

The Rights of Victims of Illegal Investment Crimes Against Confiscated Goods



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ABSTRACT. Illegal investment is a very disturbing business crime. The number of victims and the large value of losses make the case of illegal investment getting special attention. The return of losses from the proceeds of crime is actually the right of the victim, but in law enforcement practice, confiscated objects are usually returned to the state, not to the victim as the rightful party. This study will discuss the problems of investment law in business activities, illegal investment in crime terminology and victims' rights to confiscated objects. This research is normative juridical research examining the legal vacuum of confiscation of assets to be returned to the victim. Investment is a business activity protected by law. In its development, there are investment irregularities in the form of illegal investments, namely investments that are not licensed and carried out against the law. Illegal investment in the terminology of crime is not explicitly stated, but this act is punishable by fraud and money laundering. The proceeds of crime are traced and confiscated, but in legal practice, the return is given to the state. In future legal reformulations, it is necessary to stipulate provisions regarding the seizure of assets; therefore, the victims can get their rights.

KEYWORDS. Illegal Investments; victim's rights; confiscated goods.

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Introduction

As a country that cannot be separated from economic activities, we also cannot be separated from investment activities, one of which is investment activities carried out by investment companies. We find many investment activities carried out by companies in the community. However, it is not uncommon to find illegal investments or what we often call fraudulent investments practicing in the midst of society. Illegal investment is simply defined as an economic activity which in terms of investment violates the laws and regulations.¹ In investing, investors hope to get a profit. In illegal investment activities, business actors will create a picture for investors that they will benefit even though the business entity is at a loss. In investing, there is a principle of high-risk high gain. Based on this principle, the investors will invest high with high returns but must be prepared for high

¹ Fallahudin Tsauki Takalamingan, “Peran Otoritas Jasa Keuangan Dalam Melakukan Pengawasan Dan Pencegahan Terhadap Pendirian Perusahaan Investasi Ilegal Di Tinjau Dari Undang-Undang Nomor 21 Tahun 2011”. *Lex Et Societatis*, 9(1), 2021.

losses; therefore, it is very strange if business entities will offer high profits with small risk of loss, even there is no risk.²

According to data submitted by the Investment Alert Task Force of the Financial Services Authority, the losses suffered by the public, due to being tempted and trapped by illegal investments from 2011 to 2021 reached Rp. 117.4 trillion with the number of victims reaching millions of people.³ The value of the loss is of course only in the form of material losses. The immaterial losses suffered by the community are certainly very large, such as stress, household divisions, social conflicts to suicide. Family relations and friendships are also threatened, considering that the perpetrator usually invites the closest people to him first.

Illegal investments use money game schemes or Ponzi schemes, namely rotating public funds by paying bonuses to old consumers with the source of funds coming from new consumers.⁴ The government has actually made various efforts to prevent this illegal investment, one of which is by forming an Investment Alert Task Force consisting of 13 ministries and institutions. The Investment Alert Task Force in its task of preventing public losses from December to early January 2021 again found 133 illegal peer to peer lending fintech platforms and 14 business activities without permits that could potentially harm the community. Meanwhile, of the 14 illegal investment entities that were prosecuted in early 2022, they carried out commodity futures trading (PBK) activities without a permit; unlicensed cryptocurrencies; cooperative without a direct sales license without a license; and other activities.⁵ The list of illegal investment entities handled by the Investment Alert Task Force is as follows:

- a. Discontinued illegal investment business actors
- b. Discontinued illegal commodity futures trading business actors

² Aldika Yafi Raharjo, "Pengembalian Kerugian Korban Sebagai Akibat Investasi Ilegal oleh Koperasi". *Jurist-Diction*, 3(6), 2020, pp. 1957-1978.

³ Christiyaningsih, "OJK: Kerugian Akibat Investasi Ilegal 2011-2021 Capai Rp 117,4 T", <https://www.republika.co.id/berita/r5wi5o459/ojk-kerugian-akibat-investasi-ilegal-20112021-capai-rp-1174-t>

⁴ Sufmi Dasco Ahmad, "Peranan Otoritas Jasa Keuangan Dalam Penanggulangan Investasi Ilegal di Indonesia". *Jurnal Privat Law*, 6(1), 2018, pp. 1-12.

