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Civil and Criminal Liability Arising from Breach of Contract and Sexual Misconduct: An Indonesian Legal Perspective

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Abstract

Decision of the Honorary Council of Election Organizers (DKPP) Number 90-PKE-DKPP/V/2024 has shocked the public, because Hasyim Asy'ari was proven to have violated the code of ethics and was dismissed from his position as Chairman of the General Election Commission (KPU). In the verdict, there are facts that Hasyim Asy'ari has also entered into a contractual relationship to give something, do something and not do something, giving birth to rights and obligations. However, the contractual relationship was confirmed in the form of a statement letter. Prior to the contractual relationship, Hasyim Asy'ari had also had sexual relations with a woman who was not his wife at the Van der Valk Hotel, Amsterdam, during a business trip to the Dutch. Therefore, the research is to analyze whether or not Hasyim Asy'ari can be held liability for breach of promise for the contractual relationship he made and to analyze whether or not he can be held responsibility for the sexual relationship he committed. This research is a legal research that uses statute, concept, case and comparison approaches. The results show: first, the contractual relationship made in the form of a statement letter remains valid, so Hasyim Asy'ari can be held liability for breach of promise. Second, based on the territorial principle, Hasyim Asy'ari can be held responsibility and can be found guilty of committing a criminal act as referred to in Article 242 or 243 the Dutch Criminal Code. Based on the active national principle, Hasyim Asy'ari can be held responsibility and can be found guilty of committing a criminal act as referred to in Article 285 the Indonesian Criminal Code.

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Introduction

The characteristics of the branches of power tend to be aggressive and expansionist. This differs from the law, which tends to be compromising, peaceful, and characterized by agreements in social and political life.[1] Therefore, a legal system has been developed to balance such aggressive and expansionist power in order to maintain a balance between individuals and groups in the distribution of rights and privileges among them.[2] This is where the essential function of law lies, namely, to prevent social disintegration and protect social life from serious disturbances,[3] whether caused by individuals or by those exercising power.

Preventive as well as repressive legal protection against serious disturbances committed by individuals or those exercising power is conceptualized through various legal institutions, including laws that limit power as an embodiment of the rule of law or rule of ethics, which are currently frequently emphasized by the Constitutional Court through its landmark decisions, namely, by imposing certain sanctions, both legal and ethical. Indeed, to ensure that their application is as concrete as the enforcement of legal rules, ethics are considered necessary to be formalized in the form of a code of ethics. Certain legal professions organized within the branches of state power have professional codes of ethics established and accepted by their respective legal professional communities as guidelines for those professions concerning prescribed conduct, while simultaneously ensuring the moral quality of the professions in the eyes of society.[4] It cannot be denied that the binding force of a professional code of ethics originates from the professional community itself, and its enforcement is likewise carried out by that community.[5]

Law and ethics in the exercise of governmental power are indeed inseparable, which has ultimately led to the development of codes of ethics and ethical infrastructure (institutions), both within the legislative, executive, and judicial branches of power, as well as within other independent institutions or authorities.[6] One example is the establishment of the Election Organizer Ethics Council (hereinafter referred to as DKPP), which is responsible for handling violations of the code of ethics committed by election

[1] Peter Mahmud Marzuki. (2008). Pengantar Ilmu Hukum. Jakarta: Kencana. [76].
[2] *Ibid.*
[3] *Ibid.*
[4] Serlika Aprita. (2020). *Etika Profesi Hukum.* Bandung: Refika Aditama. [79].
[5] Peter Mahmud Marzuki, *Op., cit*. [85-86].
[6] Jimly Asshiddiqie. (2015). *Penguatan Sistem Pemerintahan dan Peradilan.* Jakarta Timur: Sinar Grafika. [174].

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organizers, whether by the chairperson concurrently serving as a member or by members of the General Elections Commission (hereinafter referred to as KPU), or by the chairperson concurrently serving as a member or by members of the Election Supervisory Agency (hereinafter referred to as Bawaslu). The establishment of commissions or institutions responsible for enforcing codes of ethics, whether permanent or ad hoc, reflects the growing awareness among humankind of the importance of a system of professional ethics.[7]

In principle, election organizers, namely DKPP, Bawaslu, and KPU, in carrying out a series of electoral stages and exercising their rights and authority, must comply with the rule of law and the rule of ethics. The principle of not abusing rights and authority is a universally applicable principle embraced by civilized nations that uphold the supremacy of law and the supremacy of ethics. Indeed, an ancient legal maxim states, "neminem lædit qui suo iure utitur," meaning that no one is harmed by the exercise of a right. This maxim was subsequently developed to mean that every exercise of rights or authority constitutes an act that must comply with the law and must not violate the law.[8] Certainly, election organizers who have taken an oath or made a pledge according to their respective religions or beliefs before assuming office would be highly unlikely to abuse their rights and authority, provided that they fear Almighty God.

However, DKPP Decision Number 90-PKE-DKPP/V/2024 has attracted public attention because the Chairperson of KPU, Hasyim Asy'ari, was permanently dismissed from his position on the grounds that he was proven to have violated the code of ethics and guidelines for the conduct of election organizers.[9] Based on the facts and reasons underlying the dismissal of the KPU Chairperson from his position as set out in the DKPP decision, the KPU Chairperson was proven to have targeted Cindra Aditi Tejakinkin (hereinafter referred to as CAT), who was a member of the Overseas Election Committee (hereinafter referred to as PPLN) in The Hague, the Netherlands, by giving her special treatment from the outset. This began with revising a KPU Regulation that initially prohibited marriage, unregistered religious marriage, and cohabitation without a legally valid marriage between election organizers

[7] Seseorang dapat dikatakan profesional memerlukan tiga hal, yaitu *knowledge, skill*, dan *ethics,* sehingga seseorang yang tidak memiliki salah satu diantara ketiganya tidak dapat dikatakan profesional. Lawrence Friedman dalam Peter Mahmud Marzuki. (2005). *Penelitian Hukum*. Jakarta: Kencana. [14].

[8] Peter Mahmud Marzuki, *Op., cit*. [155].

