



Reconstruction of Criminal Law in the Indonesian Financial Investment Sector

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Abstract

Criminal acts in the field of financial investment in Indonesia cannot be overcome only by specific laws (Banking Law, Capital Market Law, Commodity Futures Trading Law, Trade Law, and OJK Law) alone but together with Article 372 and Article 378 of the Criminal Code. The author sees the inadequacy of norms in the regulation of criminal acts in the field of financial investment today, which results in losses of up to Rp. 105.81 trillion (in the last decade). This paper is normative legal research with a statutory approach and a conceptual approach. The result of this research is that it is necessary to reconstruct the regulation of criminal acts in the field of financial investment by providing the following elements: 1) whoever; 2) Carrying out a series of activities under the pretext of cooperation, investment, and/or economic business (which can be valued in money); 3) With or without permission from the authorized agency/institution, and 4) By promising excessive, unreasonable and/or outside profit/profit determined by the competent authority.

Keywords: *Reconstruction; Criminal Law; Indonesian Financial Investment Sector*

Introduction

In line with the development of the people's economy, the crime rate in the economic sector has also increased. Criminal acts in the field of financial investment are crimes that are increasingly happening in society and are very detrimental. In the past decade, data from the Indonesia Financial Services Authority (OJK) Investment Alert Task Force show that there have been 132 cases of fraud under the guise of investment with total losses of up to IDR 105.81 trillion (Indonesia Financial Services Authority Investment Alert Task Force, 2017).

A large number of victims of crimes in the financial investment sector, of course, must receive special attention from the state. In the perspective of victim protection, philosophically it is closely related to the objectives of the Indonesian State as set out in the Fourth Paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia namely "protecting the entire nation and all spilled Indonesian

blood and advancing public welfare. ...”. By realizing general welfare, the state has made efforts to meet the basic needs of its citizens. The 1945 Constitution of the Republic of Indonesia has also supported efforts to create welfare for its citizens. Fulfilling the welfare of citizens includes at least social welfare and economic welfare. This provision is contained in Chapter XIV of the National Economy and Social Welfare which consists of Article 33 regulating the economy and Article 34 concerning the poor.

The Indonesian government’s efforts in creating prosperity through economic growth through several sectors, especially investment, should be appreciated. Based on the US News survey, Indonesia is currently ranked second in the world as the best investment destination in the world (Kompas.com, 2018). However, there are still things that need to be addressed in the investment sector in Indonesia. One thing that must be addressed is the arrangement of business licenses so that the ease of business licenses will create a conducive investment climate. This is because the less conducive investment climate in a country is influenced by a lack of legal certainty and a complicated bureaucracy (Yati Kurniati, Donni Fajar, Tevy Chawwa, 2008)

Center for Indonesian Policy Studies (CIPS) researcher Novani Karina argues that the government must evaluate the regulations that have been implemented, both at the central and regional levels (Kompas.com, 2018). This is due to different interpretations of local governments regarding regulations issued by the central government. There are at least 69 regulations for registration to become a legal business, which are still followed by the existence of building permits, nuisance permits (still in effect in some areas) (Kompas.com, 2018).

Apart from this, constraints on investment in Indonesia are influenced by the prevalence of criminal acts in the investment sector. This disrupts Indonesia’s investment climate (CNN Indonesia, 2016) and affects public confidence in financial service products in the investment sector (JawaPos, 2017).

Fraudulent investment or illegal investment includes crimes which there are a series of activities under the pretext of cooperation, investment and/or certain businesses but based on the evil intentions of the perpetrator (an unlicensed/unlicensed business entity) to profit from these activities. Criminal acts in the field of financial investment have a broader meaning because they include licensed business entities, licensed business entities but whose permits have expired, and unlicensed business entities. Perpetrators of crimes in the financial investment sector commit crimes intending to benefit themselves through activities in the name of cooperation, investment, and/or certain businesses against the community with the lure of large returns. Criminal acts in the field of financial investment are such as “time bombs” that exist in the community, at first this activity went well to attract people to join. When at a certain point the “bomb” will explode and cause huge material losses to the people who join.

