

CRIMINAL LIABILITY OF PERPETRATORS IN THE CRIME OF PROMOTING ONLINE GAMBLING ON SOCIAL MEDIA

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Abstract

This study aims to analyze criminal liability for people who are involved in online gambling promotions through social media accounts and to analyze current law enforcement of promoting online gambling under the guise of binary options on social media. This study uses empirical normative legal research methods, using a qualitative approach to see the provisions or rules that are faced in a fact or reality that occurs in society. The results of this study are that the act of promoting online gambling on social media can be accounted for as long as the action meets the elements of Article 27 Paragraph (2) of the 2016 ITE Law and in that act, the perpetrator can be held accountable for his actions as contained in Article 44 of the Criminal Code, means the perpetrator who commits the crime of promoting online gambling on social media, their souls are not disabled in growth or impaired and are fully aware of their action. Furthermore, the supposed role of the Police, Prosecutors, and Judges has been confirmed in the legislation, and law enforcers should have carried it out. Then in its application based on the results of research on the actual role of the police in conducting investigations, prosecutors in carrying out prosecutions, and judges who are tasked with adjudicating in the context of law enforcement against Article 27 paragraph (2) of the 2016 UURI ITE which is ideally still not maximized because there are still obstacles, such as quality, quantity, and coordination that hinder the realization of ideal law enforcement against Article 27 paragraph (2) of the 2016 ITE Law.

Keywords: criminal liability, gambling, promoting, social media

INTRODUCTION

The rapid development of technology and information with a combination of high technological capabilities and sophisticated global networks has resulted in the production of technology and information increasing rapidly. Especially in Indonesia, the development of technology and information has made significant progress, seen from the various needs of people in Indonesia who are starting to carry out activities depending on technology and information.

The development of technology and information is supported by the presence of the internet which greatly facilitates people's lives. The internet is one of the technologies most often used by the people of Indonesia, the internet has even become a necessity in the daily life of the Indonesian people. With the entry of the internet in Indonesia, Indonesia is one of the countries with the most internet users with 82 million users.¹

The development of technology and information in Indonesia has connected society as if without boundaries and has caused significant social, economic and cultural changes to change and develop very quickly. Coupled with the conditions that hit the whole world with the presence of the Corona Virus Disease (hereinafter abbreviated as Covid) pandemic which was discovered in 2019 resulted in the limitation of all social life to meet face-to-face, making the internet the best alternative for humans to continue to fulfill their needs as a zoon political. At present, information and communication technology seems to be a double-edged sword because it contributes to improving the welfare of society, progress, and human civilization but at the same time it is also a very effective means for the occurrence of unlawful acts (*on rechtmatige daad*).

Indonesia is a country that declares itself as a constitutional state as regulated in Article 1 Paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) which contains the rule that Indonesia is a state of the law is an *expressis verbis* in the 1945 Constitution of the Republic of Indonesia. Therefore, all aspects of life in the Republic of Indonesia are regulated and limited by applicable legal norms in the social, political, cultural, economic, and so on.

There are various kinds of rights of citizens contained in the 1945 Constitution of the Republic of Indonesia, one of which is the right to communicate and obtain information which is affirmed in Article 28 F of the 1945 Constitution of the Republic of Indonesia which contains the rules that:

Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information using all available channels.

Based on the description of Article 28 F above, it can be seen that the freedom to express thoughts and freedom of opinion as well as the right to obtain information through the use and utilization of information and communication technology is aimed at advancing public welfare, educating the nation's life, as well as providing a sense of security, justice, and legal certainty for users. electronic system operators. In the life of society, nation, and state, the rights and freedoms through the use and utilization of information technology are carried out by taking into account the limitations stipulated by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to meet the demands imposed by the law. fair in accordance with considerations of morality, religious values, security, and public order in a democratic society.²

The freedom to access electronic systems is very influential in the rapid economic growth in Indonesia. As a comparison, it can be seen between conventional trading methods and modern trading methods as they are today. In the past, conventional business actors introduced their business products by advertising them in magazines, newspapers, and billboards. But now with the existence of electronic media, consumers no longer care about advertisements in reading media, consumers are more interested in advertisements displayed on electronic media such as tv, radio and internet stations.

The growing electronic media forces business actors to always think that the products they offer are in demand by consumers. The birth of various applications such as Instagram and Youtube that make it easier for users to communicate without having to meet face-to-face, makes business actors see opportunities to be able to promote their products by utilizing people who have a lot of followers on their social media accounts to promote products that they sell. it sells. The promotion method described above is known as paid promote or endorsement. People who have a lot of followers on their social media accounts are usually people who have a daily life that is not like people in general so that people are interested in following their daily lives on social media and people who have a lot of

¹https://kominfo.go.id/index.php/content/detail/3980/Kemkominfo%3A+Pengguna+Internet+di+Indonesia+Capai+82+Juta/0/berita_satker#:~:text=Bandar%20Lampung%2C%20Kominfo%20%2D%20Kementerian%20Komunikasi,peringkat%20ke%2D8%20di%20dunia.

² Law Number 19 Year 2016 concerning Information and Electronic Transactions

followers on social accounts. the media are considered as people who can influence their followers so they are also known as influencers.

