

## Building a Political Capital Market Law in Providing Legal Protection Based on Justice for Investor

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### Abstract

*The purpose of this study was to determine why the legal protection of the public shareholders is not optimal and to find a political model of capital market law which provides legal protection to shareholders. The research method is juridical normative where the data collection techniques is by studying the literature and using the method of deductive reasoning. Conclusions require two kinds of legal protection; they are 1) the internal structure of the capital market in Indonesia by strengthening the investment benefit guarantees, guaranteed increase of equity capital ownership and strengthening the security of investments; 2) external legal protection by involving the Institute Alternative Dispute Resolution and Arbitration development.*

**Keywords:** Political Capital Market law, Justice Protection, Investor

### 1. Introduction

Regulations on capital market activities regulated in Law Number 8 of 1995 on Capital Markets and Government Regulation No. 45 year 1995 concerning Capital Market Organization, and Government Regulation No. 46 of 1995 on Inspection Procedures in the Capital Market. Political capital market law, as in Act No. 8 of 1995 on the Capital Market, are<sup>1</sup>: 1) Creating a strong legal framework; 2) Increase the transparency and guarantees of protection to investors; 3) Creating a trading system that is secure, orderly, efficient and liquid as well as providing investment opportunities for small investors. Capital market aims to support the implementation of national development<sup>2</sup> in order to improve equity, growth, and stability of the national economy towards improving people's welfare. To achieve these objectives the capital market has a strategic role, as one source of financing for the business world. On the other hand capital market is an investment vehicle for the community, including small and medium investors.<sup>3</sup>

<sup>1</sup> Nindyo Pramono, PT Go Public Law and Capital Market Indonesia, Andi, Yogyakarta, 2013. Pg. 223-225.

<sup>2</sup> <http://ekonomi.inilah.com/read/detail/1840625/peran-bank-dan-pasar-modal-kurang-untuk-pembangunan/> #. VHXen8m93CM accessed on Thursday, Maret 15, 2012. at 20.00 PM

<sup>3</sup> General Explanation of Law No. 8 of 1995 on Capital Markets.

Investing is a process that involves risk. The risk is always associated with the amount of return on investment (ROI) is expected. The higher expected return will make the higher risk, and vice versa.<sup>4</sup> The risks included in the category of return on investment is<sup>5</sup> the financial integrity of stock brokers (intermediaries) investors who deposit money and securities to the broker-dealer, they expect their assets are not lost due to bankrupt broker-dealer; securities fraud; market manipulation; full disclosure. Some of these risks are become an obstacle for people to invest in the equity markets, while political capital market law as it existed in Law No. 8 of 1995 on the Capital Market, including Government Regulation No. 45 of 1995 and Government Regulation No. 46 of 1995 on the Capital Market activity has not been in favor of the investor. Therefore, legal protection against the investor who is a minority shareholder is becoming important. It takes imagination to create predictive and anticipatory law to provide legal protection for investors' justice based.

## **2. Problem Statements**

1. Why the legal protection of the public shareholders is not optimal and adequate?
2. How is political capital market law model in providing legal protection to substantive justice based to the shareholders?

## **3. Research Method**

This study is normative by using secondary data consists of primary legal materials, secondary law and tertiary legal materials. Techniques of collecting data by study the literature and data analysis techniques using inductive techniques qualitative reasoning methods of deduction.

## **4. Discussion**

### **4. 1. Political Capital Market Law in Providing Legal Protection of Investors**

Political law<sup>6</sup> is the willingness of the State to the law. It means that for what the law was created, what is the purpose of its creation and which direction to head to. Law Politics is government policy regarding which law will be retained, which laws will be replaced, which law will be revised and which laws will be eliminated.<sup>7</sup> Theoretically analyzing the legal and political relationship cannot be separated from the two variables of law (legal product) as the dependent variable (Variable affected, as a result) and politics as independent variables (variables affected). It can also mean working of the law is very influenced by politics.<sup>8</sup> Political law is often associated with the existence of the state in achieving the goal to realize a fair and prosperous society. The objectives listed in the state constitution. In democracies<sup>9</sup>, inputs were taken into consideration for the determination of the law comes from the aspirations of the people which is distributed through the representatives of the people and then processed to show up as outputs in the form of legal regulations. Satjipto Rahardjo defines political law as an activity to select and the way that would be used to achieve a social objective and specific law in society.<sup>10</sup> Political laws are instructions or the official line that formed the basis of departure and how to create and implement the law in order to achieve the goals of the nation and the State<sup>11</sup>. Political laws contain two inseparable sides, they are, as the direction of making the law or the legal policy of state institutions in the making of law, and also as a tool to assess and criticize whether a law that made is appropriate or not with the frame of legal policy to achieve the purpose of the State.<sup>12</sup> Adi Sulistiyono; law politics<sup>13</sup> is a policy taken by the State in planning (the national legislation), enact, and enforce the law to establish a legal system in an effort to achieve the goal of the State as mandated by the constitution.