⁵ Otoritas Jasa Keuangan Republik Indonesia, "Awal Tahun Satgas Waspada Investasi Minta Masyarakat Waspada Fintech dan Investasi Ilegal Temukan 133 Fintech Peer-To-Peer Lending Dan 14 Entitas Penawaran Investasi Tanpa Izin", <https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Pages/Siaran-Pers-Awal-Tahun-Satgas-Waspada-Investasi-Minta-Masyarakat-Waspada-Fintech-dan-Investasi-Ilegal.aspx>

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- c. Business actors with illegal direct sales systems or discontinued pyramid schemes
- d. Business actors by duplicating the name of the discontinued licensed entity.⁶

From a juridical point of view, business crimes in illegal investments have two sides, namely on the one hand there are aspects of civil law and on the other hand aspects of criminal law. These legal aspects have two objectives and contradictory characteristics. The civil law aspect is more concerned with peace between the two parties so that it is only related to legal relations between individuals while the criminal law aspect is more concerned with the public interest or the wider community so that it is more coercive, to deter parties who have caused losses. In the regulations governing aspects of civil law, it is also regulated regarding aspects of criminal law with the proportion of unconditional confessions and not absolute and conditional confessions.⁷ Whatever the legal mechanism adopted by the victim, the main goal that the victim wants is to return the money that has been deposited by the victim. Meanwhile, the current legal process has not shown legal protection for victims.

The laws and regulations in Indonesia do not clearly regulate the return of victims' rights. In this study, we will discuss the law on investment in business activities, illegal investment in crime terminology and the rights of victims of confiscation of assets.

Method

This research is normative juridical research examining the void of norms regarding asset confiscation on the proceeds of illegal investment crimes in returning losses to victims. The legal materials in this study are primary legal materials, namely the Criminal Code and the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and

⁶ Otoritas Jasa Keuangan Republik Indonesia, "Lampiran 1 Siaran Pers SWI Oktober I. Daftar Entitas Investasi Ilegal Yang Ditangani Satgas Waspada Investasi", <https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Documents/Pages/Siaran-Pers-Satgas-Waspada-Investasi-Gencarkan-Cyber-Patrol--Tindak-Fintech-Lending-dan-Penawaran-Investasi-Ilegal/Lampiran%20154%20Entitas%20Ilegal%20Oktober.pdf>

⁷ Sufmi Dasco Ahmad, *loc. cit.*

Eradication of the Crime of Money Laundering and other technical juridical regulations. Secondary legal materials consist of journals, books, and electronic articles related to this research topic. The collection of legal materials is carried out through a literature study, in which the sources cited are listed in footnotes and bibliography. Analysis of the problem is carried out qualitatively.

Investment Law in Business Activities

Every human being has the desire to seek financial freedom.⁸ One of the efforts to achieve it is through investment. The term investment comes from the Latin, namely *investire* which means to use.⁹ Investment can be interpreted as an investment activity carried out by investors, both foreign and domestic investors in various business fields that are open to investment, with the aim of obtaining profits.¹⁰ In simple terms, investment can be defined as an effort to spend a certain amount of money or funds on something that is intended to gain profits in the future. These include the purchase of property, securities (such as deposits, stocks, bonds, mutual funds), precious metals, jewellery, or other forms.¹¹

Investment in addition to providing benefits for individuals personally, also provides benefits to the state through various forms of investment. Bahodirovich gave an opinion regarding the impact of investment on the country as follows:

⁸ Riwi Sumantyo, Ariyanto Adhi Nugroho, & Hery Sulisty, "Model dan Strategi Perencanaan Keuangan Keluarga pada Masa Pandemi Covid-19 di Kota Surakarta". *KUAT: Keuangan Umum dan Akuntansi Terapan*, 3(1), 2021, pp. 44-48. Financial freedom is the condition of someone who is free to use money to fulfil a lifestyle with passive income. Passive income ownership makes a person not rely on his source of income only on fixed income. The amount of passive income is influenced by the amount of investment owned by the community. Referring to this, investment plays an important role in encouraging people's financial freedom. In a broader perspective, individual financial freedom provides a good signal for managing macroeconomic stability. Financial freedom is an indication of the potential for steady demand.

⁹ Salim H.S.& Budi Sutrisno, *Hukum Investasi di Indonesia*, Depok, Rajagrafindo Persada, 2014, p. 3.

¹⁰ Fallahudi Tsauki Takalaminingan, *op. cit.* p. 29.