[9] Kode etik dan pedoman perilaku yang dilanggar diantaranya seperti: (1) tidak menjaga integritas dan profesionalitas penyelenggara pemilu; (2) menyisipkan kepentingan pribadi dalam rangkaian penyelenggaraan pemilu; (3) tidak menempatkan sesuatu sesuai hak dan kewajibannya; tidak memelihara dan menjaga kehormatan penyelenggara pemilu; (4) tidak mencegah penyalahgunaan tugas, wewenang, dan jabatan. Lihat Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [63-64].

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during their terms of office, which was subsequently amended to prohibit only being in a marital relationship with another election organizer. This was intended to establish a working relationship that ultimately served as a means of inserting his personal interests in the form of fulfilling his sexual desires toward CAT under the pretext of an official trip to the Netherlands.[10] Therefore, there are at least 2 (two) important facts in DKPP Decision Number 90-PKE-DKPP/V/2024 that give rise to the legal issues to be addressed in this research.

First, after Hasyim Asy'ari fulfilled his sexual desires toward CAT, on January 2, 2024, there was also evidence of a contractual relationship between Hasyim Asy'ari and CAT, who had become the target of the gratification of his sexual desires. Several principal terms of the contractual relationship included the following: Hasyim Asy'ari "committed" to arranging the transfer of ownership of an apartment into CAT's name; Hasyim Asy'ari would provide Rp. 30,000,000 once a month to cover accommodation expenses for travel between Indonesia and the Netherlands and fulfill the need for meals at restaurants once a week; and if these commitments and other commitments were not fulfilled, Hasyim Asy'ari would be obliged to pay CAT a penalty of Rp. 4,000,000,000, payable in installments over a period of 4 (four) years.[11] Thus, the contractual clauses mentioned above, when examined in relation to the requirements for the validity of an agreement as stipulated in Article 1320 of the Indonesian Burgerlijk Wetboek, have fulfilled those requirements, including agreement,[12] legal capacity,[13] a certain subject

[10] Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [48-49].

[11] Lihat Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [7 dan 57].

[12] Kesepakatan dianggap terjadi apabila terjadi penawaran dan penerimaan oleh para pihak. Pernyataan kehendak disepakatinya suatu perjanjian harus dinyatakan secara tegas. Namun kehendak yang dimaksud dapat dilakukan dengan tingkah laku atau hal-hal lain yang menyatakan kehendak. Dalam Agus Yudha Hernoko. (2010). *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial*. Jakarta: Kencana. [162]. Dalam peristiwa ini penawaran oleh CAT diterima oleh Hasyim Asy'ari dengan ditandatanganinya surat oleh Hasyim Asya'ari sendiri dengan materai Rp. 10.000. Lihat Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [7].

[13] Berdasarkan Pasal 21 ayat (1) Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu, syarat menjadi anggota KPU diantaranya sehat jasmani dan rohani berusia paling rendah 40 (empat puluh) tahun. Sedangkan berdasarkan Pasal 3 Peraturan KPU Nomor 12 Tahun 2013, syarat menjadi anggota PPLN diantaranya sehat jasmani dan rohani dan berusia paling rendah 25 (dua puluh lima) tahun. Dengan demikian Hasyim Asy'ari selaku ketua KPU dan merangkap Anggota KPU dan CAT sebagai anggota PPLN dipastikan memenuhi syarat kecakapan secara usia dan tidak berada dalam pengampuan.

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matter,[14] and a lawful cause.[15] However, the problem is that these commitments were only affirmed in the form of a written statement, which constitutes a unilateral legal act rather than a legal act involving both parties.

Second, there is also evidence of the concrete manifestation of the reprehensible act of fulfilling sexual desires as previously described. On October 3, 2023, Hasyim Asy'ari conducted a technical guidance session (Bimtek) on the implementation of the 2024 elections in Amsterdam, the Netherlands, where he delivered remarks and officially opened the technical guidance event. On the same date, CAT was contacted by Hasyim Asy'ari and asked to come to the Van der Valk Hotel in Amsterdam, where Hasyim Asy'ari was staying. When CAT arrived at the hotel where Hasyim Asy'ari was staying, the two engaged in conversation in the living room of Hasyim Asy'ari's hotel room. During the conversation, Hasyim Asy'ari persuaded CAT to engage in sexual intercourse, but CAT refused. However, Hasyim Asy'ari continued to force her to engage in sexual intercourse, and ultimately sexual intercourse between the two occurred. As a result, CAT, as the victim, experienced physical health problems following sexual intercourse with Hasyim Asy'ari.[16] In relation to this incident, criminal law should specifically serve to protect legally protected interests against reprehensible acts, including legal interests relating to property, life, liberty, bodily integrity, and personal honor.[17]

Based on the facts described in the DKPP decision above, it is evident that the actions of Hasyim Asy'ari, who at that time served as the Chairperson of KPU, not only violated ethical standards but also violated legal norms. This is because his conduct was not merely unprofessional under the code of ethics, but his actions in the administration of elections also harmed others and betrayed public trust. Therefore, this research identifies 2 (two) legal issues: (1) Is the contractual relationship between Hasyim Asy'ari and CAT legally valid, and can civil liability be imposed? (2) Does the sexual intercourse

[14] Berdasarkan Pasal 1332-1334 *Burgelijk Wetboek* Indonesia yang dimaksud suatu hal tertentu ialah objek perjanjian ialah benda yang dapat diperdagangkan, ditentukan jenisnya, dan barang yang baru ada pada waktu yang akan datang. Dalam Agus Yudha Hernoko, *Op., cit*. [191-192]. Dengan demikian, jika hal tertentu perjanjian berupa berbuat sesuatu untuk mengurus balik nama Apartemen, uang senilai Rp. 30.000.000 dan prestasi memenuhi kebutuhan makan di restoran, maka syarat suatu hal tertentu terpenuhi.

