DEVIATION FROM THE CONCEPT OF *LEVERING* IN SALE AND PURCHASE TRANSACTIONS THROUGH CRIMINAL CHARGES OF EMBEZZLEMENT AND/OR FRAUD BASED ON GOODS INVOICES

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Abstract

Criminal allegations of embezzlement in sale-and-purchase transactions, most frequently initiated by sellers, constitute tangible evidence of a deviation from the legal concept of *levering* (delivery). Accordingly, the legal issue addressed in this research concerns the deviation from the concept of *levering* in relation to the principle of freedom of contract and the criminalization of embezzlement and/or fraud arising from non-performance in sale and purchase transactions evidenced by goods invoices. This issue arises from the seller's assumption that a goods invoice does not constitute a binding agreement, which is based on the belief that ownership of the goods remains with the seller despite delivery to the buyer. This research seeks to clarify the legal concept of *levering* in sale and purchase transactions and its relationship with the principle of freedom of contract, particularly in the context of goods invoices, with the aim of preventing the transformation of civil sale and purchase agreements into criminal cases, through legislative approaches, case studies, and conceptual

analysis. In the cases analyzed, it appears that courts generally fail to apply the two principal benchmarks established in jurisprudence, namely (i) the existence of a legally valid agreement, and (ii) the absence of bad faith. As a result, judicial decisions continue to blur the boundary between civil liability and criminal liability. The novelty of this research lies in emphasizing that the concept of *levering* grounded in the principle of freedom of contract, cannot be applied within the framework of the criminal offense of embezzlement.

Keywords: breach of contract; embezzlement; fraud; freedom of contract; levering;

Introduction

In commercial practice, breaches of contract are often conflacted with criminal acts such as embezzlement or fraud. When contractual rights are violated, parties frequently pursue criminal charges of embezzlement or fraud rather than civil actions, despite the fundamentally different legal consequences. This raises questions about the boundary between breach of contract and embezzlement/fraud within contractual relations, especially in light of court decisions that deem the breaching party to have met the elements of the alleged offense. Breach of contract is the failure to perform contractual obligations. Agreements may be formed orally or in writing under the freedom of contract, the foundational principle enabling the parties to determine the form, contents, object, and parties thereto, provided they comply with Articles 1337 and 1339 BW. Nevertheless, in practice, when a violation of such an agreement occurs, the aggrieved party often does not file a civil claim for breach of contract (*wanprestasi*), but instead chooses to pursue criminal proceedings by invoking the offense of embezzlement in the context of a sale and purchase agreement.[1]

[1] Not every failed contractual performance may be qualified as breach of contract (*wanprestasi*). In judicial practice, the burden of proof rests with the party alleging the existence of a breach of contract. Accordingly, contractual documentation, evidence of partial performance, and correspondence between the parties constitute the basis for the court's assessment. Where an agreement is concluded orally or is not set out in sufficient detail, the judge's assessment may become more subjective, relying heavily on the principle of judicial prudence and the judge's legal experience. See Dewa Ayu Putri Sukadana, "Implikasi Yuridis

This situation is reflected in several court decisions, which illustrate how non-performance of obligations under a sale and purchase agreement, namely breach of contract (*wanprestasi*), is transformed into criminal charges of embezzlement and/or fraud, as in Madiun District Court Decision Number 51/Pdt.B/2020/PN. Mjy, the case began with a credit purchase transaction for electronic goods that was subsequently not paid off on time. However, the court considered the case to be a civil matter, thus the defendant was acquitted of all legal charges *(onslag van alle rechtsvervolging)*. In contrast, in the Tebing Tinggi District Court Decision Number 74/Pid.B/2019/PN.Tbt, the court declared the defendant guilty of fraud due to the presence of deception in the transaction. Furthermore, in Pariaman District Court Decision Number 33/Pid.B/2021, failure to fulfill payment obligations in a construction project was classified as a criminal act of embezzlement. Meanwhile, in the Southeast Sulawesi High Court Decision Number 168/PID/2021/PT.KDI, the defendant was ultimately acquitted because he was not proven to have fulfilled the elements of fraud or embezzlement.

These various decisions demonstrate an inconsistency in judicial reasoning regarding the boundary between breach of contract and a criminal offense. In some cases, breach of contract is classified as a civil matter, while in others it is classified as a criminal offense. This situation has blurred the boundaries between civil and criminal law, necessitating conceptual clarification regarding the principles of freedom of contract, agreements, and delivery in sales transactions. Transforming a civil dispute into a criminal case has the potential to violate human rights, as stipulated in Article 19 paragraph (2) of Law Number 39 of 1999, which stipulates that a person cannot be punished solely for failing to fulfill contractual obligations. Therefore, the use of criminal instruments as a means of pressure in contractual disputes is inconsistent with legal principles. Efforts to recover losses should be pursued through a civil lawsuit based on breach of contract. This principle is also reinforced by Supreme Court Jurisprudence Number 4/Yur/Pid/2018, which affirms that failure to fulfill contractual obligations does not automatically constitute a criminal offense unless there is bad faith from the outset.

Wanprestasi Dalam Hukum Perdata Antara Teori Dan Praktik," *Jurnal Rechtens* 14, no. 1 (June 2025): 139–54, https://doi.org/10.56013/rechtens.v14i1.4292.

This jurisprudence provides important guidance for judges in distinguishing between civil and criminal liability.

The author has conducted a comparison with prior studies. Research by Alwan Hadiyanto, Emy Hajar Abra, and Linayati Lestari[2], Juni Kristian Telaumbanua, Sunarmi, Madiasa Ablisar, and Mahmud Muliadi[3], Ramlin, Kamaruddin, and Faisal Abdaud[4], which discusses aspects of judicial legal reasoning in interpreting the element of deceit in criminal fraud cases and the boundaries distinguishing breach of contract from the criminal offense of embezzlement within contractual relationship, and also the application of *onslag van rechtvervolging* in distinguishing criminal offense from civil disputes, as well as judicial consideration in the context of business relationship and the good faith of the parties involved. In contrast, the present study focuses on deviations from the concept of *levering* and the principle of freedom of contract as related to criminal charges of embezzlement based on goods invoices. Therefore, the author regards it urgent to address deviations from the levering concept in relation to the freedom of contract and the criminal offenses of embezzlement and/or fraud arising from non-performance in sale and purchase transactions evidenced by goods invoices. The study aims to analyze these deviations through such offenses based on goods invoices as expressions of the freedom of contract, and to clarify the levering concept in these transactions to prevent misuse of embezzlement and/or fraud provisions in breach of contract cases. The research method employed is normative legal research, adopting statutory, conceptual, and case approaches. The research data was conducted using qualitative methods

[2] Alwan Hadiyanto, Emy Hajar Abra, and Linayati Lestari, "Tipu Muslihat dalam Perspektif Hukum Pidana: Analisis Penalaran Yuridis Hakim dalam Menentukan Unsur Penipuan," *Jurnal USM Law Review* 8, no. 2 (2025): 836–48, https://doi.org/10.26623/julr.v8i2.12062.

[3] Juni Kristian Telaumbanua et al., "Tuntutan Tindak Pidana Penggelapan Terhadap Perbuatan Wanprestasi Dalam Hukum Perdata (Studi Putusan Pengadilan Negeri Tebing Tinggi No. 74/Pid.B/2019/Pn.Tbt Tertanggal 28 Mei 2019)," *Iuris Studia: Jurnal Kajian Hukum* 2, no. 2 (June 2021): 301–9, https://doi.org/10.55357/is.v2i2.139.

