

**LIMITS OF DEFAULT AND FRAUD IN LOAN AGREEMENTS****Adi Wijaya<sup>1\*</sup>, Eli Tri Kursiswanti<sup>2</sup>, Maria Ana Liwa<sup>3</sup>**<sup>1,2,3</sup>Awang Long School of Law, Samarinda, Indonesiaadi.wijaya@stih.awanglong.ac.id<sup>1\*</sup>, eli.kursiswanti@stih.awanglong.ac.id<sup>2</sup>,maria.ana@stih.awanglong.ac.id<sup>3</sup>**Abstract**

This article examines the legal boundaries between default (breach of contract) and fraud in loan agreements under Indonesian law. Although default is essentially a civil matter arising from contractual relationships, in practice, many cases are criminalized under fraud charges. The study employs a normative juridical method with a doctrinal approach, relying on statutory interpretation of the Indonesian Civil Code (Article 1320) and the Criminal Code (Article 378), supported by legal scholarship, jurisprudence, and case examples. Through qualitative analysis of primary, secondary, and tertiary legal materials, the study highlights how good faith distinguishes default from fraud, while fraudulent intent (*mens rea*) can shift a contractual breach into a criminal offense. The findings indicate that overcriminalization of contractual disputes risks undermining legal certainty and justice for parties. Therefore, law enforcement officials must carefully assess whether a dispute falls within the civil domain or fulfills the elements of a criminal act. This article concludes that default should remain a civil matter unless deceit and malicious intent are present from the outset of the agreement.

**Keywords:** Default, Fraud, Loan Agreement, Civil Law, Criminal Law

## **INTRODUCTION**

Humans, as legal subjects, essentially never live apart from social interaction. Within these interactions, various legal relationships arise that bind individuals to one another. These legal relationships can stem from laws or from agreements outlined in a contract. The existence of a contract is a crucial instrument in ensuring legal certainty, as it embodies the rights and obligations of the parties.

However, the implementation of agreements does not always proceed as intended. It is not uncommon for one party to fail to fulfill its obligations, a situation known in civil law as breach of contract or a broken promise. This situation often gives rise to disputes and even leads to legal proceedings. In principle, civil law and criminal law have different functions. Civil law regulates private relationships between individuals, while criminal law aims to maintain public order by prohibiting and sanctioning certain acts. However, in practice, there is often a gap between the two, one example being cases of breach of contract that are brought to the criminal realm on charges of fraud.

Article 1320 of the Civil Code (KUH Perdata) stipulates the requirements for a valid agreement, namely agreement, capacity, a specific object, and a lawful cause. If these requirements are met, a legal obligation arises for the parties to fulfill their obligations. If these obligations are not met, the negligent party is considered to have committed a breach of contract. On the other hand, Article 378 of the Criminal Code stipulates that fraud is a crime committed with the intention of obtaining unlawful benefits through the use of a false name, false position, trickery, or a series of lies. Thus, a breach of contract can transform into a criminal act of fraud if there is malice from the outset and the use of fraudulent means to harm the other party.

The main issue that arises is the fine line between civil breach of contract and criminal fraud. This ambiguity often results in victims receiving only criminal sanctions for the perpetrators without any restitution. This requires law enforcement officials to be meticulous in qualifying cases. This raises the question of whether debtors can be imprisoned in debt cases.

## **RESEARCH METHOD**

This study employs a normative juridical research method, focusing on the analysis of legal norms governing loan agreements, particularly the distinction between default and fraud. The approach is doctrinal, relying on statutory interpretation, doctrinal opinions of legal scholars, and case examples. The primary legal materials include the Indonesian Civil Code (KUH Perdata), especially Article 1320 on valid agreements, and the Indonesian Criminal Code (KUHP), particularly Article 378 on fraud. Secondary legal materials are drawn from scholarly works, legal journals, and relevant jurisprudence, while tertiary legal materials include legal dictionaries and encyclopedias. Data were collected through library research and analyzed qualitatively to provide a systematic interpretation of the boundaries between civil default and criminal fraud in contractual relations.

## **RESULT AND DISCUSSION**

### **A. Breach of Agreement in the Form of Default/Broken Promise**

As social beings, humans cannot avoid interacting with each other. These interactions are governed by prevailing societal norms, including legal norms. From these interactions, legal relationships emerge, one of which is through agreements. An agreement itself is the result of an agreement between the parties, with the aim of ensuring that the agreed-upon rights and obligations can be implemented and enjoyed together. However, in its implementation, problems often arise when one party, or even both parties, feel disadvantaged or do not achieve the expected results. When an agreement is not fulfilled, this situation is

called a breach of contract or a broken promise. It is important to note that a breach of contract can only arise if there is a prior agreement, either written or verbal (Fuadi, 2001).