¹¹ Otoritas Jasa Keuangan Republik Indonesia, "Berinvestasi Juga Perlu Waspada", <https://waspadainvestasi.ojk.go.id>

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Investment adds to the stock of capital, and the quantity of capital available to an economy is a crucial determinant of its productivity. Investment thus contributes to economic growth. Investment is an addition to the capital stock. Investment may occur as a net addition to capital or as a replacement of depreciated capital. Investment is a highly volatile component of GDP.¹²

According to Mursidah Nurfadillah, investment decisions are influenced by three things as follows: (a) The expected rate of return. (b) The level of risk (rate of risk). (c) Availability of the amount of funds to be invested. If the available funds are sufficient, then investors certainly want maximum returns with a certain level of risk.¹³ Lytvynenko, O. D., & Bakumenko, O. V view that there are several aspects in considering investment, namely as follows:

In modern economic science, there are different approaches to understanding the concept of investment resources and their structure. However, despite the existing discrepancies in the interpretation of this term, almost all scholars consider any types of values (financial, material, intangible, labor, intellectual, informational, innovative, organizational, etc.) or a combination of them that can be used in investment activities for the purpose of profit or other end result.¹⁴

The term investment is a popular term in the business world, while the term capital investment is commonly used in legislation. But basically the two terms have the same meaning, so they are sometimes used interchangeably. The term investment or capital investment is a term that is known in daily business activities as well as in the language of legislation.¹⁵ In normative provisions in Indonesia, the terminology used is investment as regulated in Law Number 25 of 2007 concerning Investment. In the

¹² Ahmedov Rakhimjon Bahodirovich, "The Importance of Investment in Economic Development of a Country". *Ижтимоий Фанларда Инновация онлайн илмий журнали*, 1(1), 2021, pp. 64-66.

¹³ Andreas Rudiwanto, "Langkah Penting Generasi Millennial Menuju Kebebasan Finansial Melalui Investasi". *Jurnal Moneter*, 5(1), 2018, pp. 44-51.

¹⁴ O. D. Lytvynenko & O. V. Bakumenko, "Economic Essence of Definition Investment Potential". *Молодий вчений*, 10 (1), 2018, pp. 347-350.

¹⁵ Ida Bagus Rahmadi Supanca, *Kerangka Hukum & Kebijakan Investasi Langsung di Indonesia*, Jakarta, Ghalia Indonesia, 2006, p.1.

provisions of Article 1 point 1 of Law Number 25 of 2007 concerning Investment, it is determined that what is meant by investment is all forms of investment activities, both by domestic and foreign investors to conduct business in the territory of the Republic of Indonesia.

Investment develops in line with a country in carrying out national development in order to improve the welfare and prosperity of its people. This need arises due to the inability of a country to meet the need for capital so that capital is one of the best alternatives other than through foreign debt.¹⁶ John W. Head also stated that there are several purposes for holding investment, especially foreign investment. These objectives include, among others:

1. Creating job vacancies for residents of capital-receiving countries, so that they can increase their incomes and standard of living.
2. Creating investment opportunities for residents of recipient countries so that they can share in the income of new companies.
3. Increasing exports from capital-receiving countries, bringing in additional income from outside that can be used for various purposes for the benefit of the population.
4. Generating transfer of technical training and knowledge that can be used by residents to develop other companies and industries.
5. Expanding the potential for self-sufficiency in capital recipient countries by producing local goods to replace imported goods.
6. Generating additional tax revenue that can be used for various purposes, for the benefit of residents of the recipient country.
7. Making the host country's resources, both natural and human resources, better utilized than they were before.¹⁷

Based on the source of financing, investment is divided into 2 (two), namely investment originating from foreign capital (PMA), and originating from domestic capital (PMDN). In Article 1 point 2 it is stated "Domestic investment is an investment activity to conduct business in the territory of the Republic of Indonesia carried out by domestic investors using domestic capital" while in Article 1 point 3 it is stated that "Foreign investment is an activity investing to conduct business in the territory of the Republic of

¹⁶ Rosyidah Rakhmawati, *Hukum Penanaman Modal di Indonesia*. Malang, Bayu Media, 2004, p. 5.

¹⁷ John W. Head, *Pengantar Umum Hukum Ekonomi*, Jakarta, ELIPS, 2002, p. 89.