But in reality, many influencers do not understand the laws that apply in Indonesia. Many influencers promote illegal and unsafe products for use by the public. One of the crimes that influencers in Indonesia are not aware of is promoting online gambling sites and applications, be it gambling that is purely gambling or gambling under the guise of binary options. Binary options are an online trading instrument whose way of working requires the trader (the person who trades) to guess whether an asset price will move up or down within a certain period of time.³

In Indonesian positive law, the principle of *dubio pro reo* is known, which means that everyone is considered to know the law. This principle states that a regulation if it has been promulgated in a statutory regulation by an authorized agency presupposes that everyone knows the regulation.⁴ That is, there is no reason for lawbreakers not to admit an act that has been done on the grounds that the lawbreaker does not know that his act is an unlawful act.

The case related to the problem described above is the case that ensnared influencer Indra Kesuma or commonly known as 25-year-old Indra Kenz from Medan, North Sumatra. Indra Kesuma is an affiliate and influencer who often promotes applications and online gambling sites called Binomo. The case began with a police report filed by Maruna Zara, Rob Situmorang, and eight other people as victims of Indra Kenz on the Binomo application which totaled Rp. 2,400,000,000 (Two Billion Four Hundred Million Rupiah). The articles suspected by the investigators of Indra Kenz were Article 27 Paragraph (2) in conjunction with Article 45 Paragraph (1) of the Law of the Republic of Indonesia Number 19 Year 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions.⁵

The unlawful act committed by Indra Kesuma was also strengthened by the attachment of the October SWI Press Release by the Financial Services Authority (hereinafter abbreviated as OJK) regarding the List of Illegal Investment Entities Handled by the Investment Alert Task Force in part (b) regarding Illegal Commodity Futures Trading Business Actors Discontinued at Number 34 with the entity name "Binomo" and the activities terminated are all activities on the website <https://binomoinonesia.com>, <https://idbinomo.com/>, and <https://binomo-t.com/>.⁶ This press release officially issued by OJK indicates that the entity "Binomo" promoted by Indra Kesuma is an illegal entity.

The actions carried out by Indra Kesuma are not only regulated in UURI ITE 2016 but are also regulated in Law Number 1 of 1946 concerning Criminal Law Regulations (hereinafter abbreviated as Criminal Code). Indra Kesuma's actions are regulated in Article 303 Paragraph (1) of the Criminal Code which contains rules that:

Threatened with a maximum imprisonment of ten years or a maximum fine of twenty-five million rupiah, whoever without obtaining permission:

1. Deliberately offering or providing an opportunity for gambling games and making it a quest, or knowingly participating in a company for it.
2. Deliberately offering or giving an opportunity to the general public to play gambling or intentionally participating in a company for it, regardless of whether to take advantage of the opportunity there is a condition or the fulfillment of a procedure.

However, the actions taken by Indra Kesuma were carried out using an electronic system and in Indonesia, there is known the principle of *lex specialis derogat legi generalist* which means that special laws override general laws. This principle is applied if there is an event that occurs and the event is directly regulated in more specific legislation even though the event can be applied in laws and regulations that mention the event is more general and broader.⁷

The legislation that regulates more specifically about Indra Kesuma's actions is UURI ITE 2016. This is because the media used by Indra Kesuma is an electronic system in the form of Instagram and Youtube. Indra Kesuma's actions are regulated in Article 27 of UURI ITE 2016. The acts that are prohibited in Article 27 of UURI ITE 2016 are as follows:

1. Everyone intentionally and without rights distributes and or transmits and/or makes

³ See <https://money.kompas.com/read/2022/02/25/085500926/apa-itu-binary-option-yang-membuat-crazy-rich-indra-kenz-terancam-20-tahun?page=all>

⁴ Barda Nawawi Arif, *Penegakan Hukum Pidana dalam Konteks Hukum dan Pembangunan Nasional*, UII, Yogyakarta, 2007, p. 90

⁵ See <https://news.detik.com/berita/d-5983601/kronologi-kasus-indra-kenz-dipolisikan-ditahan-hingga-dimiskinkan>

⁶ Attachment Letter to the Financial Services Authority Press Release, accessed from ojk.go.id

⁷ Shinta Agustina, *Persepsi Aparat Penegak Hukum tentang Pelaksanaan Asas Lex Specialis Derogat Legi Generalis dalam Sistem Peradilan Pidana*, Laporan Penelitian, LPPM-Unand, Padang, 2010, p. 42

- accessible electronic information and/or electronic documents that have contents that violate decency.
2. Everyone intentionally and without rights distributes and/or transmits and/or makes electronic information and/or electronic documents accessible with gambling content.
 3. Everyone intentionally and without rights distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that contain insults and/or defamation.
 4. Everyone intentionally and without rights distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that contain extortion and/or threats.

Explicitly the act that was violated by Indra Kesuma in Article 27 is in Paragraph (2) because the element of "gambling content" is fulfilled. The criminal sanctions threatened by UURI ITE 2016 against violators of Article 27 are further regulated in Article 45 paragraph (1) UURI ITE 2016 which contains rules that:

Everyone who fulfills the elements as referred to in Article 27 paragraph (1), paragraph (2), paragraph (3), or paragraph (4) shall be sentenced to a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000 (one billion rupiah).