[15] Dapat dikatakan kausa yang diperbolehkan apabila mempunyai kausa, kausaunya asli, tidak bertentangan dengan undang-undang, kesusilaan dan ketertiban umum. *Ibid*. [196]. Jika objek perjanjian pada peristiwa ini hanya terbatas pada berupa berbuat sesuatu untuk mengurus balik nama Apartemen, memberikan uang senilai Rp. 30.000.000 dan prestasi memenuhi kebutuhan makan di restoran, maka tidak bertentangan dengan makna kausa yang diperbolehkan dan klausula perjanjian memenuhi syarat kausa yang diperbolehkan.

[16] Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [61-62].

[17] Didik Endro Purwoleksono (selanjutnya disebut Didik Endro Purwoleksono I). (2019). *Hukum Pidana: Untaian Pemikiran.* Surabaya: Airlangga University Press. [8-9].

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committed by Hasyim Asy'ari constitute a criminal offense, and can criminal liability be imposed?

Methods

The method is written descriptively and must include a statement regarding the research method employed. This method is elective or optional and applies only to research articles. This research constitutes legal research that seeks the truth of coherence, namely, whether the actions (acts) of Hasyim Asy'ari, including those performed in his capacity as Chairperson of the KPU, are coherent with legal principles and whether the legal rules relating to Hasyim Asy'ari's actions are coherent with legal principles. This research employs statutory, conceptual, comparative, and case approaches. The primary legal materials used in this research include the Indonesian Burgerlijk Wetboek, the Indonesian Criminal Code (KUHP),[18] the Wetboek van Strafrecht (hereinafter referred to as the Dutch Criminal Code), other relevant laws and regulations, and DKPP Decision Number 90-PKE-DKPP/V/2024. The primary legal materials are subsequently examined in conjunction with secondary legal materials, including books, journal articles, and other legal publications obtained through a literature review, from which conclusions are drawn in the form of prescriptions concerning what is recommended and what is not recommended.

Results and Discussion

1. Contractual Relationships And The Debtor's Civil Liability For The Fulfillment Of Contractual Obligations

A Written Statement as an Agreement Between the Parties, Fundamentally, an agreement or contract constitutes one of the 2 (two) legal sources, apart from legislation, that may give rise to obligations.[19] Moreover, in contemporary societal practice, obligations arising from agreements or contracts are highly predominant.[20] Through the institution of contracts, the parties are willing to be bound by and rely upon the statements of other parties. In this regard, a contract serves as a means of ensuring that the parties fulfill their promises.[21]

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[18] KUHP Indonesia dimaksud dalam hal ini ialah KUHP lama sebagaimana dimaksud Undang-Undang Nomor 1 Tahun 1946 tentang Peraturan Hukum Pidana.

[19] Lihat Pasal 1233 *BW* Indonesia. Ketentuan Pasal 1233 *BW* Indonesia bahwa, "Tiap-tiap perikatan dilahirkan baik baik karena persetujuan, baik karena undang-undang".

[20] Agus Yudha Hernoko, *Op., cit*. [19].

[21] *Ibid*. [52].

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The authentic definition of an agreement or contract provided by legislation is stipulated in Article 1313 of the Indonesian Burgerlijk Wetboek (BW),[22] which states:

"An agreement[23] is an act whereby one or more persons bind themselves to one or more other persons."

The definition of an agreement as stipulated in Article 1313 of the Indonesian BW has undergone changes in the Nieuw Burgerlijk Wetboek[24] (NBW), as regulated in Book 6, Chapter 5, Article 6:213, namely: "a contract in the sense of this title is a multilateral juridical act whereby one or more other parties".[25] Based on the definition of a contract provided by the NBW, a contract constitutes a reciprocal legal act in which one or more persons bind themselves or mutually bind themselves to one or more other persons.[26]

The regulation of contract law under the Indonesian BW is contained in Book III concerning Obligations, particularly in the Second Chapter concerning obligations arising from contracts or agreements. An agreement or contract that gives rise to obligations contains duties referred to as "performance" (prestasi). Such performance represents the respective rights and obligations of the contracting parties.[27] Referring to the opinion expressed by C. Asser, the principal characteristic of an obligation is the legal relationship between parties, in which rights (performance) and obligations (counter-performance) are mutually exchanged. Therefore, the fulfillment of contractually agreed performance may, under certain circumstances, be legally enforced, including, where necessary, through the use of state enforcement mechanisms.[28]

An examination of Article 1313 of the Indonesian BW illustrates that, insofar as a document, whether in the form of an Agreement Letter or a

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[22] Terjemahan *BW* Indonesia. Dalam Subekti dan Tjitrosudibio. (2004). *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek) dengan tambahan Undang-Undang Pokok Agraria dan Undang-Undang Perkawinan*. Cetakan ke-35. Jakarta: Pradnya Paramita. [338].

[23] Istilah "perjanjian" merupakan diksi baru yang dipilih dan digunakan dalam *BW* Indonesia hasil terjemahan dari Subekti dan Tjitrosudibio, pada cetakan terdahulu sebelumnya dipilih dan digunakan istilah "persetujuan". Lihat Kata Pengantar dari *BW* Indonesia hasil terjemahan dari Subekti dan Tjitrosudibio. (1992). *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek) dengan tambahan Undang-Undang Pokok Agraria dan Undang-Undang Perkawinan*. Cetakan ke-25. Jakarta: Pradnya Paramita.

[24] Di Belanda sendiri *Nieuw Burgerlijk Wetboek* disebut *Burgerlijk Wetboek* atau disingkat *BW*. Akan tetapi untuk membedakan dengan *BW* lama, dalam tulisan ini digunakan terminologi *NBW* untuk menyebut *BW* yang baru. Dewasa ini, substansi *NBW* telah banyak mengalami perubahan fundamental dengan substansi yang disesuaikan berdasarkan kebutuhan masyakarat modern.

[25] J. H. Niewenhuis. (1985). *Pokok-pokok Hukum Perikatan* (*Terjemahan Djasadin Saragih*). Surabaya: Universitas Airlangga. [1].

[26] Agus Yudha Hernoko, *Op., cit*. [18-19].

[27] C. Asser. (1991). *Pengajian Hukum Perdata Belanda*. Jakarta: Dian Rakyat. [5].

[28] Agus Yudha Hernoko, *Op., cit*. [20].