[4] Ramlin Ramlin, Kamaruddin Kamaruddin, and Faisal Abdaud, "Tinjauan Yuridis Terhadap Putusan Onslag Van Rechtvervolging Terhadap Perkara Penipuan Dan Penggelapan: (Studi Kasus Pengadilan Tinggi Sulawesi Tenggara Nomor: 168/PID/2021/PT KDI)," *Jurnal Hukum Lex Generalis* 6, no. 7 (June 2025): 1–9, https://doi.org/10.56370/jhlg.v6i7.1151.

with analysis through articles on fraud and embezzlement in the Indonesian Criminal Code and articles on buying and selling and leveraging in the BW, and case studies, namely court decisions. The research data was obtained through an in-depth document review of the legal issues discussed.

Discussion

The Concept of *Levering* in Sale and Purchase Transactions and the Principle of Freedom of Contract in the Form of Goods Invoices

A receipt (*nota*) is a document used as evidence of a cash transaction for the purchase of goods or services.[5] A receipt is usually prepared and issued by the seller to the buyer after the transaction has been completed. This document contains information such as the name of the goods, quantity, unit price, and total price. By contrast, an invoice (*faktur*) is a formal document containing detailed information on a sales transaction of goods or services, including the name of the buyer, name of the seller, type and quantity of goods, unit price, total price, and the date of the transaction. Invoices are generally used for transactions involving large quantities or transactions conducted on a credit basis.[6] A purchase order is a document prepared by the buyer for the purpose of purchasing products or property. This document subsequently serves as a transactional instrument, and once it is approved by the seller, it becomes a legally binding sales contract. In this regard, a purchase order may be regarded as having the same legal force as a sales contract, as it records the purchase transaction in detail and constitutes a written contract between the company and the seller or supplier of goods.[7]

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[5] Malinda Latifah, "Keabsahan Nota Kontan Dalam Transaksi Di Bidang Usaha Mikro Kecil Dan Menengah Ditinjau Dari Aspek Pasal 1320 Kitab Undang-Undang Hukum Perdata Tentang Syarat Sah Suatu Perjanjian," *Journal of Law (Jurnal Ilmu Hukum)* 7, no. 2 (2021): 126–38.

[6] Feibiola Palit and Wenny A Ginting, "Analisis Sistem Akuntansi Pengeluaran Kas pada PT. PLN (Persero) Unit Layanan Pelanggan Manado Utara," *Jurnal Mahasiswa Akuntansi Vokasi* 1, no. 1 (September 2025).

[7] Ahmad Ervan Rosidi Kesatriawan et al., "Kedudukan Purchase Order Sebagai Dasar Kewajiban Pembayaran," *Notaire* 5, no. 2 (June 2022): **179–96**, https://doi.org/10.20473/ntr.v5i2.35000.

In addition, an invoice[8] is a file or document that functions as evidence of sale, stating the amount payable by the buyer who is obligated to make payment. An invoice must clearly contain information regarding the name of the company or the buyer and seller, invoice number, description of the goods traded, quantity of goods, unit price, and total price, complete delivery address, bank account number for payment by transfer, delivery date, method of payment, as well as the signature and company stamp.[9] The reporting party or seller relies on the embezzlement provision on the assumption that where goods are purchased under a credit or debt-based payment system, the goods remain the property of the seller even though they have been delivered to the buyer. This constitutes a deviation from the legal concept of *levering* as regulated under Article 1459 BW. The invocation of embezzlement provisions is also based on the view that the goods remain the property of the seller because no agreement has been concluded in accordance with the formal anatomy of a contract, but merely in the form of receipts, goods invoices, purchase orders, invoices, and similar documents.

In determining whether non-performance under a sale and purchase agreement constitutes a civil or criminal matter, judges should not rely solely on jurisprudence but must also possess a proper understanding of the legal concepts governing sale and purchase transactions, so that embezzlement and/or fraud provisions are not applied indiscriminately in a manner that deviates from or contradicts their legal foundations, thereby rendering the case increasingly obscure. This is because, where a seller invokes embezzlement provisions in a breach of contract case on the basis that the goods sold remain the

[8] The strength of an invoice receipt as proof that there has been a sale and purchase of goods between the purchaser of production goods and the distributor as a supplier of production goods. So that the bill of invoice has the strength of evidence that the goods were received by the shop at the price according to the agreement and the distributor holds evidence that the goods have been received and the evidence is still in debt or paid for the payment for the goods. See Rosita Nainggolan, Christian Daniel Hermes, and Humala Sitinjak, "The Strength Of Evidence Of Invoice Bonus As A Debt Binding Agreement," *Legal Brief* 11, no. 5 (2022): **2852–56**, https://doi.org/10.35335/legal.

[9] Silvia Fernanda and Andriyanto Adhi Nugroho, "Invoice Sebagai Perlindungan Hukum Pemasok Jasa Boga Terhadap Konsumen Wanprestasi Pada Pembayaran Berjangka," *Jurnal USM Law Review* 6, no. 1 (April 2023): 191–208, https://doi.org/10.26623/julr.v6i1.6726.

seller's property due to payment being made under a credit or debt-based arrangement, and the court subsequently finds the buyer or defendant guilty, the concept of *levering* under BW becomes distorted. Such reasoning effectively legitimizes a concept of *levering* constructed based on embezzlement provisions, namely that goods purchased on credit or debt remain the property of the seller. This deviation from the concept of *levering* is further aggravated by the disregard of the principle of freedom of contract, which constitutes the foundation for determining the form, content, object, and parties of an agreement.

The similarity between embezzlement and breach of contract lies in the existence of an infringement of rights and the intentional failure to perform what has been agreed, as well as the potential occurrence of an unlawful act in the form of embezzlement of goods under one's control. The distinction, however, is that breach of contract constitutes a form of the debtor's negligence in fulfilling performance in accordance with the agreement with the creditor, whereas embezzlement within a contractual relationship requires the fulfillment of both the element of intent and the actus reus of a criminal offense. In other words, the *mens rea* in the criminal offense of embezzlement, namely intentional conduct with purpose and the formal element of an unlawful act, must be satisfied, together with the fulfillment of all other constituent elements of the offense.[10] The following is a court decision regarding a fraud or embezzlement case that originated from a sales and purchase agreement:

Putusan Pengadilan	*Hasil Putusan Pengadilan*
Decision of the Madiun District Court Number 51/Pid.B/2020/PN.Mjy	This case originated by Herry Sugiarto's purchase of electronic goods by CV.Bhineka in the amount of IDR 364,305,000,00. The purchase were made through three separate transactions-on 6 May, 21 May and 13 June 2019-

[10] Pengki Sumardi, Elwi Danil, and Muhammad Hasbi, "Penegakan Hukum Terhadap Tindak Pidana Penggelapan Dengan Adanya Perbuatan Wanprestasi Dalam Pengadaan Barang (Studi Putusan Pengadilan Negeri Pariaman No.33/Pid.B/2021 Pn.PMN An.Arief Budiman)," *Rio Law Jurnal* 1, no. 2 (2023): 45–50, http://dx.doi.org/10.36355/.v1i2.