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<sup>4</sup> I Putu Gede Ary Suta, Towards a Modern Capital Markets, Yayasan Sad Satria Bakti, Jakarta, 2000, Pg. 94.

<sup>5</sup> Ibid page 95-98

<sup>6</sup> Wiwoho Jamal, Political Law. Subject material doctoral program of Law, Faculty of Law UNS, Surakarta. P. 3 accessed from [www.jamalwiwoho.com](http://www.jamalwiwoho.com), December 15, 2014.

<sup>7</sup> Ibid p.3

<sup>8</sup> Raditya Kuntoro, Political Law Formation Act of the Republic of Indonesia Number 11 Year 2008 on Information and Electronic Transactions, Journal of Law and Development, Vol. II No. April 2014. Pg. 31.

<sup>9</sup> Jamal Wiwoho, *Op Cit.* p. 4

<sup>10</sup> Moh. Mahfud MD., Political Building Law, upholding the Constitution, Rajawali Pers Jakarta, 2012. Pg. 15.

<sup>11</sup> Moh. Mahfud MD., Political Building Law, upholding the Constitution, Rajawali Pers Jakarta, 2012. Pg. 15.

<sup>12</sup> Ibid p.16

<sup>13</sup> Adi Sulistiyono, Material Matriculation, 2013. Doctoral Program of Law, Faculty of Law UNS, Surakarta, 2013. Pg. 19.

Where the process and the result is determined by the interaction of politics that occur therein. In principle, the conceived meaning in the context of the politics of law is pointed to the State of law policy. The realization of the policy can be development. Development of economic law can be regarded as legal political economy, state goal-oriented in advancing the general welfare (justice). Political economic law intended as legal policy of a State in the field of economy. One area of economic law is the capital market law. The inclusion of capital markets as any of the materials in the assessment of the Economic Law Development is an appropriate advice, looking to the functions and the existence of capital markets in the current pace of development.<sup>14</sup> According to Alan N. Rechtschaffen; *the capital markets provide a forum for issuers and investors to meet to negotiate financial instruments. Within the context of the capital markets there are two subsidiary component markets reflecting whether an investor is purchasing a financial instruments directly from an issuer or its underwriter (the primary market) or from another investor who may or may not have purchased the instrument from the original issuer (the secondary market)*<sup>15</sup>

Legally, the Law No. 8 of 1995 on Capital Markets, investors will get legal protection. In addition, the lack of legislation governing the capital market in a comprehensive manner, and with the authority of Bapepam, among others, which became a sort of Special Police then expected law enforcement and legal certainty capital market is getting better.<sup>16</sup> This is part of the politics of economic laws in the field of capital markets provide legal protection to market participants, including public investors. Political law in the protection of public investors or the company law is also known as the public shareholders affirmed in the preamble letter b and c of Law No. 8 of 1995 on the Capital Market, namely:

- (a) "... Capital Markets has a strategic role in national development as one source of financing for businesses and investment vehicles for the community.
- (b) "..... to involve the Capital Markets, so it needs take the solid legal basis to better ensure legal certainty parties who conducting activities in capital market and protect the interests of public investors from harmful practices.