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Indonesia carried out by foreign investors, both those who use fully foreign capital and those in joint ventures with domestic investors.” Based on the form, investment can be distinguished between direct investments and the form of portfolio investments, or equity participation (without a majority). The difference is the level of power. In direct investments, the foreign party controls the management of the company, so that investors start to get involved from giving their capital to a business, managing and supervising the business sector. In portfolio investments, they are not directly involved in the management. Investments are made through the ownership of bonds and stocks. In addition, there are also so-called export credits, which are short-term loans that provide opportunities for entrepreneurs or government agencies in developing countries to purchase capital equipment and equipment in the form of credit.¹⁸

Illegal Investment in Crime Terminology

The desire to invest safely in order to gain financial freedom and improve the economy actually has to deal with illegal investment practices. The term illegal investment is also known as fraudulent investment or investment fraud. Real practice that is often found in the community related to the practice of collecting funds from the community illegally, so that it is more related to the provisions of criminal law.¹⁹ Illegal investing is an unlicensed investment practice. Illegal investment activities resemble banking instruments, with the main characteristic of fraud under the guise of investment is the absence of valid licensing documents from relevant regulators (supervisors) such as the Financial Services Authority, Bank Indonesia, Commodity Futures Trading Supervisory Agency - Ministry of Trade, Ministry of Cooperatives and SMEs, and others. Business activities to collect funds from the public can only be carried out by banks.²⁰ Even in the current weakening economic conditions, the number of illegal investment

¹⁸ *Ibid.*, p. 12.

¹⁹ Nando Mantulangi, “Kajian Hukum Investasi dan Perlindungan Terhadap Korban Investasi Bodong”. *Lex Administratum*, 5(1). 2017.

²⁰ Otoritas Jasa Keuangan Republik Indonesia, *Booklet Perbankan Indonesia 2014*, Jakarta, Departemen Perizinan & Informasi Perbankan, 2014, p. 9.

offers is getting higher because people are looking for other alternatives in seeking profit.

Illegal investment practice is where people are promised a fixed profit/interest every month even though the company is making a loss. This can be seen, this form of investment is clearly unreasonable, funds are highly speculative, and seeks to avoid banking regulations in collecting funds from the public in the form of savings.²¹ The method of finding members is done by using a cultural approach, for example, illustrating that traditional activities, religious ceremonies or hajj costs require quite a lot of funds; therefore, it is better to prepare these funds by participating in investments. Furthermore, Deb, S., & Sengupta, S. state that the characteristics of investment fraud are as follows:

- 1) illegal schemes for fund raising;
- 2) purported sale of financial instruments;
- 3) guaranteed high returns on investment;
- 4) low or no risk attached initially; and
- 5) usually, a large population falling prey to the dubious schemes.²²

Illegal investments using money game schemes or Ponzi schemes are rotating public funds by paying bonuses to old consumers with the source of funds coming from new consumers. There is not the slightest real business activity to support the payment of profits to the community, the result is predictable, will lose money in a short time because the money has been handed over to other parties who have participated first. Moreover, Illegal Investment activities use public facilities to make it easier to attract people to follow the practice. Fundraising from the public is accompanied by a very tempting profit or with interest beyond the normal limits.²³ Illegal investments provide unreasonable returns. However, the legal culture of the community shows that there are still many people who are interested in participating in this illegal investment. The victims are increasing day by day. This condition certainly requires efforts to overcome the existence of illegal investments both in terms of public financial literacy and in terms of law enforcement.

²¹ Arsil, *Menjerat Investasi Bodong dengan Tindak Pidana Perbankan*, Jakarta, Lembaga Kajian & Advokasi untuk Indenpedensi Peradilan, 2013, p. 4.

²² Sadrita Deb & Subhojit Sengupta, "What Makes The Base of The Pyramid Susceptible to Investment Fraud". *Journal of Financial Crime*, 27(1), 2020, p. 145.

²³ Arsil, *op.cit.* p.1

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Illegal investment is not explicitly stated as a crime in the Criminal Code or in provisions outside the Criminal Code. Judging from the ways in which members gather for illegal investment activities, this act can be classified as fraud. The crime of fraud is regulated in Book II of the Criminal Code regarding crimes against property. Crimes against assets are in the form of attacks on the legal interests of people for their property. The crime of fraud is contained in Chapter XXV Book II of the Criminal Code, from Article 378 to Article 395 of the Criminal Code. The original title of this chapter is *bedrog*. Fraud is the act of a person by deceiving a series of lies, false names and false circumstances with the intention of benefiting himself with no rights. A series of lies is an arrangement of false sentences arranged in such a way which is a story of something as if it were true.²⁴