In determining and identifying someone who has committed a crime, it is necessary to ask him for criminal responsibility, because a criminal act (*actus reus*/criminal act) is not enough to declare someone guilty.

Criminal liability is a form of imposition on a person due to certain actions, which should be carried out alone and know the consequences of their actions. As previously explained, namely the principle of "*actus non facit reum nisi means sit rea*" which is preceded by an element of *actus reus* (criminal act) and then closed with an element of *means rea* (criminal responsibility), criminal liability includes elements of the maker, namely errors in broad meaning either intentionally or negligently, the ability to be responsible and the absence of a basis for forgiveness. Based on this explanation, the problem that will be discussed in this paper is how is criminal responsibility for people who promote online gambling products on their social media accounts?

METHOD

This research is normative legal research that is used to systematize written legal materials. Systematization means classifying written legal materials to facilitate analysis and construction work.⁸ This study takes an approach by looking at the facts and phenomena that occur in society to describe the application of law in reality. The approach is taken by analyzing laws and regulations, analyzing cases, and analyzing concepts related to the topic of the problem and seeing how the rules related to law enforcement promote online gambling under the guise of binary options on social media as regulated in Indonesian positive law.⁹ This study uses primary data and secondary data,¹⁰ Primary data is data obtained directly in field research.

This data was obtained by conducting interviews or direct interviews with related parties and domiciled in the research location chosen by the researcher. Data is also obtained by direct observation in order to obtain information or descriptions related to the topic of the research problem. Secondary data is data that serves to complement primary data as needed in research, this data can be in the form of an analysis of laws and regulations relating to the topic of research and supported by other scientific works that are related to law enforcement against people who promote online gambling under the guise of binary options on social media.

The data collection techniques were carried out through interviews, observation, and literature review. The data obtained to become the basis for this research is sought and presented in an analytical descriptive manner where the facts are described and later will then be analyzed based on the laws and regulations that apply in Indonesia (positive law) as well as existing theories. For problem-solving and the implementation of the descriptive method is done by means of descriptive analysis which is not only limited to the stage of collecting and compiling the data but also includes the analysis and interpretation of the data itself. In drawing conclusions from the data and facts

⁸ Irwansyah, *Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta, 2020, p. 173

⁹ *Ibid.*

¹⁰ Kadarudin, *Penelitian di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)*, Formaci Press, Semarang, 2021, p. 171

collected in the research conducted, qualitative analysis methods are used which are carried out by interpreting, describing, describing, and compiling a logical system that is adapted to the research objectives.

DISCUSSION

Criminal Liability against Persons who Promote Online Gambling on Social Media Accounts

1. Theory of Criminal Liability and Errors in Criminal Law

The term crime is a very basic term in criminal law, criminal acts have an abstract meaning from concrete events in criminal law. The term *strafbaarfeit* is an event that can be punished while *delictum* means an act for which the perpetrator can be punished (criminal).¹¹ The concept of criminal liability or commonly known in English as responsibility or criminal liability. Responsibility means things that can be accounted for by an obligation, and includes decisions, skills, abilities and skills including the obligation to be responsible for the laws that are implemented. While liability is a broad legal term and refers to almost all risks or responsibilities that depend on or which may include all actual or potential characteristics of rights and obligations such as losses, threats, crimes, costs or conditions that create the duty to carry out the law.

Legislators must formulate clearly and in detail what is called a criminal act, define it clearly without being vague so that there is no ambiguous formulation.¹² Basically, criminal responsibility is not only related to legal issues but also includes issues of moral values and moral values adopted by groups in society. This needs to be done in order to fulfill one of the legal objectives, namely justice.¹³ Criminal liability is a form of determining accountability for actions committed by a suspect or defendant for a criminal act that occurred. In this case, it is determined that the suspect or defendant has been sentenced or acquitted.

Ruslan Saleh explained that criminal liability also has meaning and interpretation as the continuation of objective reproaches that exist in criminal acts that can subjectively be punished as a result of their actions.¹⁴ The objective reproach referred to here is an act committed by a person and the act is included in an act that is contrary to and prohibited by laws and regulations both in formal and material form. As for what is meant by subjective reproach, it is an act that refers to the person who does the forbidden act. Subjective reproach can also be said to be a person who does prohibited acts and of course contrary to applicable law. This is because if an act committed by a person is not an act that is contrary to applicable law, but in that person, there is an error that causes irresponsibility, then criminal liability cannot exist.¹⁵

Criminal liability is imposed on perpetrators of criminal offenses related to the basis for imposing criminal sanctions. A person will have the nature of criminal liability if a thing or act committed by him is against the law, but a person can lose the nature of responsibility if an element is found in him that causes the loss of a person's ability to be responsible. Regulations related to incompetence are contained in Article 44 of the Criminal Code (hereinafter abbreviated to the Criminal Code) which contains rules that:

- (1) Whoever commits an act that cannot be insured against him because his soul is disabled in growth or is impaired due to illness, shall not be punished.
- (2) If it turns out that the act cannot be insured against the perpetrator because his mental growth is impaired or impaired due to illness, the judge may order that the person be admitted to a mental hospital for a maximum of one year as a probationary period.
- (3) The provisions in Paragraph (2) only apply to the Supreme Court, High Court, and District Court.

