

Legal Enforcement Model in Indonesia Capital Market Disputes to Make Substantive Justice

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Abstract—Law enforcement in the capital market sector becomes a serious issue, because the varies pattern of capital market business practices is very difficult to identify and qualify which includes a crime and which are not criminal acts. This paper aims to find the ideal law enforcement model in capital market disputes. This thesis is conducted by the *juridis normative* method by basing approach to the legislation in force. The research results show that there are several factors that can cause capital market legal enforcement is not optimal, they are, legal enforcement factor, regulation factor, and legal cultural factor. To further optimize there needs to be a change of paradigm in legal enforcement that is, progressive legal enforcement, with the strengthening of watchdog institutions such as Market watchdog conducted by financial services authority, and the establishment of a special institution for settlement of capital market disputes.

Keywords—law enforcement; capital market dispute; substantive justice; in Indonesia

I. INTRODUCTION

Legally, with the Law Number 8 of 1995 concerning Capital Market, it is expected, particularly to investors, that they get certainty and legal protection from any violation [1]. In addition, due to the capital markets constitution in a comprehensive manner, and with the authority of Market watchdog as Investigators then it is expected that law enforcement and legal certainty in capital markets become increasingly better [2].

Some other violations of capital market law considered as crimes, for example [3]:

A. Sarijaya Securities Case

Covering up customer funds occurred in Sarijaya Securities in 2009. Embezzlement of funds committed by the Commissioner, Herman Rusli, it was worth nearly 245 billion from Rp 8700 customers. The Judges decided to grant customers demand as many as 134 customers that Sarijaya Securities replacing the customer's investment fund worth for Rp 14.82 billion.

B. Antaboga Delta Case

This began when Antaboga sold investment products through Century Bank in the form of mutual funds with some interesting feedback. It turns out that the scheme does is divert customer funds deposited in the Century Bank into an instrument of Antaboga and such investment products were done without allowance from Market watchdog (Financial Services Authority). Customer losses reached Rp 1.4 trillion.

Violations of law in the field of capital markets could potentially give rise to capital market dispute, either civil or criminal dispute. How does legal enforcement in that capital market dispute? Market watchdog was the leading edge of law enforcement in the capital market which is now taken over by the Financial Services Authority (ASF), but in practice, the legal enforcement of capital market has not been implemented to its full potential. Infringement of the law considered as crime but not processed in a crime, there is a criminal offense but subject to administrative sanctions. The application of administrative sanctions does not make deterrent effect. Legal enforcement of the capital market is becoming a serious problem, since the colour schemes of the capital market business practices is very difficult to be identified and qualified as a capital market crime. In addition, in practice, legal enforcement of the capital market has not been optimal, this may affect substantive justice for market participants. Why is the capital market legal enforcement not optimal, and how is an ideal model in legal enforcement of capital market. The research is based on *juridical normative* approach, a review against the legislation.

II. ANALYSIS AND DISCUSSION

A. Legal enforcement

Legal enforcement is actually located on the factors that might have affected it. According to Soerjono Soekanto, there are several factors which affect legal enforcement, namely [4]: The legal factor itself; The legal enforcement factor, i.e. the parties that make up as well as applying the law; The means or facilities that support legal enforcement; The environmental or society factor where the law applies or applied; and Cultural factor, as the result of the work, copyright, and the sense of human intention based on life association.

There are several factors that cause the Indonesia capital market legal enforcement has not been optimal, they are:

1) *Legal enforcement factors*: In law science theory, essentially conducting justice in order to uphold the law and justice is done by a Supreme Court and judicial bodies underneath and by a Constitutional Court [5]. Against certain constitution violation it may be taken administrative action in which the sanction is also administrative.

2) *Regulatory factors*:

a) *The law no.8 of 1995 is not yet fully set up*: In the capital market regulation, it is not set explicitly on how dispute resolution arising from capital market activities.

b) *Administrative Sanctions has yet to give a deterrent effect*: Not all violations of the constitution and their implementation in capital market should proceed to the stage of investigation, because it precisely may inhibit the activity of supply and or overall share trade [6].

c) *There are some provisions of Constitution Number 8 Year 1995 Regarding Capital Market has no legal sanctions (criminal)*:

3) *Cultural factor*: Legal culture is human attitude toward the law and the legal system, beliefs, values, thoughts, as well as its expectations. In other words legal culture is the atmosphere of social thoughts and forces that determine how the law is used, avoided or misused. Legal culture determines when, why, and how society treats the law, the legal institution or law process; and why do they use other agencies or simply not use it. In other words, it is the cultural factor that changes the structure and the static rule of becomes alive [7].