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Written Statement, contains clauses establishing obligations (performance) to give something, to do something, or not to do something, regardless of its designation, such a document gives rise to an obligation. In this regard, the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT, constitutes an agreement containing several clauses establishing obligations (performance). The following are the obligations contained in the Written Statement dated January 2, 2024:

1. Hasyim Asy'ari will arrange the transfer of ownership of Puri Imperium Apartment Unit 1215 into the name of Cindra Aditi Tejakinkin and guarantee that the apartment ownership transfer process will be completed in May 2024, and Cindra Aditi Tejakinkin must grant Hasyim Asy'ari access to the apartment;
2. Hasyim Asy'ari will provide for the needs of Cindra Aditi Tejakinkin during her visits to Indonesia and certain needs while in the Netherlands, including the cost of round-trip (PP) airline tickets between the Netherlands and Jakarta, amounting to IDR 30,000,000 per month, and fulfill Cindra Aditi Tejakinkin's dining needs at restaurants once a week;
3. Hasyim Asy'ari will provide lifelong protection to Cindra Aditi Tejakinkin, including protecting/safeguarding her reputation and mental health, and will not disappoint her, and vice versa;
4. Hasyim Asy'ari will not marry another woman from the date this statement is made;
5. Hasyim Asy'ari will call/provide updates to Cindra Aditi Tejakinkin at least once a day throughout Hasyim Asy'ari's lifetime.

This Written Statement is hereby made truthfully. If the obligations cannot be fulfilled, I (Hasyim Asy'ari) am willing to be subjected to moral sanctions in the form of rectifying unfulfilled actions and paying an agreed penalty of IDR 4,000,000,000, payable in installments over a period of 4 years.

The fact that the Written Statement bears a duty stamp indicates its function as documentary evidence. Under Law Number 10 of 2020 concerning Stamp Duty, provisions are established regarding agreement letters and other documents prepared for the purpose of explaining an event of a civil nature and used as evidence in court.[29] The absence of a duty stamp on an agreement or contract (in casu, the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT) does not render it invalid but merely means that it does not fulfill the requirements for use as documentary evidence. Conversely, the validity or invalidity of the legal act

[29] Lihat Pasal 3 Undang-Undang Nomor 10 Tahun 2020 tentang Bea Meterai.

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performed under an agreement or contract is not determined by the presence or absence of a duty stamp but by Article 1320 of the Indonesian BW.[30]

Thus, the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT, constitutes an agreement or contract containing several clauses establishing obligations (performance) to give something, to do something, and not to do something.[31] In other words, the Written Statement has given rise to an obligation. Since the Written Statement constitutes a legal relationship in contractual form that gives rise to obligations, if it is not performed in accordance with its provisions, fulfillment of those obligations may be legally demanded.

Legal Consequences of a Written Statement as a Contractual Legal Relationship. Fundamentally, a legal relationship is a relationship governed by law. This means that a relationship not governed by law does not constitute a legal relationship. Legal relationships may exist between legal subjects and between legal subjects and property. Legal relationships between legal subjects may occur between one individual and another, between an individual and a legal entity, and between one legal entity and another. Meanwhile, a legal relationship between a legal subject and property concerns the rights exercised by the legal subject over that property.[32]

Based on the nature of the relationship, legal relationships are divided into 2 (two) categories, namely private legal relationships and public legal relationships. In determining whether a legal relationship is private or public, the determining factor is not the legal subject involved in the relationship but rather the nature of the relationship or the nature of the transaction (the nature of transaction). Private legal relationships may arise through arrangements established by the parties concerning matters within the scope of family and property. Conversely, public legal relationships may arise through arrangements established by the state.[33]

Indeed, knowledge concerning legal relationships is essential. The importance of understanding the nature of a legal relationship lies in determining the legal regime governing that relationship.[34] Understanding the nature of a legal relationship and its governing legal regime can provide legal

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[30] Pasal 1320 *BW* Indonesia, menentukan syarat sah tidaknya suatu perjanjian:
1. sepakat mereka yang mengikatkan dirinya;
2. kecakapan untuk membuat suatu perikatan;
3. suatu hal tertentu;

suatu sebab yang diperbolehkan.

[31] Lihat Pasal 1234 *BW* Indonesia.

[32] Peter Mahmud Marzuki, *Op., cit.* [216].

[33] *Ibid*. [217].

[34] *Ibid*.

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certainty in enforcing compliance with applicable law. In the case of contractual relationships, for example, the governing legal regime is contract law.

In the Indonesian BW, specifically Book III concerning Obligations, there is a section entitled "Effects of an Agreement," contained in the Third Section, encompassing Articles 1338 through 1341. These provisions determine how agreements affect the rights and obligations of the parties involved, as well as the principles that must be observed in the performance of contracts.

A contract that does not fulfill the validity requirements stipulated in Article 1320 of the Indonesian BW, whether subjective or objective requirements, may give rise to several consequences, as follows:[35]

1. Non-existence, where the absence of agreement means that no contract arises;
2. Voidable (vernietigbaar), where a contract arises due to defects of consent (wilsgebreken) or legal incapacity (onbekwaamheid), which relate to subjective requirements, thereby resulting in the contract being subject to annulment; and
3. Null and void (nietig), where a contract fails to fulfill the requirements concerning a certain subject matter or a lawful cause, which relate to objective requirements, thereby resulting in the contract being null and void by operation of law.

An examination of the Written Statement made by Hasyim Asy'ari, dated January 2, 2024, by which he bound himself to CAT, as an agreement, results in the contract being both voidable and null and void by operation of law. First, the Written Statement as a contract is voidable due to a defect of consent in reaching the agreement. This defect of consent is manifested in the existence of coercion (dwang), where such coercion resulted from the abuse of circumstances committed by CAT (in casu, as a PPLN member) against Hasyim Asy'ari (in casu, as Chairperson of the KPU). The abuse of circumstances committed by CAT occurred in a situation where sexual intercourse had taken place with HA, thereby depriving him of freedom in reaching the agreement. Second, the Written Statement as a contract is null and void by operation of law because the requirement of a lawful cause was not fulfilled, as the Written Statement contains a clause stating that "Hasyim Asy'ari will not marry another woman from the date this statement is made." In fact, at the time Hasyim Asy'ari made the Written Statement, he was a married man with a wife and 3 (three) children. This clause contradicts Article 9 of Law Number 1 of 1974 concerning Marriage, which states that "A person

[35] J. H. Niewenhuis, *Op., cit*. [2].

