

CHAPTER I

INTRODUCTION

1.1 Background

Indonesia being a state based on the law obliges every individuals to uphold the law in every way regardless of exceptions. Since the establishment of the Pancasila and the 1945 Constitution, the state aims to provide an environment for its individuals which are safe, secure, and prioritises the welfare of its citizens.¹ Therefore, every individuals are entitled of and are given access to the most basic human rights, which are right to life and liberty, freedom from slavery and torture, freedom of opinion, and the right to work and education.² Indonesia therefore assures its citizens that the law must serve three purposes of law which are justice, utility, and legal certainty.³ The aspect of justice ensures that legal protection to the citizens within a state are covered, provided that equality are attainable to improve social welfare. This principle held that everyone is entitled to an equal distribution of rights and obligations accordingly to their portion. Another objective of the law upholds the utilitarianism approach which aims to maximise the law by making sure it serves for the greatest number of people - in law, legal utility is used to measure the efficacy of a law. The law, however, needs to be implemented virtuously that is why legal certainty acts as a guarantee in ensuring

¹ The 1945 Constitution

² "Human Rights". *Un.Org*, 2016, <https://www.un.org/en/sections/issues-depth/human-rights/#:~:text=Human%20rights%20include%20the%20right,to%20these%20rights%2C%20with%20discrimination>. Accessed 24 Sept 2020.

³ "Tiga Nilai Dasar Hukum." *Suduthukum.com*, 18 July 2018, [suduthukum.com/2018/07/tiga-nilai-dasar-hukum.html](https://www.suduthukum.com/2018/07/tiga-nilai-dasar-hukum.html). Accessed 23rd September 2020

that the law is made for the interest of the public. It requires the law to be sufficiently implemented to legal subjects to provide legal accountability in their conduct. Without legal certainty, subject of law are not protected in courts, and they cannot make a clear distinction of what is required by the law and what is not bound by the law, that is why legal certainty refers to how consistent the law is exercised.

For a long time, Indonesia had experienced various legal reforms. The long period of colonialization in Indonesia, in particular due to the Dutch occupancy's, resulted Indonesia with a civil law legal system which accentuates the need of legal codifications for statutes.⁴ Consequently, Indonesia follows the Dutch Code through the Concordance Principle which allows Netherland's law to be extended to its colonies. Following independence, Indonesia still allow Dutch Companies to operate, however a conflict ignited over West Papua which forces the leader, Soekarno, to nationalize Dutch companies and expel the Dutch. This led to the prominence of state enterprises, and "discouraged the private sector."⁵ Following the fall of Soekarno, in Suharto's presidency, the Law on Foreign Investment were passed, which requires foreign that wants to invest in Indonesia to incorporate new Indonesian-domiciled company. It was only until the end of the twentieth century where merger and acquisition activities and company law reforms are seen, substantiated by World Bank's recommendation that investment activities started to become prominent.

⁴ Purba, A. Zen Umar. "The Current Status of Company Law in Indonesia." *Jurnal Hukum & Pembangunan* 24.6 (2017), pg. 515.

⁵ *Ibid.*, pg. 517

Now, we are in the era of globalization – where industrialization and mobilization have “had far-reaching effects on our lifestyle”.⁶ The barrier to trade and connects does not recognize borders anymore, what once needed physical connectivity now only relies on the complex yet invisible system of the internet. While the proliferation of technology increases, this global phenomenon had raised the development of the world’s economy. According to the World Economic Forum, rising competitiveness in the economy is equivalent to rising prosperity. Those that can grow inclusively will benefit from economic growth.⁷ Though, the movement of economic competitiveness is established not only within nations but also driving individuals to improve their quality of life. The distribution of higher-income amidst the population becomes significant – the rich get richer while the poor get more and more oppressed.

Those hard-working individuals who have been working 5-times a week or the nations who had to strengthen its fiscal and monetary policy may end up building a respectable amount of money – although having idle cash reserves. Consequently, more than ever people are searching for alternative means to generate money with their current capital - they seek long term savings that could accumulate and promise financial gains in the future. A nation or a legal entity such

⁶ Editor, Enviro. “Globalization and Its Impact on the Environment.” Environment News South Africa, Environment News South Africa, 18 Aug. 2018, www.environment.co.za/environmental-issues/globalization-and-its-impact-on-the-environment.html.

⁷ Cann, Oliver. “What Exactly Is Economic Competitiveness?” *World Economic Forum*, 27 Sept. 2017, www.weforum.org/agenda/2017/09/what-is-economic-competitiveness/.

as a public company would also look for a large amount of funds for developments, which could benefit by way of investment. According to James Chen, investment means:⁸

“a monetary asset purchased with the idea that the asset will provide income in the future or will later be sold at a higher price for a profit.”