Based on the description of Article 44 of the Criminal Code, explains the inability of a person to account for his actions or commonly known as the inability to be responsible. In positive Indonesian law, especially in the Criminal Code, there are no regulations that specifically regulate criminal liability, but only the qualifications of people who are classified as people who are unable to account for their actions, namely people whose souls are disabled in growth or disturbed by disease.

Criminal liability in the Common Law System is always associated with *mens rea* and punishment. Criminal responsibility has a relationship with society, namely the relationship of responsibility with the community as a function.

¹¹ Amir Ilyas, *Asas-Asas Hukum Pidana*, Rangkang Education Yogyakarta & PuKAP-Indonesia, Yogyakarta, 2012, p. 18-19.

¹² Andi Sofyan and Nur Azisa, 2016, *Hukum Pidana*, Pustaka Pena Press, Makassar, p. 24

¹³ Hanafi and Mahrus, 2015, *Sistem Pertanggungjawaban Pidana*, Rajawali Pers, Jakarta, p. 16

¹⁴ Roeslan Saleh, *Pikiran-Pikiran tentang Pertanggungjawaban Pidana*, Ghalia Indonesia, Jakarta, p. 16

¹⁵ *Ibid.*

In addition to this, criminal responsibility in the common law system is related to *mens rea*, that criminal responsibility is based on a mental state, namely as a guilty mind. The guilty mind has meaning as a subjective error, namely, someone is found guilty because the maker is judged to have wrong thoughts, so that person must be responsible. The existence of criminal responsibility is imposed on the maker, the criminal maker must be punished. The absence of a wrong mind (no guilty mind) means that there is no criminal responsibility and results in not being punished.

Errors as part of the *mens rea* are also interpreted as errors for violating the rules, or violating the laws and regulations. Anyone who violates the law then that person must be responsible for what has been done. Mistakes as an element of responsibility in this view make a guarantee for someone and make control of one's freedom over others. The existence of this guarantee makes someone will be protected from the actions of others who violate criminal law will be burdened with criminal responsibility.

According to Chairul Huda that "the basis of a criminal act is the principle of legality, while a person can be convicted on the basis of a mistake".¹⁶ This means that a person will have criminal liability if he has committed an act that is wrong and contrary to the law. In essence, criminal liability is a form of mechanism created to react to the violation of a certain agreed-upon act.

The element of error is the main element in criminal liability. In the sense that a criminal act does not include matters of criminal responsibility, a criminal act only refers to whether the act is against the law or prohibited by law, regarding whether a person who commits a crime is then convicted depends on whether someone who commits a criminal act has an element of error or not.

1. Elements of Criminal Liability

Criminal liability is another form of determining whether someone will be released or convicted of a crime that has occurred, in this case, say that someone has an aspect of criminal responsibility, in that case, there are several elements that must be fulfilled to state that the person can be held accountable. These elements are:

a. The existence of a crime

The element of action is one of the main elements in terms of criminal liability because a person cannot be punished if he does not commit an act where the act committed is an act that is prohibited by law.¹⁷ This is in accordance with the legality principle of *nullum delictum nulla poena sine praevia lege poenali* which means that a criminal act cannot be punished, except under the provisions of existing criminal legislation as stipulated in Article 1 Paragraph (1) of the Criminal Code.

In Indonesian criminal law, especially in the Criminal Code, it requires concrete or visible actions, meaning that the law requires visible actions, because in law a person cannot be convicted just because of one's inner state as the principle of *cogitationis poenam nemo patitur* which means that no one is convicted only on what basis. only in his mind.¹⁸

b. Error Element

Mistakes in foreign languages are also referred to as *schuld* which means the psychological state of a person related to the actions he has committed in such a way that based on these circumstances the suspect and the accused can be punished as a result of their actions.¹⁹ Errors are usually divided into two parts, in a narrow sense, and in a broad sense. In the Criminal Code, the error is used in a narrow sense, namely in the sense of negligence (*culpa*).

The term error can be used in a psychological sense as well as in a normative sense. Psychological error is the real crime of a person, this psychological error is what is inside a person, mistakes about what that person thinks and feels mental, this psychological error is very difficult to prove because it is not real (real), psychological errors are difficult to prove because its form is unknown. In Indonesian criminal law itself what is used is an error in a normative sense. Normative error is an error from the point of view of another person regarding the point of view of a person's actions. Normative errors are errors viewed from the point of view of the norms of criminal law, namely errors in the form of intentional (*dolus*) and errors in the form of negligence (*culpa*). From an act that has occurred, other people will judge according to the applicable law whether there was an intentional or intentional error in that act. Here the author describes in more detail related to errors in the form of

¹⁶ Chairul Huda, 2006, *Dari Tindak Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, Kencana, Jakarta, p. 68

