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Model of Application of the Principle of Freedom of Contract in Stock Repurchase Agreement (REPO) Transactions in the Capital Market

Eni Dasuki Suhardini[1], Rachmat Suharno,[2] Inda Nurdahniar,[3] Riza Zulfikar[4]
[1,2,3,4] Universitas Langlangbuana,
Email: eni.d.suhardini@gmail.com[1], rachmat.suharno@gmail.com[2], indanurdahniar@gmail.com[3], rizazulfikar.bdg@gmail.com[4]

Abstract The aim of the research is for shareowners to better understand their rights and obligations as well as the purpose of their agreement in repoing their shares, b) for repo holders to better understand the agreement that has been outlined in the repo transaction and then give birth to their rights and obligations so that they do not commit acts that are prohibited in repo transactions, and c) for investors (third parties) to be more careful and understand the provisions relating to repo transactions, so as not to buy shares that are repoing. OJK is more firm in implementing sanctions against those who break rules in the capital market so that investment order and certainty can be created in order to create a fair and fair play investment climate. Regulations in share repo transactions should not only be aimed at financial service institutions but also at share repo transactions carried out between issuers so that they can be monitored so that losses arising from (failure to deliver) can be minimized. OJK has added a mechanism for reporting and publishing repo transactions so that this event is known to the public and anyone interested in investing in the capital market knows the status of shares being repo. Based on the research results, it was concluded that the application of the principle of freedom of contract for parties in stock repo transactions between issuers has basically been implemented in accordance with Article 1338 paragraph (1) of the Civil Code and POJK, although in its implementation there are still parties who do not carry out their obligations; Share repo holders are civilly liable to the owner or a third party if the shares repo to them are transferred to a third party before maturity; The model for regulating stock repo transactions, whether carried out with financial service institutions or between issuers, contains reporting and publication obligations carried out by the OJK in order to provide certainty and fairness for issuers, repo holders and investors in accordance with the objectives of capital market law.

Keywords: Capital Markets; Freedom of Contract; Investor Protection; Repurchase Agreement; Stock Repurchase.

INTRODUCTION

Capital markets are activities related to Public Offerings and Securities trading, Public Companies related to the Securities they issue, as well as Institutions and professions related to Securities. The capital market as one of the supports for the implementation of national development can anticipate various changes and developments that occur in carrying out its functions. The existence of the capital market is able to mobilize the potential of society to participate in development while creating equal distribution of income and democratization of the economy and can accelerate the process of community participation in owning shares in companies so that they can be used productively.[1]

The government as a state administrator must be able to create laws and regulations that side with the people,[2] every government policy in the form of regulations or legislation will

[1] Nasarudin (et all) , *Aspek Hukum Pasar Modal Indonesia*, Edisi Pertama, Cetakan Ketujuh, Kencana Prenada Media Group, Jakarta, 2011, Hlm. 2
[2] Yohanes Suhardin, dikutip dalam M.Iqbal Asnawi, "*Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas*",*Jurnal Hukum Samudra Keadilan*,Vol II Nomor 1 Januari-Juni 2016, Hlm 128

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* Eni Dasuki Suhardini, eni.d.suhardini@gmail.com

be able to open up opportunities to create prosperity for the community. So it can be felt that the existence of law plays a very important role in creating people's welfare. This is a basic milestone for a law-based country to realize the concept of a welfare state in the state. The state has a key role in maintaining and advancing the economic and social welfare of its citizens.[3]

Achieving the goals of people's welfare with the existence of the capital market has a very close relationship because, through the capital market, the people can actively participate in improving their economy, and the government is obliged to provide certainty in investing through regulations and policies. Article 33 of the 1945 Constitution is the constitutional basis for business actors in the national economy making the welfare of society their ultimate goal.[4] The type of investment that can be chosen by a businessman or those who have excess funds is by investing either directly (direct investment) or indirect investment (indirect investment) in the capital market.[5]

The capital market is a source of financing that is really needed by business actors who need additional capital, as well as alternative financing for the investing community. [6]The capital market as a meeting place for capital owners and parties who need additional capital, or it could be said to be a meeting place for supply and demand for long-term funds, has two main functions, namely the economic function and the financial function.[7]

a. Economic Functions

The economic function of the capital market is to provide facilities to move funds from parties who have excess funds to parties who need funds. On the side of those who have excess funds from the funds they have, they expect to receive a reward for the funds they invest.

b. Financial Function

The financial function carried out by the capital market is by providing funds needed by parties who need funds, and parties who have excess funds provide funds without having to be directly involved in owning the real assets needed for the investment.