Therefore, it is safe to say that investment is similar to taking “an action with the hopes of raising future revenue”.⁹ While there are various methods of investing, the main focus of this paper will be investments that revolve in the capital market.

Capital Market is a platform where buyers (investors) and sellers (issuers) that are listed in the stock exchange ‘meets’, and undergo sales and purchase transactions of securities. The Indonesian Stock Exchange defines the capital market as a market whereby long-term financial instruments (longer than 1 year), which comprises of bonds, equities, mutual funds, and other derivative instruments are traded.¹⁰ People can invest their money with their own preferences, according to the returns and risks associated with the instrument. Capital Market acts as an alternative for a company’s capital resources which is done at first by Initial Public Offering (IPO), where the company can conduct sales and purchases. Later, the capital gained from the public offering is then used by the companies for growth

⁸ Chen, James. “Investment.” Investment, Investopedia , 30 June 2019, www.investopedia.com/terms/i/investment.asp.

⁹ Ibid.

¹⁰ “Introduction to Capital Market.” Indonesia Stock Exchange, IDX, www.idx.co.id/en-us/investor/introduction-to-capital-market/.

and possible expansions. Likewise, in public investment, it serves as an alternative to gain capital.¹¹

The importance of Capital Market lies in the role it has to the economy, conquering two functions at once – financial and economic function. It has economic function since it bridges and facilitates those that have a surplus of funds, the investors, and those that are in need of funds, the issuer. Meanwhile, the financial function is that people can invest their money with their own preferences, according to the returns and risk associated with the instrument – giving an opportunity for investors to gain accordingly.¹²

Being a central part of Indonesia's economy, it is imperative to construct a law that ensures the protection and interest of parties conducting a capital market activity.¹³ It is also crucial that a legal state needs to make sure that the positive law is of a democratic-nature - based on its people and for its people. A good positive law is a law which could cover the purpose of law which is justice. Indonesia's Capital Market is regulated under Law No. 8 of the Year 1995 regarding Capital Market (Capital Market Law). Capital Market Law stipulates the general guidelines of Capital Market, including the conditions of companies that are eligible to offer

¹¹ Ibid.,

¹² Tjiptono Darmadji and Hendy M. Fakhruddin, *Pasar Modal di Indonesia: Pendekatan Tanya Jawab* (Jakarta : Salemba Empat, 2001), pg 2

¹³ Natalia, Rizky. "Indonesia Investment – Capital Market In Indonesia."Indonesia Foreign Investment Law, 28 June 2016, www.indonesiaforeigninvestmentlaw.com/capital-market/indonesia-investment-capital-market-in-indonesia/.

its shares to the public, the requirements of underwriters, investment managers, brokers and the legal protection for investors.

The purpose of establishing Capital Market is to create a cohesive and orderly trading of securities, according to the supply and demand of the market. To guarantee that such condition is achieved, Capital Market Law stipulates the need to have a supervisory body, which is *Badan Pengawas Pasar Modal dan Lembaga Keuangan (Bapepam-LK)*. Bapepam-LK task is to conduct surveillance, necessary arrangement, and guidance of capital market activities who is directly responsible to the Ministry of Finance. Bapepam-LK is expected to establish a harmonious capital market that is fair, transparent, efficient, and upholds legal certainty, particularly in protecting the interest of the investor in the capital market.¹⁴ However, since the enactment of Law No.21 of Year 2011 regarding Financial Services Authority (FSA Law) financial institutions are under the surveillance of the FSA. While a strong regulation and supervisory bodies exist, the tendency for violations to occur by capital market actors is often found.

The prices of the long-term instruments that are sold in the capital market is affected by material information because it can easily alter its value.¹⁵ Article 1(7) of the Capital Market Law defines material information as:¹⁶

“any important and relevant fact concerning events, incidents or data that may affect the price of a Security on an Exchange or that may influence the

¹⁴ Darmadji and Fakhrduddin, op. cit, pg 14

¹⁵ Bismar Nasution, *Keterbukaan dalam Pasar Modal*, (Jakarta: Fakultas Hukum Universitas Indonesia, Cet. Pertama, 2001), pg. 1

¹⁶ Law No. 8 of Year 1995 regarding Capital Market Law, Article 1(7)

decisions of investors, prospective investors or others that have an interest in such information”

Furthermore, the article stipulates that:¹⁷

“Material Information is information that may affect the price of Securities or the decision of investors, prospective investors, or others with an interest in such information, and includes information on matters such as:

1. mergers, acquisitions, consolidations or joint ventures;
2. the distribution of stock splits or stock dividends;
3. extraordinary income or dividends
4. the making or loss of an important contract;
5. a new product or significant invention;
6. a change in a Company’s financial year; and
7. a change in control or an important change in management;”.