B. *Progressive Legal Enforcement in Capital Market Dispute*

Progressive legal enforcement is meant for legal enforcement that based on progressive law. Progressive legal theory of Satjipto Rahardjo derived from his deep feeling that after 60 years of the State, it is proved failed to manifest the life of the better law [8]. Providing legal protection to investors. According to Teresa L. Cyrus, Talan B. I. Scan and Sheena Starky, that said [9]: *The shareholder protection measure focuses on one-share-one-vote rules, a series of anti-director rights and mandatory dividends*.

Legal concepts are basically the opposite of the two basic components of the law, namely rules and behavior. Progressive law begins from the basic assumption that law is for men, and not vice versa. The presence of law is not for itself, but for a wider and bigger thing, then when there is a problem in law, the law itself which should be reviewed and improved, not the human who is forced to deal with law scheme [10].

Progressive law that relies on human has a humanity goal that embodies bliss. Legal enforcement creativity in interpreting the law will not stop at spelling the constitution but use it consciously to achieve the goal of humanity, namely happiness [11].

Legal enforcement is intended to bring about justice. In relation with the fair legal process, Aristotle's theory of justice has given a kind of philosophical foundation indirectly though

its earliest form. Reflections of a fair trial as the embodiment of progressive judiciary is intended to achieve the value of justice that is not based on procedural justice according to the law, but rather how to create substantive justice as manifestation of justice cumulative [12].

Progressive law enforcement of capital market gives maximum substantive justice to all perpetrators of capital markets without discrimination. There are several concepts of progressive law enforcement of capital market to reach substantive justice:

1) *Strengthening the functions of Market watchdog in which for this case it is done by ASF*: Article 3 of Capital Market Constitution states that the construction, the setting, and the daily supervision of the capital market activities are carried out by Capital Market Supervisory Agency hereinafter referred to Market watchdog. Article 4 the construction, arrangement, and supervision by Market watchdog with the aim of realizing the creation of regular capital market activities, reasonable, and efficient as well as protect the interests of investors and public. The authority of Market watchdog is divided into three terms, as a quasi legislative power, quasi investigative power and quasi adjudicative power [2]. Strengthening is highly done on the function of quasi investigative power and quasi adjudicative power.

Strengthening of quasi investigative power is done because on examination held by Market watchdog concerning crime may not necessarily make Market watchdog follow up on criminal proceedings, but there is discretion authority so that the capital market violation related to criminal should not continue criminal proceedings. To provide substantive justice for the market perpetrators, then crime capital markets should be processed in criminal ways.

2) *Resolution of capital market dispute outside of court*: Article 111 Capital Market Constitution states that each of parties who suffer loss as a result of Capital Market Constitution violation and or the regulations can demand compensation, either singly or jointly with other parties that have similar demands, against the party or parties responsible for the infringement. The constitution has determined the means to file charges. The authorized institutions for resolving disputes, has not expressly provided for in the constitution. Society perceived that place for solving capital market dispute is the District Court. This perception is not wrong as the Court was the one who had the authority, but in a very complicated capital market dispute, it takes special skills. Capital market expertise, has been owned by the parties as Arbitrator or Mediator, so that capital market dispute is more precisely filed in front of the Court of Arbitration, or other dispute resolution alternatives. Or specialized institutions that resolve capital market disputes. This special institution is expected to provide substantive justice, because basically capital market dispute had been resolved by the competent authorities.

III. CONCLUSION

Based on the analysis and discussion mentioned above it can be drawn conclusion that there are several factors that can cause capital market legal enforcement is not optimal, they are, legal enforcement factor, regulation factor, and legal cultural factor. To further optimize there needs to be a change of paradigm in legal enforcement that is, progressive legal enforcement, with the strengthening of watchdog institutions such as Market watchdog conducted by financial services authority, and the establishment of a special institution for settlement of capital market disputes.

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