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who is still bound by a marital relationship with another person may not marry again, except in the circumstances referred to in Article 3 paragraph (2) and Article 4 of this Law."

Thus, the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT, as an agreement or contract, has the consequence that the contract is both voidable and null and void by operation of law.

Civil Liability of the Debtor for the Fulfillment of Contractual Obligations. Epistemologically, the term tanggung gugat is translated into English as "liability" or into Dutch as "aansprakelijkheid." Meanwhile, the term tanggung jawab is translated into English as "responsibility" or into Dutch as "verantwoordelijkheid."[36] In principle, liability constitutes a specific form of responsibility. In civil cases, the term "liability" is commonly used, whereas in criminal cases, the term "responsibility" is employed.[37]

The concept of liability refers to the legal position of a legal subject (an individual or legal entity) who is considered obliged to pay some form of compensation or damages following a legal event or legal act. Thus, the term liability falls within the scope of private law.[38] In determining the justification for liability, "liability should be proportional to the degree of fault."[39]

Regarding the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT, as an agreement or contract that gives rise to obligations, it necessarily involves 2 (two) aspects, namely an active aspect and a passive aspect. The active aspect gives rise to the creditor's right to demand the fulfillment of performance (in casu, CAT may demand the fulfillment of her rights), whereas the passive aspect gives rise to the debtor's obligation to perform (in casu, Hasyim Asy'ari is obliged to fulfill his contractual obligations). Generally, performance and counter-performance are exchanged reciprocally; however, under certain circumstances, the exchange of performance does not proceed as it should, resulting in an event referred to as breach of contract (wanprestasi).[40]

The violation of contractual rights gives rise to an obligation to pay compensation based on breach of contract, as regulated under Article 1236 of the Indonesian BW (the obligation to give something) and Article 1239 of the Indonesian BW (the obligation to do something). A debtor is deemed to

[36] Lihat catatan kaki nomor 93 pada Peter Mahmud Marzuki. (2008). *Pengantar Ilmu Hukum*. Jakarta: Kencana. [135].
[37] Peter Mahmud Marzuki, *Op., cit*. [135].
[38] *Ibid*. [220].
[39] Agus Yudha Hernoko, *Op., cit*. [298].
[40] *Ibid*. [261].

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have failed to fulfill their obligations in the following circumstances: first, failure to perform; second, delayed performance; and third, performance that is not carried out as required.[41]

In the event of a breach of contract, the creditor who suffers losses as a result of the debtor's failure to perform the contract has the right to bring a legal claim to enforce their contractual rights. This is regulated under Article 1267 of the Indonesian BW, which states:

"The party toward whom an obligation has not been fulfilled may choose either to compel the other party to perform the contract, if such performance is still possible, or to demand the cancellation of the agreement, together with compensation for costs, losses, and interest."

The rights granted to the creditor may be exercised independently or combined with other legal claims, including:

1. Performance;
2. Damages;
3. Dissolution, termination, or cancellation;
4. Performance accompanied by supplementary damages;
5. Dissolution accompanied by supplementary damages.Thus, Hasyim Asy'ari's civil liability as the debtor for the fulfillment of the contractual obligations that should have been performed depends on the right of action possessed by CAT as the creditor under the Written Statement dated January 2, 2024. Upon reexamining the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT as an agreement or contract, there is a clause stipulating that:

"This Written Statement is hereby made truthfully. If the obligations cannot be fulfilled, I (Hasyim Asy'ari) am willing to be subjected to moral sanctions in the form of rectifying unfulfilled actions and paying an agreed penalty of IDR 4,000,000,000, payable in installments over a period of 4 years."

Therefore, it can be concluded that if Hasyim Asy'ari is declared to have failed to fulfill his obligations (contractual performance), then, based on the a quo provision stipulated by himself, his liability consists of performance accompanied by supplementary damages (in casu, payment of the agreed penalty of IDR 4,000,000,000, payable in installments over a period of 4 years).

2. CRIMINAL OFFENSES INVOLVING SEXUAL INTERCOURSE AND THE CRIMINAL LIABILITY OF HASYIM ASY'ARI

[41] *Ibid.*

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The Principle of the Applicability of Criminal Law in Relation to the Place Where Sexual Intercourse Was Committed by Hasyim Asy'ari. Before determining whether Hasyim Asy'ari can be held criminally liable for engaging in sexual intercourse with CAT, which may result in the imposition of criminal sanctions, it is first necessary to determine whether such conduct constitutes a criminal offense prohibited by the applicable criminal law and where the sexual intercourse occurred. The importance of the place (locus) where the act was committed lies in determining the applicability of a country's criminal law.[42] According to the facts established in DKPP Decision Number 90-PKE-DKPP/V/2024, the locus of the sexual intercourse committed by Hasyim Asy'ari was the Van der Valk Hotel in Amsterdam, the Netherlands. Accordingly, Dutch criminal law is applicable to Hasyim Asy'ari. The applicability of this territorial principle is regulated under Article 2 of the Dutch Criminal Code, which states:

"The criminal law of the Netherlands shall apply to any person who commits a criminal offence in the Netherlands."[43]

This provision constitutes a general rule governing the jurisdictional applicability of criminal law in the Netherlands.[44] The territorial principle stipulated in Article 2 of the Dutch Criminal Code means that Dutch criminal law applies to anyone who commits a criminal offense within Dutch territory, and its application extends to offenses committed aboard Dutch ships or aircraft outside the Netherlands.[45] On the other hand, the Indonesian Criminal Code adopts the active nationality or active[46] personality principle, which essentially provides that Indonesian criminal legislation applies to Indonesian citizens who are outside Indonesian territory and commit an offense that is also considered a criminal offense under the laws of the country where the act was committed, which, in this context, is the Netherlands.