¹⁷ Moeljatno, *Op.Cit.* p. 25

¹⁸ Frans Maramis, 2012, *Hukum Pidana Umum dan Tertulis di Indonesia*, RajaGrafindo Persada, Jakarta, p. 85

¹⁹ Moeljatno, *Op.Cit.* p. 25

intentional (*dolus*) or errors in the form of negligence (*culpa*) as follows:

1) Deliberate

In most criminal acts in Indonesia, there is an element of intent or *opzettelijk*, not an element of culpa. This is related to the fact that the person who is more deserving of punishment is the person who does this or commits a crime with an intentional element. Regarding the element of intentional error, it is not necessary to prove that the perpetrator knows that his act is threatened by law, so it is not necessary to prove that the act committed by the perpetrator is an evil act. It is enough to prove that the perpetrator intended his actions and knows the consequences of his actions. This is in line with the adage which states in *dubio pro reo* which means that everyone is considered to know the law, so it is assumed that someone knows about the applicable positive law, because one cannot avoid the rule of law by reason of not knowing the law or not knowing that it is prohibited. Deliberation has developed in jurisprudence and doctrine so that it is generally accepted that several forms of willfulness have been accepted, namely:

a) Intentionally as Intent

Deliberately as an intention in this form of crime, the perpetrator really wants (*willens*) and knows (*watens*) for the actions and consequences of the actions that the perpetrators commit. For example, A feels humiliated by B, therefore A has a grudge against B, so A has the plan to harm B. One day A brought a knife and stabbed B, which caused B's death, then the act can be said to be a real act. true A wants. B's death due to being stabbed by A with a knife is also what he wants.²⁰

This knowing and the wanting thing must be seen from the point of view of normative error, that is, based on concrete events people will judge whether the act was really wanted and known by the perpetrator. Errors with intentional as the intention of the perpetrator can be accounted for, intentional as this intention is a form that is easily understood by the public. If the intent with this intention is a criminal act where no one denies it, then the perpetrator deserves to be subject to a heavier criminal sentence if it can be proven that the act committed by the perpetrator is really an act carried out intentionally with the intention, can be attributed to the perpetrator. really want and want to achieve the result that is the main reason for the threat of criminal law.

a) Deliberately as a Must

This kind of intentionality occurs when the perpetrator with his actions does not aim to achieve the consequences of his actions but does the action as a necessity to achieve other goals. That is, intentional in this form, the perpetrator is aware of the action he wants but he does not want the consequences of the act.²¹ For example, A wants to take the bag that is behind the bookcase, to reach the bag, A needs to break the glass display case, so breaking the glass is not the main goal that A wants to achieve, but the act is done to achieve another goal. Deliberately destroying glass is a conscious awareness of necessity.

b) Deliberately as Possible

Deliberately as a possibility, the perpetrator actually does not want the consequences of his actions, but previously the previous perpetrators had known that the consequences could possibly occur, but the perpetrators continued to carry out their actions with all the risks that might occur.

For example, there is a driver who drives his car toward a police officer who is giving a stop sign. The driver continued to drive in the hope that the police officer would jump to the side, even though the driver took the risk of the police officer dying or jumping to the side.

1) Negligence (*culpa*)

The articles in the Criminal Code do not provide a definition of what is meant by negligence. So, understanding what is meant by negligence requires the opinion of several legal experts. Negligence is a form of error that arises because the perpetrator does not meet predetermined standards.

Moeljatno stated that:

Negligence is a structure (*gecompliceerd*) which on the one hand leads to one's actions concretely, while on the other hand leads to one's inner state. The negligence is divided into two parts, namely, negligence that he is aware of (*alpa*) and negligence that he is not aware of (*culpa*).²²

The negligence that is realized here is the negligence that the perpetrator is aware of, where the perpetrator is aware of the risk but continues to take risks and hopes that the worst consequences or risks will not occur. Whereas what is meant by unconscious or negligent negligence is a condition

²⁰ *Ibid.*, p. 121

²¹ *Ibid.*, p. 122

²² *Ibid.*

where a person is not aware of the risk of bad events resulting from the actions taken. Perpetrators do so because of lack of thought or carelessness about the existence of bad risks.

Conscious negligence is negligence that is realized by a person if he does not do an act, there will be a consequence that is prohibited by criminal law, while what is meant by unconscious negligence is that the perpetrator does not think about the consequences of the act, so he will not do it.

a. There is a Responsible Maker

The ability to be responsible is always related to the psychological state of the maker. This ability to be responsible is always associated with criminal liability, this is what makes the ability to be responsible an element of criminal responsibility. The ability to be responsible is the basis for determining the punishment for the maker. The presence or absence of this responsibility must be proven by the judge, because if someone is proven not to have the ability to be responsible, this becomes the basis for not being accountable for the maker, meaning that the maker of the act can be punished for a criminal act.