In the context of legal protection to the holders of public investors, there are some policies (political) laws in legislation the capital market, namely:

- a. The existence of the Capital Market Supervisory Agency (Bapepam) in Providing Protection of Public Shareholders (Investor) The existence of Bapepam which is now taken over by the Financial Services Authority, according to Article 3 paragraph (1) Jo Article 4 of Law No. 8 of 1995 on Capital Markets is aiming to realize the creation of activities Capital Markets orderly, fair, and efficient and to protect investors and society' interests. To realize the politics of law in Article 3 and 4 of Law No. 8 of 1995 on the Capital Market, Bapepam (FSA) is given authority like the Capital Market Authority in the United State; the SEC has three main functions: the function of Rule Making or Quasi Legislative Power, Investigatory-Enforcment function, and function Adjudicatory.<sup>17</sup>
- b. Provisions on Principle of Full Disclosure  
Capital markets are fair, orderly and efficient is the capital market that provides protection to public shareholders (investor public) against unfair and dishonest business practices. Protections that can be given by the government in a business activity only ensure investors get complete information about the risks faced.<sup>18</sup> This is called the principle of disclosure of information. The principle of full disclosure is to maintain the confidence of investors in line with the development of the Indonesian capital market.<sup>19</sup>
- c. Political law: Licensing and Multilevel Monitoring  
Besides carrying out an orderly society, the licensing authority, the approval or registration are steps or policy laws of the State in providing preventive legal protection against the public shareholder / investor public.

<sup>14</sup> Jusuf Anwar, *Economic Law in the Field of Capital Market: A Brief Overview*. In Sumantoro, *Economic Law*, UI Pres, First Printing, Jakarta, 1986. Pg. 219.

<sup>15</sup> Alan N. Rechtschaffen, *Capital Markets, Derivatives And The Law*, Oxford University Press, United States Of America, 2009. , page. 14

<sup>16</sup> Munir Fuady, *Modern Capital Market (Law Reviewing)*, Citra Aditya Bakti, Bandung, 1996. Pg. 27.

<sup>17</sup> Munir Fuady, *Op Cit.* page. 117.

<sup>18</sup> I Putu Gede Ary Suta., *Op cit.* page. 94

<sup>19</sup> Bismar Nasution, *Openness In Capital Markets*, University of Indonesia Faculty of Law Graduate Program, 2001, Pg. 33.

Related to the licensing and multilevel supervision, there are some legal protection concept shareholders, especially in public investors are:<sup>20</sup> First, to protect investors in the event of *financial integrity* of the broker in the capital market, Bapepam set minimum capital requirements and other requirements such as the listing standards, securities deposit and minimum working capital. Capital Market Act to protect investors from bankruptcy of *financial intermediaries*.

Second, in order to perform its functions to protect the public shareholders / investors, Bapepam-LK (FSA) should be given powers of investigation and bring the perpetrators of the fraud to the court.

Third, regarding the licensing, monitoring of activities and financial integrity of the company's securities, and ensures that the adequate information provided to the public, disclose all of the risks that may occur and conduct policy and prevention efforts against securities fraud and securities manipulation.

#### **4.2. Build Political Law in the Law That Provides Protection against Investor Based On Justice**

In making the legislation, legal politics is very important, at least for two reasons. First, as the reasons that the establishment of a rule-law. Secondly it is to determine what sentence to be translated into law and formulation of the articles.<sup>21</sup> Regulation is not enough in the form of juridical to be called the law (*Richtiges Recht / correct*) but these rules must be in accordance with the principles of justice (*gerechtes Recht / Just*). The law is justice (fairness: *iustitia*) or *ius / Recht*, the law indicates fair rules of the life of society as aspired.<sup>22</sup>

According to John Rawls, there are two principles of justice;<sup>23</sup> First: everyone has the same rights that are expected to provide benefits for everyone, and secondly: All positions are open to everyone. The Model of Political Law in the capital market in providing substantive justice based legal protection for public shareholders, according to the author, are classified into two kinds:

a. Protection Legal Intern, that is legal protection carried out internally within the structure in the Indonesian Capital Market, which is done by providing:

##### **1) Strengthen the Benefits Guarantee Investment**

People who invest in the stock market and then become an investor or shareholder of a public certainly aim to get the benefits, both financially (material) or non-financial (immaterial, Satisfaction). The usefulness of the expected course related to the other party in capital market activities.

To ensure the benefit required a politics (policy) law contained in statutory provisions, which include provisions concerning:

- (a) Strengthening the presence of the involvement of shareholders in determining the Company's policy, for instance the determination of dividend, corporate action (merger, acquisition, consolidation).
- (b) The Authority determines a reasonable price for shares being sold back to the company, if it disagreed with the corporate action.
- (c) The presence of a dispute Mediation institutions in the Capital Market.