Having a valuable worth, material information is therefore highly regulated in the Capital Market Law.

Disclosure principle which is a principle uphold in Capital Market Law stipulates regarding the importance of the capital market to be transparent and the need to exercise openness to the public. Article 1(25) of the Capital Market Law upholds that:

“The disclosure principle is the general guideline that requires an Issuer, a Public Company, and other Persons subject to this Law, to disclose to the public within a certain time, material Information with respect to their business or Securities, when such information may influence decisions of investors in such Securities and/or the price of the Securities”.¹⁸

The principle aims to create a fair transaction in the trading of securities, especially for small investors that may not have as much resources as other individuals or larger legal entities. Through this principle, investors have an increased sense of

¹⁷ Law No. 8 of Year 1995 regarding Capital Market Law, Article 1(7)

¹⁸ Law No. 8 of Year 1995 regarding Capital Market Law, Article 1(25)

trustworthiness in conducting investment transactions. This enables the public to access information regarding the company they want to invest in and decide on whether to pursue an investment or the other way around. However, disclosure principle has exceptions since there are certain information that are prohibited to be disclosed as follows:

1. Information that are deemed incomplete to be disclosed.
2. Information that might bring losses to the company if it is disclosed.
3. Information that are generally confidential. For instance, trade secret.

A capital market is considered fair and efficient only if its investors receives the information at the same time with the same content of information.¹⁹ However, at times, the information as mentioned above are secretly distributed outside a company for investment interest purposes – resulting in an unfair advantage since they have access to a non-disclosed information, commonly found in capital market violations.

Illegal Trading one of the violations prohibited under the Capital Market Law is defined as follows:²⁰

“insider trading in securities will usually involve the buying or selling of certain securities relating to a company by a person connected with that company, who in doing so, is in possession of specific information which relates to these securities and is not generally known but which would be likely, if made public to have a significant effect on the market price of the securities”.

¹⁹ Raffles, "Analisis Penerapan Prinsip Keterbukaan di Pasar Modal dalam Kaitannya dengan Pengelolaan Perusahaan yang Baik." *INOVATIF Jurnal Ilmu Hukum* 4.5 (2011).

²⁰ Gil Brazier, *Insider Dealing: Law & Regulation*, (London : Cavendish Publishing Limited, 1996), pg.76

Illegal trading practices is considered illegal since there is injustice in giving and receiving information that are restricted to certain people. In a sense, the information shared is not information that is publicly known rather information that only insiders knows. Thus, Insider Trading is a sales and purchase of shares of a public company by an insider which has insider information. According to the elucidation of Article 95 of the Capital Market Law, an insider means:²¹

1. a commissioner, director or employee of an Issuer or Public Company
2. substantial shareholder of an Issuer or Public Company
3. an individual, who because of his position or profession, or because of a business relationship with an Issuer or Public Company, has access to inside information; and
4. an individual who within the last six months was a Person defined in letters a,b, or c, above.

Based on the above article, the insider is prohibited to conduct the sales and purchase of securities of a public company whereby he or she is an insider. As an insider, they have to maintain the public company's confidentiality and are obliged to keep the information secure from external stakeholders - preventing other parties from taking advantage for profit which could harm investors. In addition, every party which tries to obtain insider information in violation of the law is also prohibited under Article 97 of the Capital Market Law which stipulates that:²²

²¹ Law No. 8 of Year 1995 regarding Capital Market Law, Article 95

²² Law No. 8 of Year 1995 regarding Capital Market Law, Elucidation of Article 97

“A Person who, in violation of the law, attempts to obtain and eventually obtains inside information regarding an Issuer or Public Company, is subject to the same prohibitions as an insider, as indicated in Articles 95 and 96. Consequently, such Persons are prohibited from trading in such Securities, from influencing other Persons to trade in such Securities, and from passing on inside information to other Persons that are likely to use it to trade in such Securities. Examples of obtaining information in violation of the law, include:

1. stealing inside information;
2. obtaining inside information by tricking insiders; and
3. obtaining inside information by violence or threat.”

This act is highly prohibited because once trust is lost by investors, they will seek alternative financial institutions.