Fraud is generally regulated in Article 378 of the Criminal Code which states "Whoever with the intent to unlawfully benefit himself or another person, by using a false name or false dignity, by deceit, or a series of lies, moves another person to hand over something to him, or in order to give debts or write off receivables, they are threatened with fraud with a maximum imprisonment of four years." Andi Hamzah divides the elements of the crime of fraud as follows:

1. With the intention to benefit oneself or others, which means there is intentional as a goal (*oogmerk*).
2. The act is carried out against the law, meaning that among other things the perpetrator does not have the right to enjoy that benefit (*Hoge Raad* in 1911).
3. By using a false name or false dignity, by deceit, or by a series of false words, for example claiming a name that is well known to the person being deceived or using the name of a famous person. False dignity, for example claiming to be someone who has dignity such as *kyai*, sub-district head, village head and others. By deceit, for example claiming to be buying very cheap goods to the cheated person. A series of lies means a lot, the main thing is that the lie is an attempt to deceive.
4. Move other people, meaning that in these ways he wants the person who is being cheated to be moved to hand over an item to him.
5. To hand over an item to him or to give him a debt or write off a receivable, is a core part of this crime, meaning in a criminal act of fraud,

²⁴ R. Sugandhi, *Kitab Undang-undang Hukum Pidana dan Penjelasannya*, Surabaya, Usaha Nasional, 1980, pp. 396-397.

the object can be in the form of rights (making debts or writing off receivables).²⁵

An explanation of the crime of fraud can also be seen from additional legal sources, namely court decisions. Jurisprudence of the Supreme Court dated July 26, 1990 No. 1601. K/Pid/1990 states as follows:

The main element of the fraud offense (Article 378 of the Criminal Code) lies in the methods used by the perpetrator of the offense to move other people to hand over something. The basic principle of the crime of fraud is dishonest way to obtain the property, namely by cheating / deceit. Also dishonest in obtaining benefits or advantages through deception, so that victims feel cheated. In the crime of fraud, malicious intent can be identified from the start by comparing what is said or done against the objective conditions of oneself and one's abilities. Besides, it is against the law.

The element of whoever refers to the legal subject, namely the actor who collects funds from the community. The element with the intention of benefiting oneself or others unlawfully refers to the intention to do the act of collecting these funds, namely to benefit oneself or others illegally shows that the perpetrators do not have the right to collect public funds because they are not banking institutions or other non-bank financial institutions. The use of using a false name or false dignity, with deception, or a series of lies in illegal investments usually uses framing and flexing strategies. Framing is part of the media communication strategy and/or journalistic communication. Framing is compiling or packaging information about an event with the mission of forming an opinion or leading the public's perception of an event where the investment made is definitely profitable and there is almost no risk. At the beginning of the training, participants are required to make a deposit to practice trading, with the lure of feeling a real return. To make people more convincing, the perpetrator did flexing. Flexing is showing the wealth owned or achieved to others. Flexing is a marketing strategy that aims to build consumer trust.²⁶ The aim of the strategy is to induce others to hand over money under the guise of investing.

²⁵ Andi Hamzah, *Delik-delik Tertentu (Speciale Delicten) di dalam KUHP*, Jakarta, Sinar Grafika, 2010, p. 110.

²⁶ Rohmini Indah Lestari & Zaenal Arifin, "Godaan Praktik Binary Option Berkedok Investasi Dan Trading". *Jurnal Ius Constituendum*, 7(1), 2022, pp. 19-31.

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Law enforcement for perpetrators only by using the provisions of fraud as referred to in Article 378 of the Criminal Code is certainly not enough. The maximum penalty for the perpetrator is only a maximum imprisonment of four years, even though the number of victims is very large and the value of the loss is very large. In law enforcement practice, investigators from the beginning should add provisions for the crime of money laundering. It aims to trace the circulation of money obtained from the victim. The birth of an international anti-money laundering legal regime was marked by the issuance of The United Nation Convention Against Illicit Traffic In Narcotics, Drugs and Psychotropic Substances Of 1988 (the 1988 Vienna Convention) which is seen as a milestone and the culmination of the international community's attention to money laundering.²⁷