Including the criminal law, it has not been able to provide a deterrent effect for the perpetrator. This is not without reason, the perpetrators of criminal investment have so far been subject to Article 372 and/or Article 378 of the Criminal Code, each of which regulates criminal acts of embezzlement and/or criminal acts of fraud. In several criminal cases in the financial investment sector, the perpetrators were charged with both articles.

However, the grammatical meaning of the criminal act of fraud and/or embezzlement has shortcomings because the formulation of criminal acts in Article 372 and Article 378 is a formulation of material offenses. The formulation of a material offense has the meaning that what is prohibited and punishable is that which has certain consequences (Shcaffmeister, N. Keijzer, and Sitorus, 2011).

With the grammatical meaning of these provisions for criminal acts in the field of financial investment, law enforcement officials appear to be passive, namely waiting for losses from victims and

victim reports. Criminal law aims to protect public interests, as defined by Van Hamel in his book *Inleiding studie Ned. Strafrecht 1927* that “Criminal law is all the basics and rules adopted by a country in administering legal order, namely by prohibiting what is contrary to the law and imposing sorrow on the violator” (Moeljatno, 2000).

The law should have been able to detect from the start before criminal activities in the financial investment sector run smoothly and undermine the community which results in large losses from activities to collect public funds. If, looking at the provisions of laws and regulations other than those mentioned above, in this case, the regulations relating to criminal acts in the financial investment sector have not been able to ensnare the actors who can take advantage of legal loopholes.

The *modus operandi* of criminal acts in the field of financial investment includes many things and sub-systems including tree planting/timber products, plantation/agriculture / horticultural cooperation, crypto money, umroh social gathering, etc. The perpetrators of investment crimes take advantage of legal loopholes in Indonesia, such as the Banking Law, Capital Market Law, Commodity Futures Trading Law, Trade Law, and OJK Law which regulates criminal law provisions.

The regulations regarding criminal acts in the investment sector have been regulated in several laws regarding investment, including Banking Law, Capital Market Law, Commodity Futures Trading Law, Trade Law, and OJK Law. Criminals in the financial investment sector. Criminal provisions in several investment laws cannot be applied to perpetrators of crimes in the financial investment sector. This is because it requires meeting the qualifications in each of the provisions of the law. For example, in the Banking Law, from the start, the perpetrator of a crime was not a bank but a cooperative under the Cooperative Law as an umbrella. Thus, it cannot be subject to the Banking Law and the Cooperative Law. So, returning to the provisions of general criminal acts in the Criminal Code which require that there is a loss first (the result of an act) and then can be prosecuted by law enforcement officials. It is a statutory regulation, in this case, criminal acts in the field of financial investment contained in several laws must be structured logically and systematically. Based on the background description and the inadequacy of norms in regulating criminal acts in the field of financial investment in Indonesia today. The author is interested in conducting a study on how to reconstruct crime in the field of financial investment in the future?

Research Methods

This paper is normative legal research, namely the process of finding legal rules, legal principles, and legal doctrines to address legal issues at hand (Peter Mahmud Marzuki, 2005). Based on the background of the problem and the formulation of the problem and to achieve the objectives of this study, this research is juridical-normative research which is library research, namely research on primary data, which is in the form of legal materials (Ronny Hanitjo Soemitro, 1998).

This type of research is normative in that it examines the form of reconstruction of criminal acts in the field of Indonesian financial investment in the future based on the weaknesses that exist in the current regulation. The research approach uses a statutory approach and a conceptual approach (Johnny Ibrahim, 2011). By the type of research to be carried out, namely normative legal research, the basic legal materials used in this study are library materials, which are classified as secondary data. The use of secondary data will primarily be aimed at secondary data that is public, both in the form of archives and official legal materials in government agencies. This secondary data will include various materials in the form of primary legal materials, secondary legal materials, and tertiary legal materials (Soerjono Soekanto and Sri Mamudji, 1995).