Zainal Abidin Farid stated that most laws formulate the terms of wrongdoing in a negative way. The Criminal Code does not regulate the ability to be responsible, but what is regulated in the Criminal Code itself is the opposite of the ability to be responsible, namely the inability to take responsibility.²³

As previously explained, related to Article 44 of the Criminal Code, a person who commits a criminal act cannot be held responsible for the actions that the perpetrator has committed if he does not have an element of responsible ability, the inability to be responsible if there is an error in the perpetrator, the error is divided into two parts, namely;

- 1) During the growth period of the perpetrator, the perpetrator experiences mental disabilities so which affects the perpetrator to distinguish between good and bad deeds.
- 2) If the soul of the perpetrator experiences a disorder of normality caused by an illness so that his mind does not function optimally or his mind does not function optimally to distinguish good and bad things.

The ability to be responsible is also related to a certain age for criminals. This means that only perpetrators who meet a certain age limit have the ability to be responsible and have an obligation to be responsible for the actions that have been done, this is because a certain age psychologically can influence someone to do an act. Basically, children at a certain age have not been able to realize well what has been done. That is, children at a certain age also cannot separate between good deeds and bad deeds. This affects the child cannot be convicted of his actions, if a certain child commits a crime and because of his actions a criminal process is carried out, psychologically the child will be disturbed in his adult life.²⁴

In the sentencing process, the judge is obliged to find and prove whether the perpetrator has an element of responsibility, because if a perpetrator does not have the ability to be responsible, either because of insufficient age or because a person's psychological state is disturbed, then that person cannot be held criminally responsible.

a. No Forgiving Reason

In certain circumstances, a perpetrator of a crime cannot take any other action other than committing a criminal act, even though this is not desired by the perpetrator. Therefore, the perpetrator must take legal action. This is not avoided by the perpetrator even though it is not wanted by himself. This is done by someone because of factors from outside himself.²⁵

Factors from outside of himself or his mind cause the perpetrator of the crime to be unable to do anything else which results in his guilt being erased. That is, in connection with this, there is a reason for the perpetrator of the crime to abolish the crime so that the responsibility related to it is suspended until it can be ascertained whether or not there is an element of forgiving reason in the perpetrator of the criminal act. In this case, even though the perpetrator of the crime can be reproached, the reproach cannot be continued to him because the perpetrator of the crime cannot do anything other than commit the crime.²⁶

In the doctrine of criminal law, the excuse of forgiveness and justification, justification is a reason that removes the unlawful nature of an act. The reasons for justifying and forgiving reasons are distinguished because they have different functions. The existence of this difference is because the reason for justification is a reason for justifying a criminal act that is against the law while the excuse for forgiveness leads to forgiving someone even though they have violated the law for the crime that has been committed.

²³ Zainal Abidin Farid, *Hukum Pidana 1*, Sinar Grafika, Jakarta, 2014, p. 260

²⁴ Agus Rusianto, 2016, *Tindak Pidana dan Pertanggungjawaban Pidana*, Prenadamedia Group, Jakarta, p. 80

²⁵ Chairul Huda, 2006, *Dari tiada Pidana tanpa Kesalahan Menuju Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, Kencana, Jakarta, p. 116

²⁶ *Ibid.*

1. Promotion of Online Gambling Products on social media as a Crime

The rapid development of technology today makes the law limp along with the times. The development of technology creates so many gaps to identify a crime. The rapid development of technology, has a very large influence on various forms of development of criminal acts. This is indicated by the many new modus operandi that have emerged based on technology and electronic information.

One example that can be put forward is in the form of gambling. There are so many modus operandi that has emerged with the existence of an electronic system which is a means to play online gambling. Not only terms of playing online gambling, people who promote online gambling products can also be subject to criminal sanctions. The online gambling promotion system referred to here is promotions made in the form of photos, videos, or writings containing invitations by listing the various advantages of the online gambling site which are then uploaded to social media accounts and will be viewed and accessed by many people.

The promotion referred to here is an activity to introduce a product that begins with making a post on the influencer's personal social media and this is seen by followers who engage in uploads on the social media account. This can be seen from the number of likes, shares, retweets, comments, and clicks on the upload.

One of the important roles of using influencer services to promote a product is to influence the attitudes and views of consumers toward the products they promote. One example of a social media application that is commonly used by business people to introduce their products is Instagram application. Instagram is a form of social media application that is used to share photos or videos with followers.

Everyone can be said to be an influencer if they have three-dimensional credibility which includes:

1. Attractiveness, an object that is judged from a sympathetic attitude, has ambition, intelligence, and other personality characteristics.
2. Trustworthiness is an object that is assessed based on honest sources of information.
3. Expertise is seen from a person's expertise in a particular field, such as public speaking, and his level of confidence.

The act of promoting online gambling is contrary to Article 27 Paragraph (2) in conjunction with Article 45 UURI ITE 2016. Meanwhile, Article 27 Paragraph (2) UURI ITE 2016 contains rules that:

Everyone intentionally and without rights distributes and/or transmits and/or makes electronic information and/or electronic documents accessible with gambling content. Regarding Article 27 Paragraph (2) above, there are several elements that are met for people who promote online gambling products on social media. The elements that are fulfilled are as follows:

1) Everyone's Elements

Everyone is an individual, whether an Indonesian citizen, foreign citizen, or legal entity.

2) Intentionally and Without Rights

The element intentionally is a subjective element of a crime. Deliberately means knowing and wanting to do an act that is prohibited by UURI ITE 2016, or knowing and wanting a result that is prohibited by UURI ITE 2016.