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[3] M.Iqbal Asnawi, Asnawi, "*Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas*",*Jurnal Hukum Samudra Keadilan,*Vol II Nomor 1 Januari-Juni 2016, Hlm 128
[4] Yeti Sumiyati," *Peranan BUMN dalam Pelaksanaan Tanggung Jawab Sosial Perusahaan untuk Meningkatkan Kesejahteraan Rakyat*", *Jurnal Hukum IUS QUIA IUSTUM* No.3 Vol 20 Juli 2013, Hlm 467
[5] Irham Fahmi, *Pengantar Pasar Modal*, Alfabeta, Bandung, 2012, Hlm 4
[6] Mas Rahmah, *Hukum Pasar Modal* , Kencana, Jakarta, 2019, Hlm 1.
[7] Suad Husnan, *Dasar Dasar Teori Portofolio Dan Analisis Sekuritas*, Edisi III, cet 2 UPP AMP YKPN,Yogjakarta,2002, Hlm 4.

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Capital market instruments can be differentiated into debt securities (bonds) and ownership securities (shares or equity).[8] Securities are securities, debt promissory notes, commercial securities, shares, bonds, proof of debt, Participation Units of collective investment contracts, futures contracts on securities, and any derivatives of securities. One of the equity securities that is most widely traded on the capital market is shares. Shares (equity) are a sign of a person's participation or ownership in a limited liability company (PT).

These rights can also be enjoyed by investors who buy shares on the capital market, both during the public offering and on the Stock Exchange. Investors who are interested in buying shares in the capital market show an increase. This proves that the capital market is in demand by investors, and based on the annual report of the Financial Services Authority (OJK), it can be said that the average value of share trading per day has increased by IDR 104.12 billion. (1.14%) from the previous year, namely from IDR 9.11 trillion per day in 2019 to IDR 9.21 trillion per day in 2020. The average frequency of share trading per day increased by 44.50% to 677 thousand times.[9]

Foreign investor transactions recorded sales of IDR 47.88 trillion. The behavior of foreign investors in this period caused capital outflow (net sell) in the stock market. This is different from 2019, where foreign investor transactions recorded purchases of IDR 49.20 trillion. However, stock trading until the end of 2020 was still dominated by local investors at 68.51%[10]

Trading activity for Government Debt Securities increased while for corporations it decreased, compared to 2019. Trading volume for Government Debt Securities increased from IDR 3,722.16 trillion (53.93%) to IDR 10,624.62 trillion and trading value increased from IDR 4,009.96 trillion (58.93%) to IDR 10,814.35 trillion. Trading in Corporate Debt Securities experienced a decline as indicated by volume decreasing by Rp. 10.9 trillion (2.81%) to Rp. 377.54 trillion and trading value also decreased by Rp. 7.15 trillion (1.85%) to Rp. 378.97 trillion. The volume of Repo transactions in 2019 increased from Rp. 1,809.82 trillion to Rp. 4,013.11 trillion in 2020.

Based on the description of trading activities in shares, debt securities, and specifically share repo transactions in 2019-2020, which increased from IDR 1,809.82 trillion to IDR. 4,013.11 trillion shows that the capital market is a means for issuers to increase capital, and the stock repo transaction data above is stock repo transactions carried out with financial

[8] M. Irsan Nasarudin,dkk, *Aspek Hukum Pasar Modal Indonesia*, Cet ke 8, Kencana, Jakarta, 2014, Hlm. 182.
[9] Laporan tahunan OJK 2020, https://www.ojk.go.id diakses pada tanggal 6 Maret 2022, pukul 21.00 Wib
[10] *Ibid*

services, while stock repo transactions between issuers are not registered with the OJK because they are not reported. This is interesting to examine because share repo transactions are carried out based on the principle of freedom of contract in which there is a share sale and purchase agreement between the share owner and the repo holder which gives the share owner the right to buy back his shares within the agreed time period.