	and were documented in the form of goods invoice. Payment was made on a credit or debt basis, as Herry Sugiarto personally knew the owner of CV.Bhineka and had previously purchased goods under the same arrangement devoid of encountering any payment issues. However, Herry Sugiarto argued that his failure to pay on time was due to the fact that the electronic goods he purchased were resold through his business entity, UD.Yanzen, and that such resale was also conducted on a credit-or-debt-based basis, so that when UD.Yanzen 's buyers failed to pay on time, he was likewise unable to make timely payment to CV.Bhineka. CV.Bhineka subsequently filed a criminal complaint for embezzlement, but the court held that the matter did not constitute a criminal case. Consequently, Herry Sugiarto was released by all legal charges *(onslag van alle rechtsvervolging)*
Decision of the Tebing Tinggi District Court Number 74/Pid.B/2019/PN.Tbt	The case began when Bumi, also known as Asiang, had bought goods by PT.Agung Bumi Lestari in the form of rubber bands; PE plastic (plastic for air bubbles), HD plastic (iron-pressure processed plastic) and Asoy plastic (black plastic rope super rubber bands bent straw Aqua cup PP plastic), Pop Ice lid and

	Tissue, and others in the total amount of IDR 226,828,440.00. The payment obligation was recorded in a goods bydrawal receipt (sales invoice). Bumi, also known as Asiang, stated that the goods would be resold and that payment would be made once the goods were successfully sold, under a credit-or-debt-based arrangement. After that, PT.Agung Bumi Lestari gave 30 days since the day of its came the day of purchase for Bumi alias Asiang to pay off everything. On the due date, PT.Agung Bumi Lestari reminded over and again to Bumi or known as Asiang to over to effect payments but only deafening silence. Consequently, PT.Agung Bumi Lestari took the case to the police citing fraudulent deception. The court held that Bumi alias Asiang was proven to have committed the criminal offense of fraud.
Decision of the Pariaman District Court Number 33/Pid.B/2021	This case arose by the construction project of the Pematang Panggang-Kayu Agung Toll Road, undertaken by PT.Waskita Karya, that involved the subcontracting of guardrail procurement to the PT.Triputra Utama Sutra. PT.Triputra Utama Sutra, through its director Arief Budiman, subsequently purchased goods required for the project by PT.Kunango Jantan in

	the amount of IDR 7,263,487,301.00. The contract stipulated that payment would be made inside of the agreed period after the goods were received; however, this obligation was not fulfilled. PT.Kunango Jantan then filled a criminal charge of embezzlement, and the court held that Arief Budiman was proven guilty of the criminal offense of embezzlement.
Decision of the Southeast Sulawesi High Court Number 168/Pid/2021/PT.KDI	This case arose by M.Ikhtiar, also known as Tiar bin Sanusi Kasim, purchasing billboard raw materials by Ilham Iskandar for a total of IDR 94,825,000.00. M.Ikhtiar alias Tiar bin Sanusi Kasim used false identity to persuade Ilham Iskandar in the purchase of the billboard raw materials. The dispute arose due to discrepancies among the payment and the delivery of goods, prompting Ilham Iskandar to report M.Ikhtiar alias Tiar bin Sanusi Kasim to the police on charges of fraud and embezzlement. At the first-instance court, M.Ikhtiar, also known as Tiar bin Sanusi Kasim, was found guilty and subsequently filed an appeal. Ultimately, the High Court acquitted the defendant, holding that the accused was not proven to have committed the criminal acts of fraud or embezzlement.

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Tabel 1

With the existence of an agreement regarding the price (whether paid in full or on credit) and the goods, a sale and purchase agreement had been formed. Once both parties agreed on the price and the goods, a legally valid sale and purchase agreement came into existence. This underscores the principle of consensualism, namely agreement (*consensus*).[11] This is reflected in Article 1458 BW, which provides that a sale and purchase is deemed to have taken place between the parties immediately after they have reached agreement on the goods and the price, even though the goods have not yet been delivered and the price has not yet been paid.

The sale and purchase agreement is embodied in the form of goods invoices/sales invoices/receipts, and similar documents, which constitute an application of the principle of freedom of contract.[12] This principle grants the parties the freedom to regulate their contractual relationship, namely: the freedom to enter into or not to enter into a contract; the freedom to choose the party with whom to contract; the freedom to determine or select the *causa* of the contract; the freedom to determine the object of the contract; the freedom to determine the form of the contract; and the freedom to accept or deviate from statutory provisions of an optional nature.[13] This principle emphasizes that the

[11] R. Subekti, *Aneka Perjanjian* (Bandung: Citra Aditya Bakti, 1995), p 2-3

[12] Paragraph 1337 of the Civil Code, which provides sufficient protection for parties to commercial transactions against the misuse of freedom of contract, is the fundamental basis of justice in Indonesian contract law. This paragraph lays out the boundaries of contract freedom by making it clear that all agreements must have a good reason and not be in conflict with public morals, law, or order. This safeguard is crucial to prevent harm to the less powerful party and to ensure the contractual relationship remains fair. In addition, Paragraph 1337 governs the moral limits of commercial contracts. This paragraph safeguards the integrity of commercial transactions and discourages acts that might harm public faith in the legal and business systems by making sure that agreements cannot be contradictory to morals. These agreements should not include bribery, fraud, or other anti-public interest actions. See Yenny Febrianty et al., "Knitting the Limits of Freedom: Article 1337 of the Civil Law Book and Dynamics of Business Contracts," *Paulus Law Journal* 6, no. 1 (2024): 77–90.

[13] Sutan Remy Sjahdeini, "Kebebasan Berkontrak Dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian Kredit Bank Di Indonesia" (Disertasi, Universitas Indonesia, 1993), https://lontar.ui.ac.id/detail?id=91393.

parties are free to determine the format of their contract, including contracts made in the form of goods invoices, sales invoices, purchase orders, or receipts. Supreme Court Jurisprudence Decision Number 1506 K/Pdt/2002 provides that *"a purchase order signed by both parties who bind themselves constitutes an agreement and therefore has the force of law and is binding upon both parties."* This jurisprudence further affirms the application of the principle of freedom of contract within the scope of sale and purchase agreements, which may be formed in accordance with the intentions and needs of the parties.

The preparation of a purchase order may not always be accompanied by clear stipulations, such as one of the clauses that should ordinarily be included in an agreement, namely a time limit (*fatal termijn*). In such circumstances, if one of the debtor's obligations under the agreement is not fulfilled, a breach of contract (*wanprestasi*) automatically arises.[14] This further affirms that where a sale and purchase agreement is embodied in the form of a purchase order, any failure to make payment constitutes breach of contract (*wanprestasi*) rather than embezzlement, given that the relationship is based on a contractual agreement and the delivery of goods.

With the title (*alas hak*) in the form of a sale and purchase evidenced by a goods invoice or sales invoice, there arises a levering, or transfer of the goods, which constitutes one of the seller's obligations. Article 1457 BW provides that delivery is the transfer of the sold goods into the possession and ownership of the buyer. The validity of the delivery of goods is subject to two conditions:[15]

1. The validity of the title (*titel*) serving as the basis for the *levering*;
2. The *levering* must be carried out by a person who is legally authorized to dispose of the goods (*beschikkingsbevoegd*).

The delivery of goods carried out by the seller in the above legal cases is valid when assessed against the requirements for delivery, namely: (i) the existence of a valid title (*alas hak*) for the *levering*, in the form of a sale and purchase agreement evidenced by a goods invoice, sales invoice, or receipt; and (ii) the delivery being performed by a legally

[14]Ahmad Ervan Rosidi Kesatriawan et al., "Kedudukan Purchase Order Sebagai Dasar Kewajiban Pembayaran," *Notaire* 5, no. 2 (June 2022): **179–96**, https://doi.org/10.20473/ntr.v5i2.35000.