3) Making it Accessible

The element of making it accessible has the meaning of making information or electronic documents accessible to others, either directly or indirectly. This can be done by providing links, namely links or references that can be used by internet users to access locations or electronic documents, and providing password access codes so that online gambling players can find links related to online gambling easily and quickly.

4) Electronic Information or Documents

Article 1 Paragraph (1) UURI ITE 2016 provides the following definition of electronic information:

One or a set of electronic data, including but not limited to writing, sound, pictures, maps, designs, photos, electronic data interchange (EDI), electronic mail, electronic mail, telegram, telex, telecopy or the like, letters, signs, numbers, codes processed access, symbol or perforation that has meaning or can be understood by people who are able to understand it.

Meanwhile, the definition of electronic documents according to Article 1 Paragraph (4) UURI ITE 2016 is as follows:

Any electronic information that is created, forwarded, sent, received, or stored in analog, digital, electromagnetic, optical, or similar forms, which can be seen, displayed, and or heard through a computer or electronic system, including but not limited to writing, sound, pictures, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have

meaning or can be understood by people who are able to understand them.

5) Gambling Payload

The element of gambling content is a gambling website in which there is a betting exchange built by someone. However, when referring to the true essence of gambling, what is meant by gambling content is not just websites and betting exchanges, but there must be bets and the results of these bets, both winning and losing.

Based on the description above, it is clear that the act of promoting online gambling products on social media is a crime. This is because the act of "promoting" is the same as making accessible information or electronic documents either directly or indirectly. The act of promoting is an act carried out by providing a link or reference that can be used by internet users to access an electronic document which is an online gambling site and can be directly played by internet users simply by creating an account on the site.

Then regarding the information created containing the promotion of online gambling products on social media, it is classified in electronic documents as described in Article 1 Paragraph (4) of UURI ITE 2016:

Any electronic information that is created, forwarded, sent, received, or stored in analog, digital, electromagnetic, optical, or similar forms, which can be seen, displayed, and or heard through a computer or electronic system, including but not limited to writing, sound, pictures, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have meaning or can be understood by people who are able to understand them.

Then after describing the elements of a criminal act that are met against people who promote online gambling products on social media in accordance with Article 27 Paragraph (2) of the 2016 ITE Law, it will describe the criminal sanctions that are threatened against people who are proven to have committed a crime promoting online gambling products on the internet. social media.

The criminal sanctions that are threatened against people who commit criminal acts as regulated in Article 27 Paragraph (2) of UURI ITE 2016 are regulated in Article 45 of UURI ITE 2016 which contains rules that:

Everyone who fulfills the elements as referred to in Article 27 Paragraph (1), Paragraph (2), Paragraph (3), and Paragraph (4) shall be sentenced to a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000 (one billion rupiah).

Based on the description above, it is clear that the act of promoting online gambling products on social media is a criminal act as regulated in the 2016 ITE Law, especially in Article 27 Paragraph (2) in conjunction with Article 45 of the 2016 ITE Law.

Then, if it is related to the case that the author examines in greater depth, the author first describes the case that ensnared the influencer Indra Kesuma or Indra Kenz who promoted a gambling site called Binomo with activity entities on the <https://binomoinonesia.com>, <https://idbinomo.com/>, <https://binomo-t.com>, <https://binomoworld.com>, <https://binpartner.com/id>, and All the gambling sites that the author mentioned above are gambling sites under the guise of Binary Options. The Binary option is a trading instrument (trading) that is carried out online whose way of working requires the trader (the person who trades) to guess whether an asset price will move up or down within a certain period of time.

Based on the workings of binary options as the author described above, the author argues that the workings of binary options are similar to gambling games. First, the author will describe the juridical understanding of gambling based on the Criminal Code. Article 303 of the Criminal Code, is explained.

Threatened with a maximum imprisonment of ten years or a maximum fine of twenty-five million rupiahs, whoever without obtaining permission:

- (1) Deliberately offering or providing opportunities for gambling games and making them a livelihood, or intentionally participating in a company for that purpose;
- (2) Deliberately offering or giving an opportunity to the general public to play gambling or intentionally participating in the company's greetings for that matter by caring whether to take advantage of the opportunity there is a condition or the fulfillment of a procedure;
- (3) Participate in gambling games such as search.

If the guilty person commits the crime in carrying out his livelihood, his right to carry out the search can be revoked.

The so-called gambling game is any game where in general the possibility of making a profit depends on sheer luck, also because the players are more trained or more proficient. It includes all bets on the decision of a race or other game which is not held between those who are participating in

the competition or playing, as well as all other bets.

The elements of gambling contained in Article 303 of the Criminal Code are as follows:

1. Game

The actions taken are usually in the form of games or competitions. Done solely for fun or busy to fill spare time to entertain the heart and is reactive. But here the actors do not have to be involved in the game. In other words, just watching and participating in betting in the process of playing or competing can be categorized as gambling elements.

2. Good Luck

In order to win a game or competition, it depends on the element of speculative / chance or just luck. In other words, victory is not obtained through the habit or intelligence factor of highly trained players.

