of accident.

### Forms of Liability for Default and Fraud.

An act is said to be a legal act if the act has legal consequences. Therefore, a legal action has legal liability consequences. Speaking of liability issues related to the discussion of this paper, default and fraud include acts that have been regulated in laws and regulations, which if violated both have sanctions for violators. Sanctions against a legal event committed by a person depend on the type of legal action and the field of law that regulates it. This writing will limit the analysis related to sanctions in the field of civil law, especially regarding default and sanctions for criminal acts of fraud.In Criminal law, legal sanctions are called punishment. According to R. Soesilo, punishment is: "a feeling of discomfort (misery) imposed by the judge with a verdict to the person who has violated the criminal law law" (R.Soesilo, Criminal Law Code). Violators of Article 378 of the Criminal Code regarding fraud can be sentenced to a maximum imprisonment of four years. The sanction for perpetrators of fraud is imprisonment without the alternative of a fine. In comparison, Article 379 of the Criminal Code states that if the goods delivered are not livestock and the value of the debt is not more than twenty-five rupiah, the perpetrator can be sentenced to a maximum imprisonment of three months or a fine of up to two hundred and fifty rupiah. If a judge examines and decides a criminal case of fraud, the judge will impose a prison sentence if the defendant is found to have violated Article 378 of the Criminal Code, although the maximum sanction is rarely applied. If the defendant accepts the verdict, his status changes to prisoner and serves the sentence in a correctional institution according to the specified time. Fraud is different from default, so the liability for both is also different. Defaulters can only be held accountable for fulfilling financial obligations, and cannot be punished with imprisonment. Article 11 of the ICCPR ratification law is in line with Article 19 paragraph (2) of the Human Rights Law, which states that no one should be imprisoned for failure to fulfill obligations in debt agreements. Therefore, breach of performance in an agreement cannot be punished, but must be resolved by compensation in accordance with civil law. Default and fraud liability have different corridors, so it is important to understand the characteristics of both, especially for law enforcement in Indonesia, to achieve legal certainty. Lack of understanding can result in human rights violations and loss of freedom for individuals decisions are wrong.

## CONCLUSIONS

That, default is an act of breaking a promise or not fulfilling an achievement and is part of the civil law environment. Meanwhile, fraud is an act in the criminal law environment, where fraudulent acts are carried out with the intention of obtaining unilateral benefits.

The determining factors between default and fraud are:

a. Default arises as a result of a legally made agreement. Whereas in fraud, the agreement concluded in a contract/agreement that is agreed upon has a defect of will.

b. Default is an act against the obligation. Meanwhile, fraud is an act committed unlawfully.

c. Default is motivated by the principle of good faith... Whereas in fraud, there is no good faith effort made.

The forms of liability for default and fraud are: Default is part of civil law, where the form of liability is in the form of compensation, while in fraud, in accordance with the characteristics of criminal sanctions, the form of liability imposed is in the form of imprisonment.

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