According to Andi Hamzah, this active nationality principle is comparable to a backpack attached to the back of an Indonesian citizen wherever that citizen travels. This principle is intended to ensure that Indonesian citizens who commit crimes abroad (including in the Netherlands) and subsequently return to Indonesia, even if they have not been tried abroad,

[42] Oos Arianto dan Moh. Zeinudin. (2022). "*Locus Delictie* Tindak Pidana Hacking dalam Perspektif Hukum Positif Indonesia". Surakarta: Prosiding Seminar Nasional UNIBA. [164].

[43] Naskah asli Pasal 2 KUHP Belanda "*De Nederlandse strafwet is toepasselijk op ieder die zich in Nederland aan enig strafbaar feit schuldig maakt*".

[44] P.J.P. Tak. (2008). *The Dutch Criminal Justice System.* Nijmegen: Wolf Legal Publisher. [68].

[45] Lachezar Yanev. (2019). "Dutch Criminal Justice for Ethiopian War Crimes: The Alemu Case". *Journal of International Criminal Justice,* 17(3): 633-659.

[46] Lihat Pasal 5 ayat (1) angka 2 KUHP Indonesia.

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do not escape criminal punishment.[47] Hasyim Asy'ari is unquestionably an Indonesian citizen.[48] Therefore, if the sexual intercourse he committed with CAT is classified as a criminal offense under both Dutch and Indonesian legislation, both Indonesian and Dutch criminal laws would have jurisdictional applicability to Hasyim Asy'ari, taking into account agreements between the two countries concerning adjudicative jurisdiction[49] and the principle of ne bis in idem.

Classification of Criminal Offenses Under the Dutch and Indonesian Criminal Codes Relevant to the Sexual Intercourse Committed by Hasyim Asy'ari. Regarding the conduct of Hasyim Asy'ari, who enticed, persuaded, and even forced CAT to engage in sexual intercourse, which ultimately occurred and resulted in CAT experiencing health problems as established in the facts of the DKPP decision,[50] there are at least several classifications of criminal offenses under the Dutch Criminal Code that may be alleged against Hasyim Asy'ari, including:

Article 242 of the Dutch Criminal Code

"He who performs sexual acts with a person which acts consist of or include sexual penetration of the body while he has serious reason to suspect that this person lacks the will to do so, shall be punished as guilty of negligent rape by imprisonment for a term not exceeding four years or a fine of the fourth category."[51]

Article 243 of the Dutch Criminal Code

1. "He who performs sexual acts with a person which acts consist of or include sexual penetration of the body when he knows that this person lacks the will to do so, shall be punished as guilty of intentional rape with imprisonment of not more than nine years or a fine of the fifth category;"

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[47] Andi Hamzah (selanjutnya disebut Andi Hamzah I). (2017). *Hukum Pidana Indonesia*. Jakarta: Sinar Grafika. [67-68].

[48] Kepastian ini dapat dibuktikan dengan status Hasyim Asy'ari yang pada saat melakukan persubuhan badan itu masih berstatus Ketua KPU merangkap anggota KPU. Sedangkan menurut Pasal 21 ayat (1) huruf a Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu, syarat menjadi anggota KPU ialah warga negara Indonesia.

[49] Pada dasarnya KUHP Indonesia tidak terdapat ketentuan perjanjian yuridiksi mengadili. Namun jika di bandingkan dengan Pasal 8b (1) KUHP Belanda terdapat ketentuan mengenai perjanjian yuridiksi mengadili. Secara futuristik, ketentuan Pasal 7 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-undang Hukum Pidana (selanjutnya disebut KUHP Baru Indonesia) yang masih berlaku 3 Januari 2026, telah terdapat ketentuan perjanjian yuridiksi mengadili.

[50] Putusan DKPP Nomor 90-PKE-DKPP/V/2024. [61-62].

[51] Naskah asli Pasal 242 KUHP Belanda "*Als schuldig aan schuldverkrachting wordt gestraft met gevangenisstraf van ten hoogste vier jaren of geldboete van de vierde categorie, degene die met een persoon seksuele handelingen verricht, welke handelingen bestaan uit of mede bestaan uit het seksueel binnendringen van het lichaam, terwijl diegene ernstige reden heeft om te vermoeden dat bij die persoon daartoe de wil ontbreekt*".

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2. “He who is guilty of intentional rape preceded, accompanied or followed by coercion, violence or threats shall be punished with imprisonment of not more than twelve years or a fine of the fifth category.”[52]

The term "rape" under the Dutch Criminal Code has a broad meaning, namely sexual penetration of the body.[53] Non-consensual penetration is not limited to vaginal penetration but also includes anal or oral penetration of a person's body for sexual purposes.[54] Furthermore, the Netherlands distinguishes between intentional rape and negligent rape. Negligent rape essentially involves fault in the form of negligence, as stipulated in Article 242 of the Dutch Criminal Code. Meanwhile, the form of rape regulated under Article 243 of the Dutch Criminal Code constitutes intentional rape, with violence, coercion, and threats serving as aggravating elements of the offense.[55]

The reason for distinguishing between these forms of rape is that the demarcation between separate intent and offenses resulting from negligence is not sufficiently clear.[56] For example, a situation in which a person performs sexual acts on another person, and that person clearly says "no," "I do not want this," or "don't," or similar expressions.v[57] Alternatively, there may be an explicit non-verbal physical reaction from that person, such as actively resisting, crying, or displaying bodily tension. Such non-verbal reactions may indicate conditional intent and the conscious acceptance of the possibility that the person does not wish to engage in the act. In other words, the Dutch legislature intends to facilitate the evidentiary process in rape cases where proving a conflict of will between the perpetrator and the victim is difficult, by criminalizing negligent rape, or at least conduct in which the perpetrator

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[52] Naskah asli Pasal 243 KUHP Belanda “(1) *Als schuldig aan opzetverkrachting wordt gestraft met gevangenisstraf van ten hoogste negen jaren of geldboete van de vijfde categorie, degene die met een persoon seksuele handelingen verricht, welke handelingen bestaan uit of mede bestaan uit het seksueel binnendringen van het lichaam, terwijl diegene weet dat bij die persoon daartoe de wil ontbreekt*. (2) *Als schuldig aan gekwalificeerde opzetverkrachting wordt gestraft met gevangenisstraf van ten hoogste twaalf jaren of geldboete van de vijfde categorie, degene die zich schuldig maakt aan het misdrijf omschreven in het eerste lid, voorafgegaan door, vergezeld van of gevolgd door dwang, geweld of bedreiging*”.