Moreover, the regulation which covers Insider Trading upholds the concept of fiduciary duty which states that an insider within a company is obliged to act in the best interest of the company. Being someone that is entrusted with care, they need to be loyal not serving their personal interest for personal gain. Likewise, in Law No. 40 of year 2007 regarding Limited Liability Companies (LLC Law), directors and commissioners have obligations to execute their rights and obligations for the companies interest which is align with the vision and mission of the company.²³

The prohibition of insider trading wishes to ensure that material information that are issued by a company can reach the public in particular investors evenly and fairly. It aims to prevent one party from benefiting the information beforehand,

²³ Law Number 40 of Year 2007 regarding Limited Liability Companies, Article 92 (1) and Article 108 Paragraph (2)

because once again material information bears value, imagine it as a commodity affecting investors on whether to invest or not. Therefore, no one can benefit especially if the person concerned has access to company management since they are bounded to the fiduciary-duty relationship.²⁴

Legal enforcement towards violations of insider trading in the Capital Market Law consist of three sanctions namely administrative, civil and criminal as follows: ²⁵

1. Administrative sanction: Covered in Article 102 of the Capital Market Law
2. Criminal sanction: Covered in Article 103-110 of the Capital Market Law
3. Civil Sanction: Compensation for loss, Covered in Article 111 of the Capital Market Law.

These legal enforcement is hoped to be a form of legal protection so that perpetrators of insider trading can be reduced in numbers, and a warning to capital market actors to conduct transactions cautiously.

Indonesia's Capital Market Law does not regulate securities transaction conducted by not an insider (outsider) based on insider information. For instance, if a commissioner in a public company ask his friend to buy the shares of his company based on information that he owns, such act will not be penalized as stipulated under Article 97 of the Capital Market Law. This shows that it does not

²⁴ Haidar, Fadilah. "Perlindungan Hukum Bagi Investor Terhadap Praktik Kejahatan Insider Trading Pada Pasar Modal di Indonesia." *Jurnal Cita Hukum* 2.1 (2015), pg. 144

²⁵ Ibid., pg. 148

recognize the misappropriation theory which considers everyone who conducts securities transactions based on insider information as performing insider trading – in other words even though the perpetrator does not owe fiduciary duty to the company, the person is said to be conducting insider trading. The Black Law’s Dictionary defines misappropriation theory as follows:²⁶

“the doctrine that a person who wrongfully uses confidential information to buy or sell securities in violation of a duty owed to the one who is the information source, is guilty of securities fraud”.

In the absence of legal protection towards insider trading violations, unfair market mechanism will exist, illicit profit will subsist, and market distrust which causes loss to investors will be established. Consequently, legal protection for investor is a crucial element in the continuity of investment and business activities, which will be realized in the form of legal structure and legal substance, working in synergy in providing legal certainty and protection.²⁷

In reality, insider trading practices in Indonesia has not receive proper attention from the general public. The aspect of inequality that insider trading has in regard to other capital market parties creates injustice. With the limited amount of insider trading practices cases brought to court and most ended up being unfinished – settled outside of court – it is necessary that the legal problem of insider trading, particularly the protection of victims of insider trading based on

²⁶ Yulfasni, *Hukum pasar Modal*, (Jakarta : IBLAM, 2005), pg. 112

²⁷ Haidar, Fadilah.op.cit., pg. 134

Indonesia's Capital Market Law needs to be analysed. Subsequently to fulfil this, the research below needs to be conducted.

“LEGAL PROTECTION OF VICTIMS OF INSIDER TRADING IN INDONESIA'S CAPITAL MARKET”.

The research on insider trading has been conducted several times as a part of thesis writing to achieve the bachelor of law as follows:

1. The research, “*ASPEK HUKUM PRAKTEK INSIDER TRADING DI PASAR MODAL INDONESIA*” written by Marvin Deardo has been conducted by a fellow UPH student. The research primarily focuses on how the sanctions are applied as well as the means of prevention of insider trading. Meanwhile, this paper will focus on the legal protection of victims of insider trading under Indonesia's Capital Market Law as well as how perpetrators are handled under Indonesia's Capital Market Law.²⁸
2. “*Tinjauan Yuridis Insider Trading Melalui Outsider: studi kasus Rajiv Louis terhadap akuisisi Bank DBS Group Holding Ltd dengan PT Bank Danamon Tbk*” by Josua Kristian Wijaya, Universitas Pelita Harapan (2020) . The research has a case-analysis basis which aims to dissect regarding the alleged insider trading

²⁸ Deardo, Malvin “Aspek Hukum Praktek Insider Trading di Pasar Modal Indonesia”. Skripsi, Tangerang: Fakultas Hukum Universitas Pelita Harapan, 2015.