Fraud is a predicate offense of money laundering. According to Article 2 of the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, the proceeds of the crime of money laundering are assets, one of which is obtained from the crime of fraud. The crime of money laundering is not a stand-alone crime, but there must be a preliminary crime. Regarding the connection between money laundering and other crimes, Pamungkas states as follows: “money laundering recently is a world phenomenon and has become an international challenge. Money laundering is generally defined as a process to change crime from corruption, drugs, gambling, smuggling, and other serious crime, so those crime results made visible and bright as a clean wealth because its origin has been concealed.”²⁸

Money laundering in Indonesia is one of the nation's unresolved problems. Indonesia as a country based on law (*rechtstaat*) and not based on mere power (*maachtsstaat*), then law enforcement efforts adhere to the principles of the rule of law, namely the rule of law, the principle of equality before the law and the guarantee of human rights by law and court decisions. In the context of the teaching of the welfare state, the Indonesian government is obliged to synergize law enforcement efforts based on the values of justice

²⁷ Yunus Husein, *Negeri Sang Pencuci Uang*, Jakarta: Pustaka Juanda Tigalima, 2005, p. 13.

²⁸ Djoko Pamungkas, "How Police Overcomes Money Laundering? Study Analysis of Role of Central Java Regional Police Department on Money Laundering Case". *Journal of Law and Legal Reform*, 1(1), 2019, pp. 25-34.

with efforts to achieve national goals to realize general welfare for the community.²⁹

Valeriia Dyntu and Oleh Dykyi state “Money laundering can be defined as a financial transaction and other activities, which are committed to a particular target of concealment the real origin of the revenue.”³⁰ Ayodeji Aluko, Mahmood Bagheri state "Money laundering is indeed a global phenomenon which undermines the economic and political stability of States.”³¹ Money laundering has a systemic impact on people's lives. Rhoda Weeks-Brown illustrates this impact as follows:

money laundering is what enables criminals to reap the benefits of their crimes, including corruption, tax evasion, theft, drug trafficking, and migrant smuggling. Many of these crimes pose a direct threat to economic stability. Corruption and tax evasion make it difficult for governments to deliver sustainable and inclusive growth by diminishing the resources available for productive purposes, such as building roads, schools, and hospitals. Criminal activity undermines state authority and the rule of law while squeezing out legitimate economic activity. And money laundering may create asset bubbles in markets like real estate, a common vehicle.³²

Bijan Bidabad said “Money laundering harms individual and public rights as well as economies.”³³ The effect of the crime of money laundering which is very dangerous to the finances and economy of a country, then this crime is classified as one of the extraordinary crimes (extraordinary crime) and deserves to be given heavy criminal sanctions. Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of

²⁹ Edward Fernando Siregar, Helvis Helvis, & Markoni Markoni, “Analisa Yuridis Eksekusi Sita Jaminan Terhadap Tindak Pidana Pencucian Uang (TPPU) First Travel”. *Jurnal Syntax Transformation*, 2(11), 2021, pp. 1560-1573.

³⁰ Valeriia Dyntu & Oleh Dykyi, "Cryptocurrency in the System of Money Laundering". *Baltic Journal of Economic Studies*, 4(5), 2018, pp. 75-81.

³¹ Ayodeji Aluko & Mahmood Bagheri, "The Impact of Money Laundering on Economic and Financial Stability and on Political Development in Developing Countries: The Case of Nigeria". *Journal of Money Laundering Control*, 15(4), 2012, pp. 442-457.

³² Rhoda Weeks Brown, “Straight Talk”, <https://www.imf.org/external/pubs/ft/fandd/2018/12/imf-anti-money-laundering-and-economic-stability-straight.htm>

³³ Bijan Bidabad, "Money Laundering Detection System (MLD) (A Complementary System of Rastin Banking)". *Journal of Money Laundering Control*, 20(4), 2017, pp. 354-366.

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the Crime of Money Laundering stipulates the maximization of punishment for the crime of money laundering, namely in addition to serious crimes (accumulation of imprisonment and fines) there are also obligations of law enforcers in the context of asset recovery for the proceeds of a crime, such as the seizure of assets belonging to the perpetrator of the crime. This is expected to generate compliance, deter perpetrators, and prevent other people or the public from committing these crimes.³⁴

Countermeasures against money laundering are carried out using preventive measures through increasing awareness of financial institutions, increasing the role of financial intelligence and supervisory authorities, and including in this step carrying out international cooperation, especially considering the transnational nature of this crime.³⁵ White-collar crime has now reached a level that is very dangerous for the joints of social life. Petter Gottschalk states “White-collar crime is crime against property for personal or organizational gain, which is committed by non-physical means and by concealment or deception.”³⁶ The criminal acts committed no longer recognize national boundaries (transnational). Forms of crime are increasingly sophisticated and highly organized, making it very difficult to be detected by law enforcement. The perpetrators of these crimes always try to save the money from their crimes in various ways, and one of them is through money laundering. International cooperation is very important to trace and confiscate assets from illegal investment proceeds hidden abroad.