Default can arise from negligence or intentional misconduct. If a debtor fails to fulfill their obligations, they are obligated to pay compensation to the creditor after a grace period (Marbun, 2015). This applies if the debtor still fails to fulfill the promised performance within the specified time period.

#### 1. Elements of Default

##### a. Error

The element of wrongdoing is fulfilled if the act committed could have been avoided and the perpetrator can be held responsible for it, meaning they can foresee the consequences of their actions. Two benchmarks are used to measure the presence or absence of wrongdoing:

- 1) Objective, that is, if under normal circumstances the consequences of the action should have been foreseeable.
- 2) Subjective, namely the consequences that can be predicted according to an expert's assessment.

In law, error can be understood in a broad sense (including intent and negligence) or in a narrow sense (limited to negligence only).

##### b. Negligence

Negligence occurs when someone is aware of the potential for harm to another party but still fails to fulfill their obligations. Determining negligence is often difficult because it's not always clear when exactly the performance must be fulfilled.

##### c. Intentional

Intentionality means an act is done consciously and with the will of the perpetrator. It doesn't require a specific intention to harm another person; the perpetrator simply needs to be aware that their actions could have certain consequences. The simplest example of a breach of contract is an agreement not to perform a certain action; if the perpetrator does so anyway, they are considered to have violated the agreement.

According to Subekti, default is negligence or carelessness which can take 4 (four) forms:

Not carrying out what was promised.

- 1) Carrying out what was promised, but not according to the agreement.
- 2) Carrying out obligations, but late from the specified time.
- 3) Doing something that is actually prohibited in the agreement.

That we will make it easier for readers to understand a few examples of cases related to breach of contract are as follows:

Example:

If Mrs. ANI borrows money from her neighbor Mrs. Budi in the amount of 5 million rupiah on the grounds that she needs money for her child's operation and her husband is fired from his job, where in the written agreement Mrs. ANI must return the money by paying installments of 1 million rupiah every month, however Mrs. Ani can only pay for the first month and the remaining 4 months of 4 million are no longer able to make payments to her, then this legal event is called default (the basis of the mensreanya is good faith).

Based on the above matters, the act of Mrs. ANI's inability to return Mrs. BUDI's money cannot be reported to the police by Mrs. BUDI, because the legal event of Mrs. ANI's relationship as a debtor and Mrs. BUDI as a creditor in terms of making an Agreement/agreement has fulfilled the requirements of a valid agreement as per Article 1320 of the Civil Code, and the legal event of Mrs. ANI who has conveyed to

Mrs. BUDI that she needs money for her child's treatment and finally makes Mrs. BUDI willing to lend her money to Mrs. ANI is a true legal event and there are no terms of lies in it. Therefore, Mrs. ANI's actions are classified as CIVIL which is called Default/Breach of Promise, so Mrs. Ani cannot be imprisoned for not being able to pay the debt.

This is also emphasized in Article 19 paragraph (2) of the Human Rights Law, which regulates the following:

*No one may be sentenced to prison or detention by a court decision on the grounds of inability to fulfill an obligation in a debt agreement.*

Based on the text of the article, in our opinion, even if there is a report, a person cannot be punished for his inability to pay his debt.

Therefore, the creditor's efforts if the debtor breaks his promise or cannot pay the debt or installments that have been agreed upon in the agreement in accordance with legal provisions are:

1. Carry out billing/settling through deliberation
2. Carrying out takeover of collateral in the hands of creditors (Fiduciary Law No. 42 of 1999 and Mortgage Law No. 4 of 1996)
3. Making a legal claim by filing a civil lawsuit.

## **B. Elements of the Crime of Fraud in an Agreement**

In practice, it's not uncommon to encounter parties breaking their promises. A breach of promise, or default, occurs when one party fails to fulfill the agreed-upon rights and obligations, resulting in the failure to fulfill the objectives of the agreement. This situation often gives rise to legal issues. While resolution can be achieved through amicable means, these efforts often fail and drag on until the dispute is ultimately brought to court for a judge's decision.

In law enforcement practice, aggrieved parties often report breaches of contract to the police. Once the report is filed with the police, the case is automatically processed as a criminal offense, not a civil dispute. This is due to the public's lack of legal understanding, coupled with low awareness and compliance with applicable legal norms in Indonesia. The term breach of contract comes from the Dutch word *wanprestatie*, which means the failure to fulfill obligations or obligations under an agreement, whether based on a contract or a law. These rights and obligations can only arise if the agreement meets the legal requirements according to Article 1320 of the Civil Code. However, in reality, many breach of contract cases are pursued through criminal channels, particularly with allegations of fraud as stipulated in Article 378 of the Criminal Code.