committed by Rajiv Louis, which certainly differs from the author's thesis since it does not include the DBS and Danamon Bank case. Furthermore, its central idea revolves in exploring the supervisory role of the FSA in insider trading cases. Lastly, it differentiates from the author's thesis because it focuses on the legal implication of an Outsider in an insider trading transaction.²⁹

3. *“Kejahatan perdagangan informasi orang dalam di pasar modal: suatu tinjauan hukum tentang upaya pencegahan dan penerapan sanksi di Indonesia dan Amerika Serikat”* written by Agustina, Universitas Pelita Harapan 2017. The thesis is done by way of a comparative study of Indonesia and the United States in regard to insider trading. The main focus is differentiating the Securities and Exchange Commission (SEC) of the United States and Indonesia's FSA as a supervisory body. Meanwhile my thesis primarily centres on the legal protection of victims of insider trading.³⁰

Despite similar research have been conducted on Insider trading in recent years, the author's research differs substantially because it seeks to analyse the implication of the Capital Market Law towards victims of Insider Trading primarily regarding its legal protection as well as how the perpetrators are handled which

²⁹ Wijaya, Josua Krtistian *“Tinjauan Yuridis Insider Trading Melalui Outsider: Studi Kasus Rajiv Louis terhadap Akuisisi Bank DBS Group Holding Ltd dengan PT Bank Danamon Tbk.”*. Skripsi, Tangerang: Fakultas Hukum Universitas Pelita Harapan, 2020.

³⁰ Agustina, Agustina *“Kejahatan Perdagangan Informasi Orang Dalam di Pasar modal: Suatu Tinjauan Hukum tentang Upaya Pencegahan dan Penerapan Sanksi di Indonesia dan Amerika Serikat”*, Skripsi, Tangerang: Fakultas Hukum Universitas Pelita Harapan, 2017.

differs with the first research conducted by Marvin Deardo. Moreover, the author's research is not a case-based analysis on Rajiv Louis insider trading issue that is why it is distinctive from it. Rather, the author's thesis will include some case inside the thesis, however, will not be the focus of the paper (only acts as a support for a claim). Lastly, the author thesis does not use a comparative approach as used by Agustina. Even though, this paper will compare some regulations with other countries the approach used is different since the paper will use a statutory approach.

1.2 Formulation of Issues

1. How is insider trading perpetrators handled under Indonesia's Capital Market Law?
2. How is legal protection carried out to victims of insider trading under Indonesia's Capital Market Law?

1.3 Research Purpose

The purpose of this research paper are as follows:

1. To give certainty to traders regarding the supervision and handling of illegal practices of capital market transaction, particularly insider trading pursuant to Indonesia's Capital Market Law.
2. To discover the efficacy of Indonesia's Capital Market Law in protecting victims of insider trading practices.

1.4 Research Benefit

1.4.1 Theoretical Benefit

This juridical study is expected to be useful for:

1. Adding valuable information regarding the capital market law as a reference for future research.
2. Expanding legal opinion and providing input in matters related to insider trading practices in Indonesia.
3. Adding useful materials regarding the protection of victims of insider trading practices in Indonesia.

1.4.2 Practical Benefit

This juridical study is expected to be useful in practical life for:

1. Providing additional insights for legal practitioners who are in the areas of capital market.
2. Highlighting the importance of knowledge and carefulness in conducting capital market transactions.

1.5 Framework of Writing

In order to create a beneficial scientific work, a study must obtain results.

Therefore, the author divides the research into chapters that are interconnected.

The order is as follows:

1) CHAPTER 1 : Introduction

This chapter mainly discusses the general information towards the main discussion of the thesis, outlining the laws and regulations on Indonesia'

Capital Market Law and Insider Trading, the issues of the law, formulation of issues and the purpose of writing this very thesis.

2) CHAPTER 2 : Literature Review/Theoretical Framework

Here, the author will explain the definitions concerning the matters related in the discussion including definitions of Insider Trading, fiduciary duties, misappropriation theory, legal sanctions, etc. As well as laws that apply in cases that are appointed as the topic of thesis writing.

3) CHAPTER 3 : Research Methodology

This chapter explains the procedures and references used by the author in obtaining data for research. Moreover, this chapter explains about the type of research used by the author to describe the issues related with victims of insider trading.

4) CHAPTER 4 : Research Result & Analysis

This section will particularly discuss and analyse the results from the research conducted – discussing legal protection, and possible legal remedies.

5) CHAPTER 5 : Conclusion & Recommendation

This chapter will be divided into two: the conclusion and recommendation. The chapter contains conclusions based on the data from the research and analysis as well as suggestions that can be given by the author regarding the issues.