Victims’ Rights to Confiscated Objects

Asset confiscation in the criminal law system in Indonesia is part of an additional crime in the form of confiscation of certain goods resulting from a crime. The confiscation of certain goods, under Indonesian criminal law, can only be carried out with a court decision that has permanent legal force. However, during the law enforcement process, other actions can be taken in the form of confiscation. Confiscation is a forced effort by investigators to

³⁴ Erma Denniagi, “Analisis Ke-Ekonomian Pemidanaan Tindak Pidana Pencucian Uang Dalam Undang-Undang Nomor 8 Tahun 2010 Tentang Pencegahan Dan Pemberantasan Tindak Pidana Pencucian Uang”. *Lex Renaissance*, 6(2), 2021, pp. 246-264.

³⁵ Yenti Garnasih, *Kriminalisasi Pencucian Uang (Money Laundering)*. Jakarta, Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2003, p. 35.

³⁶ Petter Gottschalk, *White-Collar Crime: Detection, Prevention and Strategy in Business Enterprises*, Florida, Universal-Publishers, 2010, p. 14.

take over and store objects (assets) for the sake of proof in the law enforcement process at the stages of investigation, prosecution and trial.³⁷

Provisions regarding confiscation can be reviewed from the provisions of Article 39 of the Criminal Procedure Code. Paragraph (1) stipulates that objects that may be subject to confiscation are objects or claims of a suspect or defendant which are wholly or partly suspected to have been obtained from a criminal act or as a result of a criminal act; objects that have been used directly to commit a crime or to prepare it; objects used to hinder the investigation of criminal acts; objects specially made or intended to commit a crime; and other objects that have a direct relationship with the crime committed. In a special provision, namely Article 81 of the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, it is stated that in the event that sufficient evidence is obtained that there are still assets that have not been confiscated, the judge orders the public prosecutor to confiscate the assets.

Returning assets obtained from the asset confiscation is a form of legal protection for victims of illegal investments. Legal protection must look at the stages, namely legal protection born of a legal provision and all legal regulations provided by the community which are basically an agreement by the community to regulate the behavioral relationship between members of the community and between individuals and the government which are considered to represent the interests of the community. In the event that the victim suffers a financial loss in the form of loss of money or goods as a result of a crime, then one of the legal protections for the victim is an effort to restore the victim's rights in the form of money or goods that have been lost due to the act; therefore, it can be returned to the victim. Asset recovery for victims is an important part of achieving legal goals, namely justice, especially for crime victims who do not have a clear position in the structure of the criminal justice system.³⁸

³⁷ Widiya Yusmar, Somawijaya Somawijaya, & Nella Sumika Putri, "Urgensi Pengesahan Rancangan Undang-Undang Perampasan Aset Tindak Pidana Sebagai Upaya Pemberantasan Tindak Pidana Pencucian Uang Dengan Predicate Crime Tindak Pidana Narkotika". *Jurnal Ilmiah Galuh Justisi*, 9(2), 2021, pp. 219-240.

³⁸ Satriawan Sulaksono & Widodo Tresno Novianto, "Perlindungan Hukum Dalam Pemulihan Aset Bagi Korban Tindak Pidana Pencucian Uang Yang Tercampur Dengan Aset Pelaku". *Jurnal Hukum Dan Pembangunan Ekonomi*, 7(1), 2019, pp. 107-119.

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Article 46 of the Criminal Procedure Code states that the object subject to confiscation is returned to the person or to those from whom the object was confiscated, or to the person or to those most entitled to it if the interests of investigation and prosecution no longer require it; the case is not prosecuted because there is insufficient evidence or it turns out that it is not a criminal act; or if the case is set aside for the public interest or the case is closed for the sake of law, unless the object is obtained from a criminal act or is used to commit a criminal act. If the case has been decided, then the object subject to confiscation is returned to the person or to those named in the decision, unless according to the judge's decision the object is confiscated for the state, to be destroyed or to be damaged until it can no longer be used or, if the object is still needed as evidence in other cases.