[15] R. Subekti, *Aneka Perjanjian* (Bandung: Citra Aditya Bakti, 1995), p 8-10

authorized person, namely the seller or the owner of the goods. A sale and purchase agreement binds the parties upon the attainment of mutual consent; however, this does not mean that ownership of the goods sold is transferred simultaneously with the formation of the agreement, as the transfer of ownership of the goods requires delivery (*levering*).[16] The *levering* of goods from the seller to the buyer is also followed by the transfer of ownership rights over those goods. Thus, in this context, it is not merely the physical goods that are handed over to the buyer, but also the ownership rights attached to the goods, which were previously vested in the seller and are transferred to the buyer.

If an agreement concerns an object that must be delivered by one party to another, the right over that object arises only once the object has been delivered. Payment of the purchase price plays no role in the transfer of ownership. Even if the buyer has paid the price, if the goods have not yet been delivered, the buyer does not become the owner. Conversely, if the goods have been delivered even though the price has not yet been paid, the buyer already becomes the owner and merely has a debt owed to the seller.[17] Article 1459 of BW states that ownership of the goods sold does not transfer to the buyer as long as delivery has not been carried out in accordance with Articles 612, 613, and 614. The requirements for the validity of *levering* include: (1) the existence of an agreement that gives rise to an obligatoir obligation, (2) the existence of *levering*originating from an agreement of a proprietary (in rem) nature, (3) the existence of a valid title and the authority to dispose on the part of the transferring party, and (4) the existence of good faith.[18] The forms of delivery of goods are divided into two types:[19]

a. Actual delivery (*feitelijke levering*), namely delivery from hand to hand. In the case of movable goods, actual delivery and

[16] Ahmadi Miru, *Hukum Kontrak Dan Perancangan Kontrak*, Cetakan ke-2 (Jakarta: Raja Grafindo Persada, 2008), p 126-127

[17] Wirjono Prodjodikoro, *Azas-Azas Hukum Perjanjian* (Bandung: Mandar Maju, 2000), p 14-15

[18] Muhammad Faisal, "Kepentingan Bezit, Levering, Verjaring, Bezwaring, Dan Beslag Terhadap Pembedaan Benda Dalam Hukum Kebendaan Indonesia," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* 22, no. 1 (October 2022): 217–28, https://doi.org/10.30743/jhk.v22i1.6104.

[19] Sri Soedewi Masjchoen Sofwan, *Hukum Perdata: Hukum Benda* (Yogyakarta: Liberty, 2000), p 24-25

juridical delivery usually occur simultaneously, as regulated in Article 612 BW.

b. Juridical delivery (*juridische levering*). In the case of immovable property, actual delivery is separated from juridical delivery, where juridical delivery requires registration of the object; therefore, actual delivery must be followed by juridical delivery.

The Use of Embezzlement and/or Fraud Provisions in Cases of Breach of Contract in Sale and Purchase Agreements

There is a tendency for disputes related to agreements to be resolved by reporting them to the police; at first glance, such matters appear to be civil cases, yet their resolution is sought through criminal proceedings.[20] Therefore, law enforcement officials must be able to distinguish the respective domains of law, namely, whether an act falls within the realm of civil law or criminal law.[21] The points of intersection between civil law and criminal law arise in various aspects, including the object of the dispute, sanctions and remedies, legal processes, court decisions, coordination among law enforcement agencies, as well as legal principles and doctrines, which can be elaborated in three stages:[22]

[20] Breach of contract may result in contract crimes, including embezzlement, fraud, and breach of fiduciary duty. Factors such as loss and intent, as well as positions of trust, are critical indicators in determining whether a breach of contract should be regarded as a crime. The criminalization of breaching contracts in Indonesia significantly influences conduct, helping to prevent contract violations. However, it is noteworthy that BW lacks specific provisions for terminating contracts due to breaches, resulting in potential ambiguity of legal consequences in contractual agreements. This lack of clarity may lessen the effectiveness of criminalizing contract breaches as a preventative measure because parties might not fully comprehend the legal repercussions. See Harris Arthur Hedar, Dhoni Martien, and Irwan Sapta Putra, "Criminality of Breach of Agreement: Consequences and Legal Remedies," *Russian Law Journal* XI, no. 6 (2023): 722–28.

[21] Amiruddin Amiruddin, Chrisdianto Eko Purnomo, and Rina Khairani Pancaningrum, "Himpitan Konsep Penipuan Dalam Ranah Hukum Pidana Dan Hukum Perdata," *Journal Kompilasi Hukum* 7, no. 2 (October 2022), https://doi.org/10.29303/jkh.v7i2.102.

[22] Selamat Lumban Gaol, "Titik Singgung Hukum Pidana Dan Perdata Dalam Penjatuhan Putusan Lepas Dari Segala Tuntutan Hukum Dalam Tindak Pidana Penggelapan (Studi Putusan Nomor 1073/Pid.B/2020/PN.Jkt.Tim)," Articles, *UNES Law Review* 6, no. 1 (September 2023): 4056–67, https://doi.org/10.31933/unesrev.v6i1.2173.

1. Constatering State (Assessment and Proof). At this stage, the judge must analyze the validity of the events presented before the court. The judge must assess the truth of the events in the criminal case charged against the defendant as set out in the indictment. In addition to the indictment, the fundamental guideline in rendering a criminal verdict is the evidentiary assessment of whether or not the indictment is proven, which materially contains the alleged criminal act committed by the defendant.
2. Qualifying Stage (Classification). At this stage, the judge determines whether the events charged by the public prosecutor against the defendant are proven to be true and subsequently determines whether the elements of a criminal offense are present in the conduct of the perpetrator, both in relation to subjective and objective elements. The judge must be able to qualify whether the proven conduct constitutes a violation of criminal law or merely a violation of civil law. In this qualifying process, the judge can already determine whether there are aspects of civil law in the defendant's conduct and whether there are grounds for the elimination of criminal liability, either in the form of justifying reasons or excusing reasons.
3. Constituting State (Determination). The judge applies the law to the facts that have been qualified at the previous stage by assessing whether there is a causal relationship between those facts and the violation of legal norms in the criminal case. The judge draws a conclusion from the qualified facts and applies the appropriate law to those facts. At this stage, the judge determines which law applies to the qualified events, including determining whether the perpetrator's act fulfills the elements of a criminal offense or does not constitute a criminal act due to the existence of grounds for the elimination of criminal liability, as previously explained, or is clearly classified as a civil case.

To differentiate a criminal act of embezzlement and 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 in the crime of embezzlement is obtained legally, whereas in the crime of fraud, it is obtained illegally. The intention in the crime of embezzlement is deliberation as intent; this kind of intention lies in the matter of time 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 should exist before the transition occurs. 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 the intention to realize the consequences 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.[23]

Fraud as a criminal offense involves using false names, false capacities, deceitful practices, or lies that lead to legal consequences such as surrendering goods, granting credit, or discharging debt. In civil cases that become criminal, these elements must be proven first. Civil fraud aims to manipulate consent by deceiving one party into an agreement through defective consent, which can be annulled. Both civil and criminal fraud share the element of deceit or misrepresentation to mislead and conceal the truth. According to Nieuwenhuis,[24] fraud constitutes a qualified form of mistake. Fraud is deemed to exist when a false impression regarding certain qualities or circumstances is created by the misleading conduct of the opposing party, and such false impression arises from a series of deceptive acts. Meanwhile, according to Herlien Budiono, fraud occurs when a person, with intent, knowledge, and deliberateness, misleads another person, conceals certain facts, provides incorrect information, or employs other forms of deceit.[25] Thus, the emphasis is that fraud in the civil law sphere is primarily directed at a series of deceptive acts intended to induce a

[23] Yonatan et al., "Criminalizing Civil Law Actions of Default into Criminal Acts of Fraud: A Human Rights Perspective," *Yuridika* 39, no. 3 (September 2024): 303–28, https://doi.org/10.20473/ydk.v39i3.51329.