##### **2) Increasing the Equity Capital Ownership Warranty**

The Capital Market Supervisory Agency and Financial Institution's data also revealed that the number of domestic investors in the Indonesia Stock Exchange only 0.2 percent (about 460 thousand) of Indonesia's population of 230 million people. According to him, the ratios of the domestic capital market investors are still very small compared to other Southeast Asian countries. Singapore, for example, has domestic investors as much as 30 percent of the population, while Malaysia has 12.8 percent.<sup>24</sup> It means that the purpose of capital markets to improve the distribution of income of the people has not been maximized.

Therefore it is necessary legal policies that can guarantee the equity of capital ownership, which is done by, among others, are:

<sup>20</sup> I Putu Gede Ary Suta, *Op cit.* page . 95-98

<sup>21</sup> Ade Komarudin, Politics, Law Integrative MSMEs, MSMEs State Policy in Creating Forward and Competitive, RMBBooks, PT Wahana Semesta Intermedia, Jakarta, 2014, Pg. 285.

<sup>22</sup> Theo Huijbers, Philosophy of Law in track history, Yogyakarta: Kanisius, 1982. Pg. 49

<sup>23</sup> John Rawls, *A Theory of Justice*, The Belknap Press Of Harvard University Press, Cambridge, Massachusetts, 1999, p. 52.

<sup>24</sup> TEMPO.CO - Friday, February 28, 2014. accessed on February 29, 2014 At 20 pm.

- a. Socialization and or public education on capital markets;  
There are still many people, especially middle and lower who believe that investing in the stock market is like gambling. In the end, there is not much society which invests in the stock market. It needs a legal policy that people are guaranteed equal distribution of capital ownership by imposing the capital market authority (FSA) for performing or executing socialization and education to the community.
- b. Simplifying System Administration on Capital Market  
During this period, the investment in the capital market must involve many parties, such as the Investment Advisor, Broker, Underwriter, the Investment Manager, Sales Agent, Custodian Bank, the Securities Administration Bureau, where parties are held by a company, namely the stock/Securities Company. The number of parties resulted in the high costs for the investor to pay a fee or commission; it is burdensome, especially for middle and lower investor. In addition, many parties will potentially conflicting interests that harm investors. For example Registrar and Custodian, both carried out by the company and carry out similar functions.
- c. Creating a system of information quickly and transparently;  
During these information quickly and correctly and transparently solely owned by directors, commissioners and majority shareholder. Investors cannot receive the information quickly, correctly and transparently. In order to the investor can receive information quickly, correctly and transparently is needed a policy requiring particular party (the Issuer) to immediately convey material information via electronic media such as web sites, SMS, WA, BBM, etc.
- d. Totally Increased Full Disclosure Principles  
At the present time the politics of law in the protection of investors, put the country outside the legal concept. The state should not be involved in the determination of investment in the capital market, but only obliged to determine the basis for the regulation<sup>25</sup> as issuers or public companies, for example; in providing sufficient information. According to the law, conducted research to the Financial Services Authority's document is only due to formalities, the clarity and adequacy of information, and do not connected to information material.
- e. In this case the state gives less effort how investors receive the correct and valid information substantially. Full Disclosure Laws do not touch people's needs. Formalism and procedural are repressive character of laws that should not be used as a basis for capital market activities.

The principle of the investor is to benefit from funds that invest, but investors are hesitant to take the decision to invest, if not supported by substantive information from public companies or issuers. The concept of rule of law adopted by the Act of 1945 is a The state that not only protects all citizens, but also The state aimed at realizing the people's welfare, the competent institutions of The state has the obligation to ensure the correctness of the information submitted in the company's investors.

## 2) Strengthening of Security Assurance Investment

According to North, Stephan Haggard as quoted Abdul Hakim Garuda Nusantara, there are four components of the rule of law in supporting of economic growth, one of them is the security of individuals, it means that economic actors must be free from all forms of obstruction, harassment and threats, both physical and or mental health of any party in the transaction. Protection of property rights and freedom of contract of the underlying transactions in the market will be in vain if there is no individual security.<sup>26</sup> In order to provide protection of the right to personal security, countries are obliged to reduce to the minimum level of crime rate, including capital market crimes (fraud, market manipulation, insider trading and other forms). In relation with the activities of the capital market, the security of individuals can be interpreted as the security of the person investing.