### **1. Elements of the Crime of Fraud**

Several legal experts have defined criminal acts. Van Hamel defines it as human behavior regulated by law, is unlawful, committed with error, and is punishable. Wirjono Prodjodikoro states that a criminal act is an act that can be punished by the perpetrator. Moeljatno defines a criminal act as an act prohibited by law, the perpetrator of which can be punished. Simons adds that a criminal act is an unlawful act committed intentionally or unintentionally by a person who can be held accountable, and is qualified by law as a punishable act. Djoko Prakoso provides three perspectives: from a legal perspective, a criminal act is an act prohibited by law; from a criminological perspective, a criminal act is an act that goes against social norms and elicits a reaction from society; from a psychological perspective, a criminal act is an abnormal act that violates the law, influenced by the mental state of the perpetrator.

Fraud is essentially a dishonest act or statement intended to mislead, deceive, or gain an advantage for oneself or another person. The Big Indonesian Dictionary (KBBI)

defines fraud as the process, method, or act of deceiving. The Criminal Code (KUHP) does not provide a definition of fraud, but rather outlines elements that, if met, qualify an act as fraud.

The crime of fraud is regulated in Articles 378–395 of the Criminal Code, which are placed in Chapter XXV, Book II, concerning crimes against property. Article 378 regulates fraud in the narrow sense (*oplichting*), while the other articles address various forms of fraud in the broad sense. This chapter contains 18 articles, each of which regulates variations of the crime of fraud.

**The main formulation of Article 378 of the Criminal Code reads:**

"Anyone who, with the intention of unlawfully benefiting himself or another person by using a false name or false dignity, by means of trickery or a series of lies, persuades another person to hand over goods to him, or to give credit or write off debts, is threatened with a maximum prison sentence of 4 (four) years." From this article, the elements of the crime of fraud can be outlined:

- a. Subjective elements:
  - 1) There is an intention to benefit oneself or others.
  - 2) The act was committed in an unlawful manner.
- b. Objective elements:

Persuading or moving other people to act by using certain methods, namely:

  - 1) Using a fake name.
  - 2) Using a false position/state.
  - 3) Using a series of lies.
  - 4) Committing deception to get another party to hand over goods, provide debt, or write off receivables.

Based on these provisions, elements of the crime of fraud can arise from the stage of forming an agreement if one of the parties has bad intentions, for example:

1. Using a fake name

If a party to an agreement uses a name that is different from their real identity or even uses someone else's name, then this action can be classified as fraud.

2. Using a false position or state

For example, someone might claim to be an employee of a company when they have actually been dismissed. Using this pretext as their position, they then order goods from a store. If the store delivers the goods, believing their false identity, they have been deceived.

3. Weaving a series of lies

If a party to an agreement submits a series of false statements that are arranged in such a way that they appear logical and mutually reinforcing, then this constitutes fraud.

4. Using trickery

Certain actions that give rise to false confidence in other parties to the point of believing something to be true, can also be categorized as fraud.

**EXAMPLES OF DEBT AND RECEIVABLES THAT ARE FRAUDULENT OFFENCES:**

If Mrs. ANI borrows money from her neighbor Mrs. Budi in the amount of 5 million rupiah on the grounds that she needs money for her child's operation and her husband is no longer working, then to convince Mrs. Budi, Mrs. ANI hands over a piece of jewelry as collateral if she cannot pay off her debt within 2 days then Mrs. BUDI can take Mrs. ANI's jewelry to sell.

Where based on this story, Mrs. BUDI finally agreed to lend money to Mrs. ANI in a written agreement that Mrs. ANI had to return the money within 2 days and Mrs. ANI's jewelry as collateral would be returned.

However, after 2 days had passed, Mrs. BUDI came to Mrs. ANI's house and met her husband, and Mrs. BUDI told him that his wife Mrs. ANI had owed him money as stated in the agreement and Mrs. BUDI also told him about the reason why she wanted to lend money to Mrs. ANI, but it turned out that Mrs. ANI's husband said that he and Mrs. ANI had divorced 1 year ago and her child Mrs. ANI was also in good health and still in school, while regarding the jewelry that Mrs. ANI had pledged to Mrs. BUDI, it was imitation gold, and Mrs. ANI had left the house for a long time.