[24] Nieuwenhuis, *Pokok-Pokok Hukum Perikatan*, trans. Djasadin Saragih (Surabaya: Universitas Airlangga, 1985), p 34-35

[25] Herlien Budiono, *Ajaran Umum Hukum Perjanjian dan Penerapannya di bidang Kenotariatan*, Cetakan ke III (Bandung: Citra Aditya Bakti, 2011), p 102-103

person to enter into a contract, whereas in the criminal law sphere it is directed at deceptive acts intended to cause a person to surrender objects or property.

Deceit (*tipu muslihat*), based on the decision of the Arrest of the Hoge Raad dated 30 January 1911, refers to a series of misleading actions capable of creating false pretexts and erroneous impressions, which subsequently compel a person to believe and accept them. Deceit constitutes acts that are physical or tangible in nature, whereas lies are more verbal in character, expressed through statements or words. By contrast, breach of contract is assessed only after the existence of an obligation. Deceit and a series of lies may be directed either at the internal condition of the perpetrator or at external circumstances outside the perpetrator. Meanwhile, a promise always depends on the ability or capacity of the promisor himself, even though such capacity is intended to influence another person to perform or refrain from performing a particular act.[26] Deceit in criminal law involves malicious intent to induce a person to act as desired by the perpetrator, whereas in civil law, deceit often appears as convincing promises that are only fulfilled during contract performance, such as a travel agent promising a four-star hotel and Wi-Fi but delivering a three-star hotel with fewer meals and no Wi-Fi.

The Supreme Court issued a decision (Jurisprudence Number 4/Yur/Pid/2018) which discusses the criteria or elements used to

[26] Alwan Hadiyanto, Emy Hajar Abra, and Linayati Lestari, "Tipu Muslihat dalam Perspektif Hukum Pidana: Analisis Penalaran Yuridis Hakim dalam Menentukan Unsur Penipuan," *Jurnal USM Law Review* 8, no. 2 (2025): 836–48, https://doi.org/10.26623/julr.v8i2.12062.

determine whether an act is more appropriately classified as fraud or as breach of contract (*wanprestasi*),[27] namely as follows:[28]

1. Element of Intent or Negligence. One of the criteria used to assess whether an act constitutes fraud or breach of contract is the presence of intent or negligence on the part of the perpetrator. If the act is committed intentionally, it tends to be classified as fraud. However, if the act occurs due to negligence or carelessness, it is more likely to be classified as a breach of contract.
2. Intention to Fulfill Obligations. In determining whether an act constitutes fraud or breach of contract, the Supreme Court also considers the perpetrator's intention to fulfill the agreed obligations. If the perpetrator had no intention to fulfill those obligations from the outset, the act is more likely to be categorized as fraud.
3. Element of Deceit or Deviation. The Supreme Court also considers whether there is an element of deceit or deviation in

[27] The determining parameters distinguishing breach of contract *(wanprestasi)* from fraud are as follows: (a) Breach of contract *(wanprestasi)* is closely related to an agreement as a legal relationship between individuals. A breach of contract constitutes a violation of law that is created by the parties themselves, whereas fraud is governed by statutory provisions regulating crimes against property. Thus, the parameter for determining breach of contract is the violation of promises or legal rules established by the parties within an individual legal relationship. The parameter for determining the criminal offense of fraud is an act constituting a crime against a person's property, committed through deceit or falsehoods that cause someone to voluntarily surrender goods or other property; (b) Breach of contract is an act that violates a personal obligation arising from a legal relationship created by the parties through an agreement. In contrast, fraud is an unlawful act committed against another person's property; and (c) Breach of contract is grounded in the principle of good faith. This means that the debtor makes efforts to perform the agreed obligation, even if the performance ultimately ends unsuccessfully. By contrast, fraud is driven by malicious intent, which can be seen from the subjective element of the criminal offense of fraud, namely the intent to unlawfully benefit oneself or another person, containing an element of deliberateness rather than mere negligence. See Randi Aritama, "Penipuan Dalam Hukum Pidana Dan Hukum Perdata," *SENTRI: Jurnal Riset Ilmiah* 1, no. 3 (November 2022): 728–36, https://doi.org/10.55681/sentri.v1i3.283.

[28] Tania Winata and Ade Adhari, "Dasar Kriteria Dalam Menentukan Adanya Penipuan Dan Wanprestasi Dalam Yurisprudensi Mahkamah Agung Nomor No.4/Yur/Pid/2018," Articles, *UNES Law Review* 6, no. 4 (June 2024): 10643–50, https://doi.org/10.31933/unesrev.v6i4.2026.

the actions carried out by the perpetrator. If there is evidence that the perpetrator acted with the intent to mislead or deceive another party, the act will more likely be classified as fraud.

4. Resulting Losses. In assessing whether an act constitutes fraud or breach of contract, the Supreme Court also considers the extent of losses incurred as a result of the act. If the act causes significant losses to another party, it is more likely to be categorized as fraud.
5. Pattern or Scheme. The Supreme Court also considers whether the actions carried out by the perpetrator form part of a pattern or scheme designed to obtain unlawful benefits. If there is evidence that the actions are part of a well-organized scheme or plan, they are more likely to be classified as fraud.
6. Violation of the Agreement. If the perpetrator's actions violate an agreement that has been mutually agreed upon, this also becomes a consideration in determining whether the act constitutes fraud or breach of contract. If the perpetrator acts contrary to the agreement that has been made, the act is more likely to be categorized as a breach of contract.
7. Additional Evidence. In addition, the Supreme Court also considers additional evidence that supports or refutes the claim that an act constitutes fraud or breach of contract. Such additional evidence may include documentary evidence, witness testimony, or other physical evidence that can provide a clearer picture of the actions carried out by the perpetrator.

The application of fraud provisions in sales transactions is based on the assumption that the deceit employed by the buyer causes the seller to surrender the goods without reservation, where the seller is convinced that the buyer will make payment as agreed. Furthermore, the agreement that forms the basis of the contract is concluded through fraud, for example, in cases of fraudulent investment schemes in which investors are promised high returns, such that, through various deceptive practices, the investors are induced to invest. When the promised returns are not provided or paid, this situation no longer constitutes merely a breach of contract but may also amount to the criminal offense of fraud, because it fulfills the two benchmarks previously mentioned, namely the invalidity of the agreement that was made and the existence of bad faith from the outset of the agreement

(civil law), as well as fulfilling the elements of the criminal offense of fraud (criminal law). This demonstrates that the deceived party may have two options in relation to the fraud suffered, namely, to cancel the agreement or to file a breach of contract claim (if the agreement is not canceled), and to pursue criminal charges.