3. There is a bet

In games or competitions there are bets set by the player or dealer, either in the form of money or property. The effect of the existence of bets is that there are parties who benefit and lose. This element is the most important element in determining whether a related act can be categorized as gambling or not.

Based on the description of the elements of gambling that the author mentioned above, the author will describe one by one these elements with all their similarities to the binary options system or in this case the Binomo application.

1. Game Elements

The way this binary options system works is by looking at the chart and guessing whether the graph will move up or down. The author assumes here that the binary options system fulfills the elements of the game because as previously described, the element of the game is an act that is done solely for fun or busyness to fill spare time to entertain the heart and is reactive. Usually, this binary option is also played when it is to fill a void in spare time, especially with the benefits that are obtained just by playing on a laptop for 15-30 minutes, adding to the attractiveness of this binary options system.

2. The Element of Luck

The nature of luck that the author means here is that this binary option is speculative/coincidental. The victory obtained from playing this binary option is obtained not from the skill, skill, and professionalism of the player owned by the person who plays it, but the victory is seen from the graph that appears on the player's monitor screen whether it makes a profit or loss and there is no intervention from the player that results in victory.

3. Elements There is a Bet

When playing this binary option, everyone is required to create an account then the account is filled with a number of funds according to how much funds the player wants to play. The betting element that the author means here is the funds that players use to play. These funds can be depleted if the player loses continuously and can have an impact on the losses suffered by the player who loses in this game.

Based on the results of interviews that the author conducted with the judges at the Makassar District Court, according to Jahoras Siringo Ringo that an act is said to be included in the form of gambling if there is an element of betting there, the bet referred to here can be in the form of goods or money. In this case, the most important thing is that there is a bet between the guesser and the guesser. If the perpetrator guesses correctly, it means that the perpetrator will benefit there, but if the guess is wrong, then the one who benefits is the guesser and of course, it is detrimental to the perpetrator.²⁷

Although in the case that the author has raised, it is not an act of promoting online gambling which is purely gambling but under the guise of binary options which is known by ordinary people in general as a form of investment. Based on the normative research that the author did, this binary option is not included in the investment section. According to the KBBI, investment is a form of investing money or capital in a company or project with the aim of making a profit. As for the investment itself, according to Article 1 Number (1) of Law Number 25 of 2007 concerning Investment (hereinafter abbreviated as UURI Investment 2007) that investment is all forms of investment activities, both by domestic and foreign investors to doing business in the territory of the Republic of Indonesia. When examined more deeply related to the elements contained in the investment are as follows:

- 1) Investment activities, the capital referred to here is an asset in the form of money or other forms of non-money owned by investors that have economic value.
- 2) Investors/investors, investors are individuals or business entities that make investments which can be in the form of domestic investors and foreign investors.

²⁷ Jahoras Siringo Ringo, Makassar District Court Judge, Interview on 15 August 2022.

- 3) Conducting business activities, the business activities in question can be in the form of running a business, establishing a company, and carrying out project activities such as building bridges, toll roads, infrastructure, and so on.
- 4) In certain areas, the investment must carry out business activities domiciled in the territory of Indonesia. Especially for foreign investment, must be domiciled in the territory of Indonesia, unless otherwise stipulated by law.

When viewed in terms of the definition of investment, binary options are not included in the definition of investment at all, because binary options do not apply an investment system to do business in the territory of the Republic of Indonesia. Binary options only implement a system of saving money in an application or site and then profiting from guessing a price that is on that day. In binary options, there are no business activities carried out such as running business activities, establishing companies, and carrying out project activities.

Based on the description above, it can be seen that the workings of this binary option in principle have similarities with gambling. The author has proven this with a juridical study associated with Article 303 Paragraph 3 of the Criminal Code and all elements regarding the definition of gambling in accordance with how binary options work. In this case, the author agrees with the Press Release issued by the Financial Services Authority (Otoritas Jasa Keuangan/OJK) which states that the Binomo entity is blocked for all users in Indonesia because the system used in the Binomo application is a binary option which is prohibited in Article 303 of the Criminal Code.

Then regarding criminal liability for people who promote online gambling, it is very important to pay attention to, it because even though the person has fulfilled the elements of a criminal offense, the next factor that must be considered is whether the person deserves to be sentenced or not. For people who are unable to be held legally responsible, of course, the perpetrator cannot be punished. It must also be noted whether there is a justification or forgiving reason in the act. If there is one reason for forgiveness or justification in an act, the perpetrator cannot be punished, and that is what is meant by the ability to be responsible.²⁸

CONCLUSION

The act of promoting online gambling on social media can be accounted for as long as the action meets the elements of Article 27 Paragraph (2) of ITE Law 2016 and in that act the perpetrator can be held accountable for his actions as contained in Article 44 of the Criminal Code, meaning that the perpetrator who commits a crime promotes online gambling on social media. the medium of his soul is not impaired in growth or impaired by disease. After the act of promoting online gambling on social media fulfills the elements in Article 27 Paragraph (2) of ITE Law 2016 and is considered capable of being responsible for its actions, it must be considered again whether there are justifying reasons or reasons for forgiveness contained in the act as regulated in Article 48 to Article 51 Criminal Code.

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