After the legal material is grouped, then the legal material is analyzed by prescription analysis. The author collects problems regarding criminal acts in the field of financial investment which are complex and diverse. This problem will be analyzed in a convergent manner. thus leading to a single point of solution to various problems in the financial investment sector in the form of reconstruction in the future.

Research Result and Discussion

Investment is a commitment to several funds or other resources that are carried out at this time, to obtain several benefits in the future (Eduardus Tendelilin, 2001). Meanwhile, according to Sukirno, investment activities carried out by the community will continuously increase economic activity and job opportunities, increase national income, and increase the level of community welfare.

This role comes from three important functions of investment activities, namely:

- 1) investment is one component of aggregate expenditure so that an increase in investment will increase aggregate demand, national income, and employment opportunities;
- 2) the increase in capital goods as a result of the investment will increase production capacity;
- 3) investment is always followed by technological developments (Chairul Nizar, Mohd Nur Syechalad, and Sofyan Syahnur, 2013)

The concept of criminal acts in the investment sector has two definitions, namely a narrow definition and a broad understanding. Criminal acts in the investment sector narrowly define crimes/behaviors that are prohibited in the laws and regulations concerning investment in finance (Banking Law, Capital Market Law, Futures Trading Law, and Trade Law). Whereas broadly it contains the meaning of a crime/behavior which is prohibited in the laws and regulations regarding investment in the financial sector and also in the Criminal Code (KUHP).

Barda Nawawi Arief describes the criminal system in Indonesia when viewed in a narrow sense, the normative/substantive system, which is only seen from the norms of substantive criminal law. In this narrow sense, the criminal system can be interpreted as the whole system (laws and regulations) for criminalization and the entire system (statutory rules) for the awarding / imposition and execution of crimes (Barda Nawawi Arief, 2014).

About punishment in a narrow/substantive sense, it is stated that punishment consists of general rules and special rules. Criminalization in general rules is regulated in the KUHP, while in special rules it is regulated in other Special Laws outside the KUHP. Likewise, punishment is generally regulated in Article 10 of the Criminal Code. Meanwhile, criminal regulation is specifically regulated by each law. In the context of criminal offenses in the field of financial investment, criminal provisions are regulated in such a way as in the Criminal Code and outside the Criminal Code.

Mudzakir wrote, that a criminal act formula, at least contains the following formulations:

- 1) legal subjects who are the target of the norm (addressaat norm);
- 2) prohibited actions (strafbaar), either in the form of doing something (commission), not doing something (omission), and causing consequences (events caused by the behavior); and
- 3) the threat of punishment (strafmaat), as a means of enforcing the enforceability or compliance of these provisions. (Mudzakir, 2008).

Crime in the field of financial investment does not only include illegal investment (or false investment is an investment that does not have a license). However, this includes investment activities that have permits but have expired. The same applies to the activities of business entities that do not carry out investment activities but only under the guise or use investment packages. Even though it contains prohibited activities, namely Multi-Level Marketing, Ponzi schemes, and money games. Criminal acts in the financial investment sector have malicious intent (*mens rea*) which the perpetrator intends to commit from the start, both when the business entity is not yet established or when it is already established. Criminal acts in the financial investment sector are crimes that not only harm the public in a large amount of loss but also reduce public confidence in investment products and financial services proclaimed by the government. Criminal acts in the field of financial investment create bad habits for people who want to quickly get large amounts of profit. From this criminal act in the financial investment sector, creates space for the perpetrator with the community as victims and also as perpetrators.

Figure 1: Reconstruction of Crime in the Indonesian Financial Investment Sector



Source: Primary Legal Materials (processed: 2020)

The figure above illustrates that there is a pole between the actors and the community. Two interconnected interests need each other, which in fact when they meet each other will be a time bomb for the victim, in this case, the community investing money in the perpetrator. For this reason, it is important to create a dividing line in a formal offense. This is because the use of material offenses has not been able to provide a deterrent effect for the perpetrator and for the community itself as victims on the one hand and also the perpetrator's assistant on the other. The distinction of an offense into a formal offense and a material offense cannot be separated from the meaning contained in the term "action" itself. Whereas the term "action" contains two things, namely behavior or action, and consequence. To make it easier to understand, it can be said that formal offense is an offense that focuses on action, while the material offense is an offense that focuses on consequences (E. O. S. Hiariej, 2016).