Specifically in the case of Herry Sugiarto against CV Bhineka in the Madiun District Court Decision Number 51/Pid.B/2020/PN.Mjy, due to the long-standing business relationship that had been established, a high level of trust arose. In contract law, there is the principle of trust, which constitutes one of the fundamental principles in the formation of agreements, as trust is deemed capable of creating confidence among the parties that the agreement will be performed by those who entered into it. Therefore, the parties must first cultivate mutual trust between themselves, believing that each party will fulfill the promises agreed upon or perform their obligations in the future. Contractual legal acts are realized through the meeting of wills expressed by the parties, thereby giving rise to consensus, which serves as the primary foundation for the formation of an agreement.[29]

In invoking the offense of fraud, apart from the use of a false identity, there must also be deceit or a series of lies intended to induce another person to act. In the case of Herry Sugiarto, CV Bhineka argued that Herry Sugiarto had persuaded and promised that he would fully pay for the goods purchased. Statements containing promises to pay and similar assurances are, however, commonplace and customary in commercial practice. A sale and purchase agreement based on trust with respect to payment, followed by the buyer's inability to pay at maturity, cannot properly be characterized as fraud, as such a situation falls within the realm of civil law. This position is reinforced by Supreme Court Jurisprudence No. 39/K/Pid/1984, whose legal principle affirms that the legal relationship between the defendant and the witness constituted a civil relationship in the form of a sale and purchase agreement with a one-month payment term, and therefore could not be construed as the criminal offense of fraud. The Herry Sugiarto case is distinguishable from the case of Bumi alias Asiong against PT Agung Bumi Lestari in Decision of the Tebing Tinggi District Court Number

[29] Syaifuddin, Muhammad, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: Mandar Maju, 2012), hal 47-49

74/Pid.B/2019/PN.Tbt, which was proven to fulfill the elements of the criminal offense of fraud because a false identity was used in the transaction, thereby clearly demonstrating the existence of prior bad faith.

Conversely, the criminal offense of embezzlement in the context of a sale and purchase agreement requires the fulfillment of both the element of intent (*mens rea*) and the element of the criminal act of embezzlement (*actus reus*). This means that the malicious intent inherent in embezzlement, namely, intentional conduct with a specific purpose, combined with a formally unlawful act, must be present, along with the fulfillment of the material elements of the offense of embezzlement. Accordingly, only where both actus reus and *mens rea* are established within a contractual relationship may criminal law enforcement be applied. For example, where A and B enter into a deposit agreement under which A entrusts goods to B, and B later claims that the entrusted goods were stolen while in fact intending to appropriate them for himself, such conduct fulfills both the actus reus and *mens rea* of embezzlement and may therefore properly give rise to criminal liability.[30]

Different benchmarks apply to the invocation of the offense of embezzlement, as reflected in the statutory formulation of embezzlement, namely, "to unlawfully appropriate an item belonging to another person that is under one's control." In this context, the matter still cannot properly be classified as a criminal case, as it is grounded in the concept of levering. The emphasis of this provision lies in the phrase "belonging to another person," whereas goods that have been sold and delivered to the buyer are no longer the property of the seller, even if payment has not yet been made. If the seller invokes the offense of embezzlement, this creates the impression that the goods already delivered remain the property of the seller while merely being under the buyer's control. When a judge then convicts the buyer or defendant of embezzlement, this results in a normative conflict between Article 372 of the Indonesian Criminal Code and Article 1459 BW. Therefore, in principle, a seller cannot invoke the offense of embezzlement for the non-performance of obligations under a sale and purchase agreement.

[30] Telaumbanua et al., "Tuntutan Tindak Pidana Penggelapan Terhadap Perbuatan Wanprestasi Dalam Hukum Perdata (Studi Putusan Pengadilan Negeri Tebing Tinggi No. 74/Pid.B/2019/Pn.Tbt Tertanggal 28 Mei 2019)", 301–9

In practice, however, judges have applied the embezzlement provision in such cases. This demonstrates the conceptual confusion between levering and embezzlement, which leads to deviations and misconceptions regarding the legal concept of sale and purchase, particularly in relation to movable property. In several cases discussed above, it is evident that Herry Sugiarto, Arief Budiman, and M. Ikhtiar alias Tiar bin Sanusi Kasim were charged with the criminal offense of embezzlement, even though the goods had already been delivered to them. Consequently, the elements of embezzlement should not have been fulfilled, as the goods were no longer the property of the seller but had become the property of the buyer pursuant to the concept of levering in sale and purchase transactions. Of these three cases, only Arief Budiman was ultimately found guilty of embezzlement, while Herry Sugiarto and M. Ikhtiar alias Tiar bin Sanusi Kasim were acquitted, with M. Ikhtiar alias Tiar bin Sanusi Kasim obtaining his acquittal after filing an appeal.

The criminal offense of embezzlement is frequently alleged in disputes over rights that result in the non-performance of obligations under an agreed contract. The subjective element of embezzlement in the form of "intent" means that the defendant intentionally, with awareness and purpose, appropriates an item belonging to another person that is under his control as an unlawful act, namely an act contrary to legal obligations or to the rights of another person. Meanwhile, the subjective element of "unlawfulness" relates to the reprehensible or prohibited nature of a particular act, or to the characterization of the illegality of an act or intent. The element of "appropriating", according to Supreme Court Jurisprudence No. 69K/Kr/1959, means exercising control over an object in a manner contrary to the nature of the right held over that object, which does not necessarily entail personal benefit to the perpetrator. The element of "an item" refers to tangible and/or movable property that generally has economic value and thus cannot apply to intangible or immovable objects. The element of "wholly or partly belonging to another person" requires that the object be owned wholly or partially by another person; therefore, objects without an owner cannot constitute the object of embezzlement. Finally, the element of "under one's control not as a result of a crime" indicates that for an object to be considered as being under one's control, it is not necessary for the person to physically

possess the object; control may also be exercised indirectly through another person.[31]

In the law of sale and purchase, the goods traded are movable property, and therefore the delivery effected is actual (physical) delivery, which signifies the transfer of ownership of the goods from the seller to the buyer, even if the purchase price has not yet been paid. Accordingly, the imposition of the criminal offense of embezzlement in several of the cases discussed above, such as the cases of Herry Sugiarto, Arief Budiman, and M. Ikhtiar alias Tiar bin Sanusi Kasim, is considered inappropriate, as it deviates from the rules of sale and purchase under BW concerning levering.

Supreme Court Decision No. 39/K/Pid/1984 affirms that the legal relationship arising from a sale and purchase agreement cannot be interpreted as the criminal offense of fraud, a principle which by analogy also applies to the offense of embezzlement. Fundamentally, the buyers who became defendants in the aforementioned cases committed breach of contract as regulated under Article 1243 BW, which recognizes three forms of breach of contract, namely: (1) failure to perform the obligation at all; (2) performance of the obligation, but not as agreed; and (3) performance of the obligation, but late. When comparing the elements of breach of contract with those of the criminal offense of embezzlement, it is evident that the elements fulfilled are those of breach of contract, since one of the essential elements of embezzlement—namely, "appropriating goods wholly or partly belonging to another person"—is not fulfilled. In criminal law, a person may only be deemed to have committed a criminal offense if all elements of the offense as stipulated in the relevant provision are fulfilled. Consequently, if one element is not fulfilled, the person cannot be held to have committed the offense.

In addition to the offense of embezzlement, in cases of non-performance under a sale and purchase agreement, the aggrieved party frequently also invokes the offense of fraud, as regulated under Article

[31] Erasmus A. T. Napitupulu and Iftitahsari, eds., "'Mewanti-Wanti Malicious Prosecution: Perkara Perdata Jangan Dipidana' Amicus Curiae (Sahabat Pengadilan) Untuk Majelis Hakim Pengadilan Negeri Jakarta Selatan Pada Perkara Pidana Nomor 534/Pid.B/2024/PN JKT.SEL Terdakwa Atas Nama Kenny Wisha Sonda," with Wahyu Aji Ramadan and Chandra Silaen, Institute for Criminal Justice Reform, December 2024, https://icjr.or.id/wp-content/uploads/2024/12/Final-_-Amicus-Curiae-Kenny-Wisha-Sonda.pdf.