Implementing the Repurchase Agreement at the Monetary Authority of Singapore (MAS) 227 The Monetary Authority of Singapore (MAS) has adopted the agreement repurchase agreement Global PSA/ISMA as standard legal documentation for the SGS repo market. The standard/transaction size is around $25 million, the start time is from 9 a.m. to 15.30 Singapore time (Monday to Friday), and the signing/completion time is T+1. Repo practices in Singapore are based on the SGS Repo Code of Best Practice

The regulation of share repo transactions in the capital market must be able to provide hope of justice for all parties, this is based on the reasons of the players in the capital market. First, for issuers, the benefits of the capital market can be to obtain and utilize public funds with the aim of expanding the business, improving the capital structure, and transferring shareholders. Second, for repo holders and investors, the opportunity to invest in the capital market aims to obtain dividends, trade, and have an interest in company ownership. Thirdly, for OJK, the existence of the capital market is expected to increase business opportunities for all parties which can ultimately create improved economic growth in Indonesia. The formation of 268 legal regulations in the capital market must be dynamic in accordance with needs and able to respond to any changes and developments because the law must guarantee certainty in business. This certainty is really needed because the law shows its authority.

RESEARCH METHODS

The normative juridical approach method, with analytical descriptive research specifications that not only describe problems but also analyze facts and implementation of repo transactions based on capital market statutory provisions supported by primary and secondary data obtained through document studies and interviews, then analyzed using analytical juridical techniques.

RESULT AND DISCUSSION

The main element (essential) in a share repo transaction is the share price and shares as the repo object. Repo transactions include obligatory, reciprocal, encumbrance, commutative, and formal consensual agreements. In practice, when transferring material rights to shares of a repo object, there is dualism in ownership of these shares during the term of the contract. The buyer gets legal ownership, but economic ownership (beneficial ownership) remains with the seller. This is the main subject of the author's study regarding repo share ownership rights, especially in the event of failure to resell, because the repo object has been transferred to a third party. The repo mechanism is similar to a pawn because it does not require certain collateral[11]

The capital market is a source of financing that is really needed by business actors who need additional capital, as well as alternative financing for the investing community. Andrew M. Chisholm provides the definition that capital markets are places where those who require additional funds seek out others who wish to invest their excess.[12] The same definition was also put forward by Alan N. Rechtschaffen that the capital market is a meeting place for parties who have excess capital capacity (investors) with parties who need additional capital, both short-term and long-term capital.[13]

The capital market is part of the financial market which is a unified system consisting of the following elements: a) the market where securities are transacted (securities market); (b) intermediary institutions/that assist with securities transactions (securities intermediaries); (c) capital market authority or supervisor (capital market regulator)[14] In order for the system established in the capital market to run fairly, in an orderly and orderly manner, activities in the capital market need to be regulated and stated in capital market law. Capital market law in development consists of rules that are: (a) institutional regulation, rules that regulate capital market institutions, (b) functional regulation, rules that regulate activities, procedures, permits, and other things that enable the functioning of the capital market[15] Investors are not motivated to enter the Indonesian capital market if the market in question does not have a set of rules that guarantee protection, legal certainty, and justice. Moreover, business in the capital market is a business that relies on trust. Trust will be safer if it is covered by clear and binding rules[16]With the influence of the laissez-faire economic doctrine, freedom of contract

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[11] Herdina Kusumasari Saputro,dkk," *Perlindungan Hukum Bagi Investor Dalam Gagal S erah Transaksi Repurchase Agreement (Repo) di Indonesia"*, *Jurnal Hukum*, FH Univ Brawijaya, Maret 2019, Hlm 1
[12] Andrew M. Chisholm, *An Introduction to Capital Market, Products, Strategies, Participants*, John Wiley & Son. Ltd., New York, 2002, Hlm.1.
[13] Alan N. Rechtschaffen, *Capital markets, Derivatives and The Law*, Oxford University Press, Inc., New York, 2009, Hlm.4.
[14] FrankJ. Fabozidan Pamela Peterson Drake, Capital Markets, Financial Management, and In vestment Management John Wiley & Sons, New Jersey, 2009 (selanjutnya disebut Frankj. Fabozzi 1), Hlm.4.
[15] Paul Nelson, *Capital Markets Law and Compliance: The Implications of MiFID*, Cambridge University Press, New York, 2008, Hlm. 8-9
[16] Yudo Pradipto dkk, "*Kewenangan Otoritas Jasa Keuangan (OJK) Tehadap Perlindungan Hukum Bagi In vestor*" *Diponegoro Law Journal*, Vol 8 No. 1 Januari 2019

has become a general principle in supporting free competition. Freedom of contract becomes the legal expression (legal expression) of free market principles. Any state interference with contracts is contrary to free market principles. Freedom of contract tends to develop towards unlimited freedom of contract.[17]