In the future reconstruction, the author provides an idea of regulating formal offenses in the field of financial investment. This is because the perpetrators of criminal acts in the financial investment sector use loopholes that exist outside the provisions of the law. For example, by using a permit from a different ministry with the designation of the activity or having obtained a permit but the permit has expired.

The regulation of formal offenses becomes a spear to lead and enter business entities and actors into the field system based on certain special laws. In the Banking Law, for example, the entry of these

business entities will make it easier for the licensor to supervise, control and even take action against business actors/entities that have entered the banking system (in this case regulated in the Banking Law and its derivative regulations). In the banking system, Article 1 number 20 and number 21 of the Banking Law clearly state that Bank Indonesia is the Central Bank of the Republic of Indonesia as referred to in the applicable law and the Management of Bank Indonesia is the leader as referred to in the applicable law. The phrase "as defined in the applicable law" will refer to the Bank Indonesia Law. It needs to be realized that the element "without permission from the management of Bank Indonesia" as referred to in Article 46 of the Banking Law is closely related to the duties and functions of Bank Indonesia as the Central Bank.

What is important to pay attention to regarding the permit of the management of Bank Indonesia in the context of supervisory duties is the provision of Article 27 of the Banking Law which states that bank supervision by Bank Indonesia as referred to in Article 24 is direct and indirect supervision. What is meant by direct supervision is supervision in the form of inspection accompanied by corrective actions. Indirect supervision is supervision in the form of early supervision through research, analysis, and evaluation of bank reports.

Determination of a certain act as a criminal act is closely related to the legal interests to be protected. What is meant by legal interests is that the values of the legislators are to be protected, both against violations and the dangers (risks) that will occur by formulating them into a criminal provision. Establishing norms regarding theft, for example, is intended to protect ownership as a legal interest.

Figure 2: Amount of Losses and Victims of Crime in the Field of Financial Investment in Indonesia



Source: Primary Legal Materials (processed: 2020)

The figure above is Crime in the Indonesian Financial Investment Sector. Case 1 is Koperasi Cipaganti Karya Guna Persada, Case 2 is Koperasi Simpan Pinjam Pandawa Mandiri Group, Case 3 is Dream from Freedom, Case 4 is First Travel, and Case 5 is Gradasi Anak Negeri). Law enforcement against criminal acts in the field of financial investment has now begun to be addressed, one of which is the establishment of the Investment Alert Task Force. The Investment Alert Task Force is a task force for handling suspected illegal actions in the field of public fundraising and investment management.

This task force consists of regulators including the Financial Services Authority of the Republic of Indonesia, the Ministry of Trade of the Republic of Indonesia, the Investment Coordinating Board, the

Ministry of Cooperatives and MSMEs, and the Ministry of Communication and Information of the Republic of Indonesia. As well as law enforcement which includes the Republic of Indonesia Attorney General's Office and the Indonesian National Police. Then in 2017, the Indonesian Financial Services Authority's Investment Alert Task Force brought together six new members to prevent the rampant criminal activity in the field of financial investment that continues to grow.

The six new ministries/institutions are Bank Indonesia, the Ministry of Home Affairs of the Republic of Indonesia, the Ministry of Religion of the Republic of Indonesia, the Ministry of Education and Culture of the Republic of Indonesia, the Ministry of Research, Technology and Higher Education of the Republic of Indonesia, and the Financial Transaction Reports and Analysis Center.

However, in its implementation, the Investment Alert Task Force has not been strong enough to fight crimes in the financial investment sector. This is because the Investment Alert Task Force has not been able to take direct action against the perpetrators of criminal acts in the financial investment sector (Kontan, 2018). Also, the Investment Alert Task Force is still passive, waiting for complaints from the public. Thus, law enforcement against criminal acts in the financial investment sector is still weak even though the Investment Alert Task Force has been formed.