378 of the Indonesian Criminal Code, which provides that any person who, with intent to unlawfully benefit himself or another, by using a false name or false capacity, or by means of deceit or a series of lies, induces another person to deliver an item wholly or partly to him, commits fraud. Several items of jurisprudence that may serve as guidance regarding the use of the offenses of embezzlement and/or fraud in civil disputes may be set out as follows:

1. Court Decision Number 598/Pid/2016: the defendant was proven to have borrowed money from the witness Wa Ode Ikra binti La Ode Mera (the victim witness) in the amount of Rp 4,750,000.00. However, the defendant did not repay the debt to the victim witness in accordance with the agreed time, despite having been repeatedly requested to do so. Therefore, this constitutes a civil legal relationship and not a criminal act, such that its resolution is predominantly within the realm of civil law, and accordingly, the defendant must be released from all legal charges. **The Supreme Court has consistently held that if a person fails to fulfill obligations under an agreement, where the agreement was lawfully made and not based on bad faith** (bold emphasis by the author), then such conduct does not constitute fraud, but rather a civil law matter.
2. Court Decision Number 1357K/Pid/2015: the Supreme Court held that the legal relationship established between the defendants and the victim witness was a civil relationship in the form of a debt relationship secured by a plot of plantation land or a house owned by the defendants, and that in such legal relationship the defendants committed a breach of promise or default by failing to hand over the plantation land or house to the victim witness. The acts of the defendants do not constitute a criminal offense; rather, they are civil in nature, the resolution of which may be pursued through civil law.
3. Court Decision Number 1336K/Pid/2016: that if at a later time the witness Apriadi is unable to repay the loan to the victim witness, among other reasons, because the defendant has also not yet repaid his loan to the witness Apriadi, then the matter constitutes and falls within the

realm of civil law, which juridically must be resolved before a civil court judge.

4. Court Decision Number 902K/Pid/2017: that the case a quo originated from a loan transaction involving a sum of money between the defendant and the victim; however, when the agreed maturity date arrived, the defendant was unable to repay the loan, such that it constitutes a debt and falls within the civil law domain, and therefore, its resolution must proceed through civil channels.

Based on these jurisprudences, it can be concluded and affirmed that breach of contract in an agreement must not become a criminal case. The benchmark for determining whether a matter falls within the civil law domain, namely the occurrence of breach of contract in an agreement, is whether the agreement was lawfully made in accordance with Article 1320 BW and whether there is no bad faith. Therefore, if an agreement is achieved with a defect of consent in the form of fraud and can be suspected to involve bad faith, then what was initially a civil matter may become a criminal matter. This is as affirmed in Jurisprudence of Court Decision Number 1689K/Pid/2015, in which the defendant's cassation argument stating that the defendant's case was not a criminal case but rather a civil debt relationship between the defendant and Astrindo Travel could not be justified, because in ordering the tickets the defendant had used a false name or false position; a civil legal relationship that is not based on honesty and is accompanied by bad faith to cause loss constitutes fraud. Another decision affirming the same principle is Court Decision Number 366K/Pid/2016, which states that an agreement based on bad faith or malicious intent to harm another person is not a breach of contract but fraud.

Then, to what extent can the provisions on embezzlement and/or fraud be applied in civil cases in the form of breach of contract?[32] For

[32] Theories and views of scholars are very important for understanding acts of fraud and breach of contract (wanprestasi), especially in the context of criminal law, and can be presented as follows: (1) According to Soerjono Soekanto, fraud is an act by a person with the intention of obtaining something from that person or another person through deceit or promises that cannot be fulfilled or false explanations, whereas breach of contract (wanprestasi) is the inability or failure of a person to fulfill obligations that have been previously agreed upon; (2) According to Mahfud MD, the criminal act of fraud and breach of contract both cause losses to other parties, but the

acts of embezzlement, they cannot be applied in cases of breach of contract, especially in relation to sale and purchase transactions, so that they remain within the realm of civil law, due to the existence of the concept of *levering*, which causes the criminal elements not to be fulfilled. As for acts of fraud, these are placed on the existence of malicious intent (*mens rea*) as recognized in criminal law, or the existence of bad faith as recognized in civil law, and the validity of an agreement. Fraud does not exist solely within the criminal realm but also within the civil realm. Nevertheless, the concept of fraud in civil and criminal law has its own distinct characteristics, where in the civil realm, fraud is a form of deceit employed by one of the parties, such as providing a misleading description, obscuring, or concealing the true facts, thereby causing the other party to sign the agreement when, had they known of the deceit, they would not have signed it (Article 1328 BW), whereas fraud in the criminal realm is more directed toward an act of deceiving or acting dishonestly with respect to a person's property, such that the person then relinquishes it not of their own free will but due to deception.[33] Good faith can be used as a principle to distinguish

two differ in the manner in which the perpetrator carries out the act. Fraud is committed by deceiving or misleading others in order to obtain something, whereas breach of contract is committed by failing to fulfill obligations that have been agreed upon; (3) According to Hikmahanto Juwana, the relationship between the criminal act of fraud and breach of contract is that a party committing a breach of contract may be subject to criminal sanctions for fraud if, in committing the breach of contract, they also commit the criminal act of fraud. In this case, the breach of contract becomes part of the elements of fraud committed by the perpetrator. See Khairul Umam et al., "Analisis Yuridis Mengenai Itikad Buruk Dalam Tindak Pidana Penipuan Dan Hubungannya Dengan Wanprestasi Dalam Sengketa Hutang Piutang," *El-Mujtama: Jurnal Pengabdian Masyarakat* 5, no. 1 (January 2025), 515–23, https://doi.org/10.47467/elmujtama.v5i1.6451.

[33] According to Article 224 of the Criminal Law of the People's Republic of China, contract fraud refers to the act of a party deliberately concealing the truth or fabricating facts during the process of signing or performing a contract, causing the other party to have a wrong understanding and enter a contract or perform contractual obligations with it. This kind of behavior not only violates the principle of good faith in civil law but also, when it reaches a certain degree of severity, will violate criminal law and constitute the crime of contract fraud. The constitutive elements of the crime of contract fraudulence mainly include the following aspects: main elements, the subject of this crime is the general subject, that is, any natural person or unit with criminal responsibility capacity can become the criminal subject of this crime; subjective element, the actor must intentionally, that is, knowing that his or her act

between criminal fraud cases and breach of contract based on several factors, namely:[34]

1. Good faith. Emphasizes the good intention or good faith of the party in performing the contract.

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will cause the other party to have a wrong understanding and hoping to obtain illegal benefits through this wrong understanding. If the actor only causes the other party to misunderstand due to negligence or overconfidence, this crime cannot be constituted; objective elements, this crime infringes upon the socialist market economics order and the property rights and interests of others. Specifically, it damages the economic interests of the other party in the form of a contract; objective requirements, during the process of signing and performing the contract, the actor adopts deceptive means, such as fictionalizing facts and concealing the truth, etc, causing the other party to fall into a wrong understanding and making a property disposition based on this wrong understanding, resulting in economic losses for the victimized party. See Zhenyang Jin, "The Ambiguous Area Between Contract Breach and Contract Fraud," in *Proceedings of the 2025 11th International Conference on Humanities and Social Science Research (ICHSSR 2025)*, Advances in Social Science, Education and Humanities Research (Paris: Atlantis Press SARL, 2025), 945:351–62, https://doi.org/10.2991/978-2-38476-440-2_41.