There are Attorney General Regulation No. 27 of 2014 Jo. Attorney General Regulation No. 9 of 2019 concerning Guidelines for Asset Recovery through Asset Recovery Centers (PPA), Government Regulation Number 7 of 2018 concerning the Provision of Compensation, Restitution, and Assistance to Victim Witnesses, Law of the Republic of Indonesia Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering, however, there is a legal vacuum in criminal procedural law in which the victims do not receive full compensation or none at all. In the case of illegal investment, the victim can ask for compensation as regulated in Article 20 of the Regulation of the Supreme Court of the Republic of Indonesia Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations which states, "Losses suffered by victims due to criminal acts committed by corporations compensation can be requested through a restitution mechanism according to the provisions of the applicable laws or through a civil lawsuit."

In practice, returning losses to victims against perpetrators in the criminal justice process is certainly not easy. The asset recovery mechanism for victims of predicate crimes who are not state actors cannot be carried out through the asset confiscation mechanism. The rationale for this is that the application of the criminal act of confiscation of assets actually transfers ownership or rights to assets from the perpetrator to the state automatically. This condition can be seen in the Supreme Court's Decision in the First Travel case. In a copy of the cassation decision number 33096 K/Pid.Sus/2018, it is stated "That as the facts at trial, the evidence is the result of crimes committed by the Defendants and confiscated from the Defendants who have been

proven apart from committing the crime of fraud as well proven to have committed the crime of Money Laundering. Therefore, based on the provisions of Article 39 of the Criminal Code in conjunction with the confiscation of the State.”

In the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, one of the mechanisms for returning assets to victims of crime can be implemented through a judge's decision which states that these assets are returned to those named in the decision. Considering in the NCB Asset Forfeiture mechanism in which it is very likely that the actual victim has not been identified, assets that are known or reasonably suspected to be the result of the crime can be confiscated. Therefore, the identification of the actual victim in a case is very important in order to realize justice for the victim as a whole, including the victims of crimes that are not the state.³⁹

Determination of the actual victim, the magnitude of the loss and the return of the loss is very important in the legal formulation of the return of the rights of victims of illegal investments in the future. The principle of *pari passu prorata parte* in bankruptcy cases can at least be an example in determining the return of assets to victims. The principle of *pari passu prorata parte* basically states that the debtor's assets are mutual guarantees for creditors in which the proceeds of the sale will be distributed to creditors proportionally, unless creditors have the right to take precedence.⁴⁰ The conclusion of the *pari passu prorata parte* principle is to determine the equal or equal classification of debtor assets among creditors.⁴¹

³⁹ Tania Irwan, “Implementasi Upaya Pemulihan Aset Korban Kejahatan Tindak Pidana Penipuan dan Pencucian Uang Dalam Kasus First Travel”. *JISIP (Jurnal Ilmu Sosial dan Pendidikan)*, 5(4), 2021, pp. 698-719.

⁴⁰ Adi Satrio, R. Kartikasari, & Pupung Faisal, “Eksekusi Harta Debitor Pailit Yang Terdapat Di Luar Indonesia Dihubungkan Dengan Pemenuhan Hak-Hak Kreditor”. *Ganesha Law Review*, 2(1), 2020, pp. 96-108.

⁴¹ Monitacia Kamahayani & Suyud Margono, “Penerapan Asas Pari Passu Pro Rata Parte Terhadap Pemberesan Harta Pailit PT Dhiva Inter Sarana dan Richard Setiawan (Studi Kasus Putusan Mahkamah Agung Republik Indonesia Nomor: 169 PK/Pdt. Sus-Pailit/2017)”. *Jurnal Hukum Adigama*, 3(1), 2020, pp. 71-91.

Conclusion

Illegal investments are not explicitly stated in the terminology of crimes in Indonesian criminal law, but the perpetrators can be charged with the provisions of Article 378 of the Criminal Code concerning fraud and with the provisions of the crime of money laundering. The addition of provisions for the crime of money laundering is very important to facilitate the search for the proceeds of crime. In law enforcement practice, asset recovery is difficult to give to the victims. Judges tend to return the proceeds of crimes to the state. It happens because of the legal vacuum of asset forfeiture and the difficulty of determining who is the actual victim, the magnitude of the loss and the proportion of the return on the loss.

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