The Investment Alert Task Force stopped the activities of 168 entities suspected of engaging in peer to peer lending business activities but were not registered or had business licenses from the Financial Services Authority (OJK, 2019). The activities of these 168 entities are suspected to be online financial crimes that violate statutory regulations. To date, the number of entities suspected of conducting online financial activities is 803, namely 404 entities in the 2018 period and 399 entities from January to March 2019.

The Investment Alert Task Force asks the public to always be careful in using their funds. Do not be lured by the lure of high profits without seeing the risks that will be accepted. The Investment Alert Task Force continuously takes preventive actions in the form of socialization and education so that the public can avoid losses on the illegal investment. Public participation is very necessary, especially not to become a participant in the entity's activities and to immediately report any investment offers that do not make sense.

The handling carried out by the Investment Alert Task Force cannot be separated from the support of the public who have submitted reports or complaints. The weakness in the Investment Alert Task Force's actions is that there is no special action against entities that carry out activities without permission from the Financial Services Authority.

Initial indications of investment crime already exist by providing unreasonable returns on investment, but there has been no action from the Investment Alert Task Force as coordination with institutions that are members of the Task Force. This is because there are still weaknesses in the existing legal construction, not in the existing institutions. Therefore, criminal law policies in the future must use the nature of violating formal law as the spearhead of preventing and eradicating criminal acts in the field of financial investment. The following authors provide elements of criminal offenses in the field of financial investment in the future:

- 1) Whoever;
- 2) Conducting a series of activities under the pretext of cooperation, investment, and/or economic business (which can be valued in money);
- 3) With or without permission from the authorized agency/institution;
- 4) By promising excessive, unreasonable, and/or outside profit/profit determined by the competent authority.

Whoever in this first element is a common element in the formulation of a criminal act. What is meant by whosoever is a legal subject accused of committing a criminal act and filed as a defendant, the perpetrator does not need certain criteria, anyone can do so and he can be held accountable for the criminal act committed. A criminal act is a behavior that violates the applicable criminal provisions when the behavior is committed, whether that behavior is in the form of committing certain acts prohibited by the criminal provisions or not committing certain acts required by the criminal provisions.

The second element in the reconstruction of criminal offenses in the field of financial investment is to carry out a series of activities under the pretext of cooperation, investment, and/or business of an economic nature (which can be valued in money). In the Big Indonesian Dictionary, the word "series" means the result of compiling (compiling, coupling, and so on) (KBBI V, 2018). Then the word "activity" in the Big Indonesian Dictionary means activity; effort; occupation (KBBI V, 2018). So that all actions taken by criminal offenders in the field of financial investment include offering financial investment products, offering trade products, in conventional media (in public advertisements and advertisements on social media/internet). This second element is closely related to the third element in the offense suggested by the author. This second element was initiated by the author by looking at the legal implications of the current regulation of criminal acts in the financial investment sector (*ius constitutum*). Whereas with the incomplete or insufficient regulation of criminal acts in the financial investment sector, the victim's loss and the perpetrator's evil intentions cannot be prevented by existing legal instruments.

This third element is the realization of several separate arrangements in the area of financial investment. These separate arrangements are contained in the Banking Law, the Capital Market Law, the Futures Trading Law, the Trade Law, and the OJK Law. Each of these special laws requires a permit from the competent agency/institution. For example, Article 16 of the Banking Law, which stipulates that each party that will conduct activities to collect funds from the public in the form of deposits, must first obtain a business license as a commercial bank or people's credit bank from the management of Bank Indonesia unless the activity of collecting funds from the public in question is required. regulated by separate laws. In principle, the legal instruments in the special law also provide "special" treatment to carry out activities in the field of financial investment. This can be found in banking activities, for example, Article 16 of the Banking Law requires that every activity to collect funds from the public in the form of deposits must first obtain a business license as a Commercial Bank or Rural Bank from the Management of Bank Indonesia (currently switching to OJK). The license is submitted with special conditions stipulated in the Banking Law.