The author states that when compared with the requirements that serve as benchmarks for determining when fraud in the civil law sphere becomes a criminal matter in Indonesia, it appears that regulations in China are more specific in elaborating civil fraud that may violate criminal law, by using four benchmarks, namely: the subject (a perpetrator who intentionally realizes that their behavior can cause another party to have a mistaken understanding and then the perpetrator obtains benefits contrary to the law from that misunderstanding, where one important emphasis is that if the perpetrator causes misunderstanding due to negligence or excessive self-confidence, then it does not constitute fraud under criminal law), the object (causing harm to economic interests), objective requirements (in the signing and performance of a contract, the perpetrator uses deceptive means such as concealing the true facts which ultimately cause economic loss to the victim), whereas in Indonesia it is based on only two requirements, namely: whether the agreement is made validly or not and the absence of bad faith. Basically, the evidentiary process in Indonesia is simpler, where the validity of an agreement depends on Article 1320 BW, in which fraud is one of the defects of consent, so that if it is proven that the agreement contains a defect of consent in its formation, then the agreement is invalid and, which should be voidable, may give rise to a criminal charge of fraud, whereas bad faith is reflected in the behavior of the perpetrator both at the time of contract formation and during the performance of the contract.

[34] Mohammad Ardhi Perdana and Fikrotul Jadidah, "Good Faith Sebagai Penentu Dalam Pemenuhan Unsur Tindak Pidana Penipuan Dan Wanprestasi Dalam Putusan Perkara Nomor 38/Pdt.G/2024/PN Slw," *HUMANIORUM* 3, no. 2 (April 2025): 154–59, https://doi.org/10.37010/hmr.v3i2.96.

2. Contractual obligations. The existence of obligations inherent in the contract between the parties involved.
3. Evidentiary strength. In fraud cases, it is important to have concrete evidence supporting the existence of deceitful acts and the intent to mislead another party, whereas breach of contract places greater emphasis on proving that the party failed to fulfill contractual obligations without any element of intent or malicious intent.
4. Impact of losses. Fraud often results in significant financial and psychological losses for the victim. In contrast, in breach of contract cases, losses tend to relate to financial dissatisfaction arising from one party's inability to fulfill its obligations under the contract.

By using these factors to determine good faith, law enforcement officers can more easily determine whether the act committed constitutes a breach of contract or a criminal offense of embezzlement and/or fraud, because basically both civil law and criminal law recognize these terms, namely when a person from the outset enters into a contract in bad faith and when a person has malicious intent to commit a criminal act. In practice, sellers who bring breach of contract cases into criminal proceedings do not automatically obtain compensation for the acts committed by the buyer. This is because criminal and civil cases have different mechanisms, where criminal law focuses on the imposition of penal sanctions, while civil law focuses on the awarding of compensation. If the seller files criminal charges for embezzlement and/or fraud and seeks to obtain compensation from the perpetrator, then, based on Article 98 of the Criminal Procedure Code, the seller may file a civil claim for compensation within the criminal proceedings, which must be submitted to the judge no later than before the public prosecutor submits the criminal indictment. The filing of a compensation claim within criminal proceedings in the cases previously discussed was not carried out by the seller or the victim, so they did not obtain compensation for the acts committed by the defendant, not to mention situations where the judge decides that the alleged criminal act is not proven or that the case does not fall within the criminal domain, resulting in the defendant being released from all legal charges. Therefore, from the outset, the seller should file a civil lawsuit in order to provide greater legal certainty in the judgment, where in the cases

mentioned above it is already clear and evident that the buyer has committed a breach of contract.

According to Ruslan Saleh, there is no point in holding a defendant criminally liable for his actions if the actions themselves are not unlawful, so it can also be said that there must first be certainty regarding the existence of a criminal act, and then all elements of fault must also be connected to the criminal act committed. For fault to exist that results in the defendant being punished, the following must be present: (1) committing a criminal act; (2) having the capacity to be held responsible; (3) acting with intent or negligence; and (4) the absence of justifying or excusing grounds. To determine whether a case falls within the civil or criminal domain, it is first necessary to examine which domain's elements are fulfilled. A fundamental and clear difference between breach of contract and the criminal offense of fraud is intent; if from the outset the agreement is accompanied by malicious intent and deceit to obtain a debt or to eliminate a debt, then this falls within the elements of the criminal offense of fraud. Conversely, if an agreement is basically accompanied by good faith but there are circumstances that cause the debtor not to perform the agreement, then this can be classified as a breach of contract.[35]

In jurisprudence concerning the overlap between civil and criminal cases, judges have carried out legal development by establishing two requirements for a civil case to become a criminal case, as previously described. These requirements can serve as benchmarks for all judges to more easily distinguish between cases of breach of contract and embezzlement and/or fraud. By applying these benchmarks, there will no longer be parties who transform civil cases into criminal cases, because clear boundaries have been established in this regard, and there will be uniformity of decisions among judges. The imposition of a guilty verdict for the criminal offense of embezzlement in sale and purchase cases indicates that the judge does not properly understand the concept of levering and deviates from this legal concept. If judges themselves do not understand the concept of levering and assume that goods that have been delivered remain the property of the seller as long as the price has not been paid, this constitutes a deviation from a misleading legal

[35] Satiah Satiah and Riska Ari Amalia, "Kajian Tentang Wanprestasi Dalam Hubungan Perjanjian," *JATISWARA* 36, no. 2 (August 2021): 126–39, https://doi.org/10.29303/jtsw.v36i2.280.

concept and will create a negative precedent. Therefore, in breach of contract cases linked to the criminal offense of fraud, judges should apply the two requirements in jurisprudence as benchmarks to understand a case, whereas in breach of contract cases linked to the criminal offense of embezzlement, judges should understand civil law concepts in order to draw a clear boundary between civil cases and whether or not the elements of a criminal act are fulfilled.

Conclusion/Concluding Remarks

In the practice of sales and purchase agreements, there remains a lack of clarity in distinguishing between civil and criminal legal instruments. A buyer's failure to fulfill contractual obligations is often classified as embezzlement and/or fraud by the seller. However, conceptually, the element of embezzlement is not met in this context because ownership of the goods has transferred to the buyer upon delivery, thus preventing unlawful control over another person's property. Therefore, default cannot be automatically constructed as embezzlement. In the case of fraud, its application can only be justified if all elements of the crime are met, particularly the existence of deception or the use of a false identity that reflects malicious intent *(mens rea)*. This differs from fraud in the civil realm, which places more emphasis on misrepresentation or concealment of material facts without requiring malicious intent as a primary element. This lack of precision in distinguishing between the two legal regimes is further reinforced by judicial practice, which continues to conflate civil disputes with criminal cases. This situation demonstrates the need for law enforcement officials, particularly judges, to have a comprehensive understanding of the basic concepts of contract law to prevent deviations from civil law principles.

Although there is existing jurisprudence providing clear guidelines, including Supreme Court Jurisprudence Number 4/Yur/Pid/2018, which defines the boundary between breach of contract and fraud, its implementation in practice remains inconsistent. This jurisprudence emphasizes that criminal qualifications can only be applied if there is an invalidity of the agreement or bad faith from the outset. Nevertheless, many breach of contract cases are still processed as criminal offenses, demonstrating a failure to properly apply jurisprudential guidelines. Furthermore, these deviations reflect a chain of errors in the law

enforcement system, starting with the reporting party's strategy of criminalizing civil disputes, continuing through law enforcement officials during the investigation and prosecution stages, and ultimately, the judge's decision. Therefore, jurisprudence can no longer be positioned merely as a persuasive source but must serve as a reference and be implemented consistently. By applying the correct legal concept and consistency in the use of jurisprudence, the boundaries between civil and criminal liability in sales and purchase agreements can be more clearly defined, so that the potential for misuse of criminal instruments in contractual disputes can be minimized.

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