Based on the story above, the legal actions of Mrs. ANI who owes money to Mrs. BUDI based on bad intentions made a series of lies in order to be given a debt and then never intended to return the money to Mrs. BUDI, then two elements are fulfilled, namely the *actus reus* element (physical element) and the *mens rea* element (mental element). The *actus reus* element is the essence of the crime itself or the act committed, while the *mens rea* element is the perpetrator's mental attitude at the time of committing the act. So Mrs. ANI's actions can be reported to the police as a criminal act, but not because Mrs. ANI cannot pay her debt to Mrs. BUDI but rather a series of lies as explained in ARTICLE 378 of the Criminal Code has been fulfilled.

## CONCLUSIONS

In the principle of contract enforcement, all parties must adhere to the agreed terms. If one party fails to fulfill its obligations, it must demonstrate good faith by notifying the other party and requesting a postponement or leniency. Furthermore, it is important to analyze whether the failure was purely due to negligence or force majeure. If the failure is due to force majeure, the debtor cannot be sued for damages. Conversely, if the default occurs due to negligence and meets the elements of a crime, the default case can be brought to the realm of criminal law.

Therefore, law enforcement officials are required to carefully understand the boundaries between breach of contract and criminal fraud. Law enforcement officers are required to gather information and evidence from the parties to determine the appropriate legal action. Indeed, every agreement arises from the good faith of the parties. The principle of freedom of contract allows the parties to determine the content, form, and with whom the agreement is made. However, this freedom must remain grounded in good faith and must not conflict with laws and regulations, the public interest, or morality. The goal is to achieve justice and prevent a stronger party from exploiting a weaker party.

Criminal law recognizes two legal entities: individuals and legal entities (corporations). Both have the right to take legal action, including entering into agreements. However, in practice, the implementation of agreements does not always run smoothly. Failure to fulfill obligations often occurs, for example in debt, fiduciary, and lease agreements. In many cases, the aggrieved party chooses to report the case to the police. This requires law enforcement officials to be careful in distinguishing between civil disputes and criminal offenses. Sometimes an action appears to be a breach of contract, but in fact, it fulfills the elements of fraud. Therefore, it is important to first assess the existing elements: whether it fulfills the civil realm of breach of contract, or the criminal realm of fraud. Fraud itself is a material delict, a criminal act that is considered complete if the consequences prohibited by law actually occur (Bassar, 2014).

The elements of fraud include the act of someone to benefit themselves or another person unlawfully, by using a false name, false position, trickery, or a series of lies, so that the other party gives something, provides a loan, or writes off a receivable. The fundamental

difference between breach of contract and fraud lies in the presence of malicious intent (*mens rea*). If from the outset an agreement is made with bad intentions and uses deception to gain profit, then it meets the elements of the crime of fraud. However, if an agreement is made in good faith but then fails to be implemented for a specific reason, then it is more appropriately classified as a breach of contract. Therefore, the accuracy of law enforcement officials is very necessary to qualify an act, whether it is a breach of contract or a crime of fraud.

The main difference that serves as a distinguishing parameter is that in default there is always good faith, while in fraud there is a malicious intent to control or obtain something unlawfully. Therefore, even if one party fulfills part of their obligations, if the element of fraud has been fulfilled, their actions are still criminally punishable. Conversely, if the negligence occurs due to force majeure, due to the creditor's own fault, or because the creditor has waived their rights, the case cannot be brought to the criminal realm and remains within the civil sphere. However, if the agreement was made from the outset with the intention of deceiving, for example by falsifying the contents of the agreement or providing false information regarding the circumstances of a particular party, then the default can be drawn up as a criminal case on suspicion of fraud.

From this description, it can be concluded that breach of contract is essentially a civil matter. However, if there is an element of intent, malice, or deceit from the outset of the agreement, the breach can shift into a criminal act of fraud. In other words, the boundary between civil and criminal law in the context of breach of contract is largely determined by the malicious intent of the party committing the breach.

Default is essentially a civil offense arising from a contractual relationship. However, if the process of creating or executing an agreement involves intent, deception, or false identity for the purpose of obtaining unlawful gain, then the default can become a criminal act of fraud, as stipulated in Article 378 of the Criminal Code.

Thus, the line between breach of contract and fraud lies in the intent and the method used. Law enforcement officials must be able to objectively assess whether the dispute is a purely civil matter or whether it meets the elements of a criminal offense. This understanding is crucial to prevent the overcriminalization of contractual disputes, while ensuring that perpetrators of genuine fraud are prosecuted and victims receive full justice.

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