The fourth element in the reconstruction proposed by the author is a more specific criminalization of the criminal act of fraud (a series of lies). This fourth element is also an appeal that has been frequently encountered. The Investment Alert Task Force urges the public not to take part in attractive offers with lucrative returns without risk. This element exists in the Regulation of the Minister of Trade Number 36 / M-DAG / PER / 9/2007 concerning the Issuance of Trading Business Permits. Article 5 paragraph (1) states that:

SIUP is prohibited from being used for the following activities:

- a) That is not by the institutional and/or business activities, as stated in the SIUP;
- b) Raising funds from the public by offering promises of unfair benefits (money game);
- c) Trade-in goods and/or services with a direct sales system (single-level marketing or multi-level marketing);
- d) Trade-in Survey Services;
- e) Commodity Futures Trading.

This fourth element is also contained in several appeals given by several countries that are concerned about criminal acts in the field of financial investment. Bank Negara Malaysia also provides characteristics of criminal offenses in the field of investment on the internet platform by offering above average (reasonable) returns and low investment risk. Here are the characteristics:

- a) Operators of illegal internet investment schemes lure unsuspecting victims to make on-line investments or receive investment advice online, by offering investment opportunities above a market rate of return and will claim that their schemes are at zero or very low risk.
- b) When questioned, most illegal operators will either claim to be foreign operators that do not require licenses from Malaysian regulators to operate their business, or claim that they already have the appropriate license from relevant authorities/regulators.
- c) Unsuspecting victims of these schemes would be enticed as operators will pay them high returns at the initial stage and this is used as a tactic to lure and recruit new investors.
- d) The survival of this scheme is dependent upon the recruitment of new depositors, i.e., funds obtained from new depositors will be used in paying dividends to the existing depositors. Therefore, the scheme will fail when there is no contribution of funds from new depositors; and
- e) However, the operator will eventually abscond with deposits collected when he feels that the scheme is about to fail, thus leaving the depositors at the losing end.
- f) These operators are not licensed to receive deposits by Bank Negara Malaysia or licensed to offer investment advice from the Securities Commission related to funding management, securities, and futures.

Likewise, the Federal Bureau of Investigation (FBI) provides warnings related to criminal acts in the field of financial investment. One of the emphasizes is "offer of low- or no-risk investment, guaranteed returns, overly-constant returns, complex strategies, or unregistered securities".

The state must be present in protecting the rights of the people who are harmed by the perpetrators of criminal acts in the field of financial investment. The role of the state is by forming laws according to the needs of society. Handling criminal acts in the field of a financial investment as a rational effort is overcome by criminalization which is part of the politics of law enforcement in a broad sense, namely as part of social politics in the form of community or state efforts to improve the welfare of its citizens (Muladi and Barda Nawawi Arief, 1992). Public protection policies or efforts (social defense) and efforts to achieve community welfare, the main objective of which is to protect the community to achieve community welfare (Barda Nawawi Arief, 2014).

Conclusion and Suggestion

The future reconstruction of criminal offenses in the field of financial investment includes the following elements: 1. Whoever; 2. Carrying out a series of activities under the pretext of cooperation, investment, and/or economic business (which can be valued in money); 3. With or without permission from the authorized agency/institution; 4. By promising excessive, unreasonable, and/or outside profit/profit determined by the competent authority. Reconstruction of the regulation of criminal acts in the field of financial investment is necessary so that the objectives of protecting society can be achieved. Moreover, there are weaknesses in the construction of criminal acts in the field of financial investment that currently apply (*ius constitutum*). Includes: using material offenses in the prosecution against the perpetrator; the nature of violating the material law results in passive law enforcement and law enforcement.

It is hoped that in the future, the House of Representatives of the Republic of Indonesia and the President of the Republic of Indonesia will be able to formulate criminal acts in the field of financial

investment with formal offenses. Thus, public losses and the number of victims in criminal acts in the financial investment sector can be prevented from the start (preventive function). And if a loss has occurred, criminal law enforcement can be carried out to provide a deterrent effect to the perpetrator.

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