[53] Tatyana V. Dolgolenko. (2011). “Criminal Liability for Rape and its Place Within the System of Crimes Against Sexual Freedom and Sexual Inviolability Under the RF and Some Foreign Countries Criminal Codes”. *Journal of Siberian Federal University-Humanities & Social Sciences*, 2(4): 240-245.

[54] Perluasan ini diilhami konvensi pencegahan dan pemberantasan kekerasan terhadap perempuan dan kekerasan dalam rumah tangga (konvensi Istanbul). Negara Uni Eropa seperti Belanda berkewajiban positif untuk menggunakan hukum pidana untuk memberikan perlindungan hukum yang efektif terhadap pemerkosaan. Dalam Johannes Keiler. (2024). “From Coercion to Consent: Dutch Rape Law Reform and The Complexities of Consent”. *Maastricht Journal of European and Comparative Law*. 30(6): 760-782.

[55] Hoko Horii dan Annelien Bouland. (2023). “Drafting New Rape Law: How Dutch Legislators Talk About Sexual Consent”. *Recht der Werkelijkheid,* 44(1): 14-48.

[56] *Ibid*.

[57] *Ibid*. [28].

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should reasonably suspect that the other person lacks the willingness to engage in the act, as reflected in the elements of Article 242 of the Dutch Criminal Code.

If the sexual intercourse committed by Hasyim Asy'ari were adjudicated under Indonesian criminal law, the provisions governing offenses involving sexual intercourse under the Dutch and Indonesian Criminal Codes that could be alleged against him would differ significantly. The offense of adultery cannot be alleged against him because it does not satisfy the requirements of Article 5 paragraph (1) point 2 of the Indonesian Criminal Code, which requires that the act of adultery be punishable under the criminal laws of both Indonesia and the Netherlands. Initially, the Netherlands criminalized adultery (overspel/adultery) where one or both parties were married, with the provision that only the spouse concerned could file a complaint and that the marriage had to be dissolved through divorce before the complaint could be submitted.[58] However, in 1971, adultery ceased to constitute a criminal offense in the Netherlands. This decriminalization was based on the Dutch view that adultery constituted a victimless crime and should not be subject to criminal punishment.[59] Accordingly, the sexual intercourse committed by Hasyim Asy'ari may only be prosecuted under.

Article 285 of the Indonesian Criminal Code Article 285 of the Indonesian Criminal Code[60]

"Any person who, by violence or threat of violence, forces a woman to have sexual intercourse with him outside marriage shall be punished for rape with imprisonment for a maximum term of twelve years."

Article 285 of the Indonesian Criminal Code regulates the criminal offense of rape, which requires the existence of coercion through violence or threats of violence to compel sexual intercourse and limits the victim to a woman who is not married to the perpetrator. Furthermore, the element of "sexual intercourse" as formulated in Article 285 of the Indonesian Criminal Code is interpreted as being limited to penile penetration of the vagina.[61] In other words, when comparing the offense of rape under the Indonesian Criminal Code, the New Indonesian Criminal Code, and the Dutch Criminal Code, the essential difference is that the Dutch Criminal Code criminalizes

[58] Willemijn Ruberg. (2015). "Adultery and the Double Standard in a Dutch City in the Eighteenth and Nineteenth Centuries". *Cultural and Social History*, 12(4): 445-464.

[59] Andi Hamzah (selanjutnya disebut Andi Hamzah II). (2015). *Delik-delik Tertentu (Speciale Delicten) Di Dalam KUHP.* Jakarta: Sinar Grafika. [169].

[60] Bandingkan dengan Pasal 473 KUHP Baru Indonesia.

[61] Anugerah Rizki Akbari. (2016). *Reformasi Pengaturan Tindak Pidana Perkosaan*. Depok: Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia. [3].

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negligent rape, whereas Indonesia limits the offense of rape to fault in the form of intent.

Criminal Liability for Sexual Intercourse Committed by Hasyim Asy'ari Under the Dutch and Indonesian Criminal Codes. In the Netherlands, criminal liability is fundamentally equivalent to fault. Dutch criminal law recognizes the principle of culpability (geen straf zonder schuld), meaning that there is no criminal liability without fault. Criminal offenses under the Dutch Criminal Code contain an element of fault, either in the form of intent or negligence. Therefore, this element of fault must be established before criminal liability can be imposed on a person, and the Public Prosecutor is obliged to prove it before the court. If fault cannot be proven, the consequence is an acquittal.[62]

Furthermore, for criminal liability to be imposed, there must be no applicable defenses, whether in the form of grounds of justification or grounds of excuse.[63] Grounds of justification concern the substantive lawfulness of an otherwise unlawful act, including Article 40 (necessity or duress), Article 41 paragraph (1) (self-defense), Article 42 (implementation of statutory provisions), and Article 43 paragraph (1) of the Dutch Criminal Code (carrying out an official order issued by a competent authority), all of which take into account the principles of subsidiarity and proportionality. Meanwhile, grounds of excuse relate to fault, including Article 39 (insanity) and Article 43 paragraph (2) of the Dutch Criminal Code (carrying out an unauthorized order in good faith).[64] In addition, necessity or duress and excessive self-defense, as stipulated in Articles 40 and 41 paragraph (2) of the Dutch Criminal Code, constitute other statutory grounds for excluding fault.[65]

Within the construction of Article 242 of the Dutch Criminal Code, the form of fault is explicitly negligence, whereas Article 243 of the Dutch Criminal Code involves fault in the form of intent.[66] Intent encompasses acts committed with both will and knowledge. This is reflected in the phrase "he knows that this person lacks the will to do so" in the formulation of Article 243 paragraph (1) of the Dutch Criminal Code. Meanwhile, negligence in the context of Article 242 of the Dutch Criminal Code is interpreted as involving serious grounds

[62] P.J.P. Tak, *Op., cit*. [71].