In the Act No. 8 of 1995 on Capital Markets there are some provisions that can be considered to ensure the safety of investments, but that provision is not maximized because there are still weaknesses.

Because of that it needs strengthening the law policies to give security guarantees investment, namely by adding provisions on:

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<sup>26</sup> Abdul Hakim Garuda Nusantara, Law and Economic Growth, Opinion, Kompas, Saturday, November 7, 2015, Pg. 7.

## (a) The necessity of strict legal penalties;

A weakness in the rule of law, creating a loophole for certain parties to take advantage and harming the other side as public shareholders. In the Act No. 8 of 1995 on the Capital Market, there are several provisions that have no legal sanctions, among others, are: Article 45, 47 where the Custodian may issue a written order from the securities on the account owner, and banned from giving information about customer accounts at any party. Article 56 paragraph (1) and Article 58 paragraph (1) Custodian must record mutation Securities ownership in collective custody with the increase and decrease Effect on each securities account. Article 60 the account holder whose securities are recorded in collective custody is entitled to cast votes in the General Meeting of Holders of Securities. To the breach of some of that provision have no sanctions, although there is no obligation for a custodian to replace losses due to his mistakes, but there is no clear mechanism. Therefore strengthening security of investment is done by adding the provisions of strict legal penalties. This is in line with the views of John Austin, stating that the law has four elements, namely *sovereignty, Comand, Duty, and sanctions*. Then the provisions of capital market law needs to be amended in order to better ensure the safety of the investment.

## (b) Improvement Authority by the FSA.

In order to provide reinforcement of security assurances, then it is no less important is the monitoring of the policies that have been set. Therefore we need optimal supervision by the FSA institutions. To increase the oversight authority of the FSA should be expanded and improved. This is similar to the draft Law Amendment Act No. 8, 1995, there are some additional authority Bapepam / FSA, namely: in the case of disclosure of the ownership of securities: prohibiting certain parties to conduct their activities directly or indirectly in the capital market if it had allegedly been involved in the capital market sector: in the case of examination of the crime of capital markets ; require capital market supporting professionals to submit their dispute to the FSA regarding the capital market; in the case of organ issuers and public companies; using electronic data as evidence in *scrip less trading*.

## b. Extern protection

Law protection for investors carried out when having a legal dispute involving the institution is by way outside of the court. Dispute resolution process in the sense of Justice would be called a kind of law enforcement as well,<sup>27</sup> because the activity cannot be separated from the law that has been created and provided by the law-making institution. In line with *out court* system that is a system dispute resolution outside of the court of law.<sup>28</sup> The legal protection of justice based on the public shareholders in the event of a dispute is done by completing by two ways, according to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. Institutions outside the country's judiciary are indispensable, because during this time the involvement of the judiciary (state) in the protection of investor perceived don't be effective and efficient, because the facts as follows:<sup>29</sup>

## (a) Generally, the majority shareholders are those who have strong financially;

## (b) The decision of the judiciary in general cannot be predicted;

## (c) The cost of Advocates for dealing with cases of relatively large for shareholder, who are hard to reach by public shareholders;

## (d) The company does not necessarily pay the costs Advocates, if the case is defeated;

**5. Conclusion**

In building Legal Political capital markets to provide substantive justice based legal protection for public investors, according to the writer classified into two kinds:

**5.1. Protection Legal Intern, that legal protection is done internally within the structure of the Indonesian Capital Market, who done by providing:**

## (1) Strengthening the Security Benefits of Investment,

## (2) Increasing the Guarantee Equity Capital Ownership;

## (3) Strengthening of Security Assurance Investment.

<sup>27</sup> Satjipto Rahardjo, *Op Cit*, page. 181.

<sup>28</sup> The meaning of the Court are tribunals as stipulated in Article 24 paragraph 2 of the Constitution 19 45 amendment IV.

<sup>29</sup> Munir Fuady, *Op Cit*. page. 253.

5.2. Legal Protection Extern, the legal protection is done when an investor has a legal dispute with the company, directors, commissioners, by engaging with institutions outside the judiciary, namely:

- (1) Develop Alternative Dispute Resolution (APS);
- (2) Develop Arbitration.

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