[63] Bandingkan dengan KUHP Baru Indonesia yang secara sistematika penyusunannya telah memisahkan antara tindak pidana yang berkaitan dengan alasan pembenar dan pertanggungjawaban pidana yang berkaitan dengan alasan pemaaf. BAB II bagian kesatu ialah tindak pidana yang pada paragraf 8 berjudul alasan pembenar dan bagian kedua ialah pertanggungjawaban pidana yang pada paragraph 2 berjudul alasan pemaaf.

[64] *Ibid*. [72-73].

[65] Anton van Kalmthout. (1998). "Intoxication and Criminal Responsibility in Dutch Criminal Law". *European Addiction Research*, 4(3): 102-106.

[66] P.J.P. Tak, *Loc. cit.*

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for suspecting that the sexual act was not performed voluntarily, which constitutes a form of negligence.[67] This is reflected in the phrase "while he has serious reason to suspect that this person lacks the will to do so" in the formulation of Article 242 of the Dutch Criminal Code.

If Hasyim Asy'ari were tried under Dutch criminal law based on the territorial principle and in connection with the facts established in the DKPP decision that Hasyim Asy'ari persuaded and subsequently forced CAT to engage in sexual intercourse with him, and that sexual intercourse actually occurred, Hasyim Asy'ari could be held criminally liable under Article 243 or Article 242 of the Dutch Criminal Code. The elements of these 2 (two) provisions must first be proven, particularly whether Hasyim Asy'ari, before or during the sexual intercourse, had serious grounds to suspect that CAT lacked the willingness to engage in the act, or "knew" that CAT lacked such willingness, or whether the act was preceded, accompanied, or followed by coercion, violence, or threats against CAT.

However, if Hasyim Asy'ari were tried under Indonesian criminal law based on the active nationality principle and in connection with the persuasion followed by coercion directed at CAT to engage in sexual intercourse, Hasyim Asy'ari could be held criminally liable under Article 285 of the Indonesian Criminal Code. The persuasion followed by coercion directed at CAT to engage in sexual intercourse with Hasyim Asy'ari could give rise to criminal liability under Article 285 of the Indonesian Criminal Code, provided that the coercion involved violence or threats of violence and that it could also be conclusively proven that CAT was not Hasyim Asy'ari's wife. The fault attributable to Hasyim Asy'ari for criminal liability under Article 285 of the Indonesian Criminal Code must necessarily take the form of intent. This is because the phrases "threat of violence," "violence," and "forces" are characteristics of intentional conduct within the formulation of criminal offenses under the Indonesian Criminal Code.[68] Therefore, the element of fault in the form of intent under Article 285 of the Indonesian Criminal Code must be proven in order to impose criminal liability on Hasyim Asy'ari.[69]

It cannot be denied that Indonesian criminal law (the Indonesian Criminal Code) is historically derived from Dutch criminal law,[70] resulting in

[67] Hoko Horii dan Annelien Bouland, *Op., cit*. [26].

[68] Didik Endro Purwoleksono (selanjutnya disebut Didik Endro Purwoleksono II). (2016). *Hukum Pidana*. Surabaya: Airlangga University Press. [69].

[69] Syarat untuk dinyatakan mampu dibebani pertanggungjawaba pidana ialah: (1) mampu menentukan niaat, kehendak, atau rencana atas perbuatan yang dilakukan; (2) mengetahui bahwa perbuatannya tersebut dipandang tidak patut oleh Masyarakat; dan (3) mengetahui apakah arti, makna, atau hakikat perbuatan itu baik atau buruk. *Ibid.* [68].

[70] M. Ali Zaidan. (2015). *Menuju Pembaruan Hukum Pidana*. Jakarta: Sinar Grafika. [7]

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numerous similarities in legal principles and criminal law doctrines, as the Indonesian Criminal Code currently applicable is a legacy of Dutch colonial rule. These similarities also include defenses or grounds for excluding criminal punishment based on grounds of justification and excuse, as discussed previously.[71]

Conclusions

Based on the Written Statement made by Hasyim Asy'ari on January 2, 2024, by which he bound himself to CAT, the statement constitutes an agreement or contract containing several clauses that establish obligations (prestasi) to give something, to do something, and not to do something. As an agreement or contract that gives rise to legal obligations, Hasyim Asy'ari, as the debtor, is obliged to fulfill his contractual obligations. Conversely, CAT, as the creditor, is entitled to demand the fulfillment of her rights. Thus, if the contractual obligations stipulated in the Written Statement are not properly performed, legal consequences arise in the form of civil liability, which must be fulfilled in accordance with the terms of the agreement entered into by the parties. Based on the territorial principle of Dutch criminal law, the sexual intercourse committed by Hasyim Asy'ari with CAT constitutes the criminal offense of intentional rape as stipulated in Article 243 of the Dutch Criminal Code or negligent rape as stipulated in Article 242 of the Dutch Criminal Code. However, under the active nationality principle of Indonesian criminal law, such sexual intercourse constitutes the criminal offense of rape as stipulated in Article 285 of the Indonesian Criminal Code. Therefore, for Hasyim Asy'ari to be held criminally liable, if he is tried under the jurisdiction of a court in the Netherlands, the element of fault in the form of intent under Article 243 of the Dutch Criminal Code or negligence under Article 242 of the Dutch Criminal Code must be proven. However, if Hasyim Asy'ari is tried under the jurisdiction of a court in Indonesia, the element of intent as stipulated in Article 285 of the Indonesian Criminal Code must be proven.[72]

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[71] Lihat Didik Endro Purwoleksono II, *Op. cit*. [71].

[72] Syarat untuk dinyatakan mampu dibebani pertanggungjawaba pidana ialah: (1) mampu menentukan niaat, kehendak, atau rencana atas perbuatan yang dilakukan; (2) mengetahui bahwa perbuatannya tersebut dipandang tidak patut oleh Masyarakat; dan (3) mengetahui apakah arti, makna, atau hakikat perbuatan itu baik atau buruk. *Ibid.* [68].

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