In reality, Freedom of contract and the principle of pacta sunt servanda give rise to injustice. Freedom of contract is based on the assumption that the parties have a balanced bargaining position, but in reality, the parties do not always have an equal bar. So the party that has a stronger bargaining position tends to dominate the party that has a weaker bargaining position. Then this view shifted towards the propriety paradigm, meaning that although freedom of contract is still an important principle in contract law, civil law, and common law, currently freedom of contract is not unlimited freedom. R. Setiawan stated that restrictions on freedom of contract are influenced by the development of the doctrine of good faith, the doctrine of abuse of circumstances, the increasing number of standard contracts, and the development of economic law.[18]

Contract law recognizes 3 (three) principles that are interrelated with each other, namely the principle of consensualism, the principle of the binding force of contracts, and the principle of freedom of contract). Immanuel Kant formulated the essence of a contract, namely the union of two parties' wills, one with another. A contract is a personal right, namely a right that only applies to one person and not others[19]

The theoretical basis for binding contracts for the parties which is generally adhered to by civil law countries was developed by postglossators in the fourteenth century which later became known as canon law. Canon law added several principles to the Roman system of treaty law. First, the principle of binding promises for those or the parties who make them. Second, promises are the basic cause of contracts. If it is a proper cause, then it provides validity[20]

Based on the flow of determinism, it is related to the issue of freedom and forced conditions that are widely discussed among ethical philosophers, that all human actions are determined in such a way by previous causes that he is practically unable to carry out those actions based on his own free will. That the state of human unfreedom is caused by the influence of natural coercion. Naturalist Indeterminism, on the contrary, states that there is

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[17] Morton J Horwitz, *The Transformation of America Law 1870-1960 The crisis of Legal Orthodoxy*, Oxford University Press, Oxford,1992, Hlm. 33

[18] R. Setiawan, *Aneka Masalah Hukum dan Hukum Acara Perdata, A*lumni, Bandung,2008, Hlm. 179- 180.

[19] Ervin H Pollack, *Jurisprudence,* Ohio State University Press Columbus, 1979, Hlm. 264

[20] Harold J.Berman, *Law and Revolution, The Formation of Western Legal Tradition*, Harvard University Press, Cambridge, 1999, Hlm. 246,

freedom of human will. Humans have absolute freedom in their actions based on the manifestation of their own nature.

The issue of human freedom, when viewed from ethics, must be investigated as a whole from the development of the body, spirit and soul individually and then connecting them to each other. Apart from being influenced by the conditions of society, every person is also influenced by his own instincts. A person's morality is measured by his ability to regulate these instincts well and in balance. In ethical matters, one must pay attention to the human "conscience" factor. Ethicists admit that the human "inner voice" factor often helps from mistakes that endanger him[21]

The condition of a company's shares is a measure of an issuer's success, so many companies are looking for other alternatives to increase share prices which have fallen because if this is allowed to continue, there is a high possibility that the company will go bankrupt.[22] One way is to carry out securities sales transactions with a promise to buy them back within a certain time. This is known as a Repurchase Agreement or Repo.

A repo transaction is almost the same as buying and selling with the right to buy back, namely an agreement that the seller is given the right to buy back the goods he has sold by returning the purchase price he has received along with all the costs the buyer has incurred for carrying out the sale and delivery. Article 1519 KUH Civil Code and Article 1522 of the Civil Code). With this provision, if the seller has sold the goods to the buyer intending to buy the goods back, the right to buy must be agreed beforehand, this right does not exist if it is not agreed beforehand.

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This repo transaction is basically an agreement in the capital market that arises from the development of agreements based on the principle of freedom of contract, as contained in

[21] Nandang Sambas," Determinisme dan Indeterminisme*", Bahan Kuliah Filsafat Hukum,* Program Doktor Ilmu Hukum Unisba,18 April 2020, Hlm. 50

[22] Asril Sitompul, *Pasar Modal, Penawaran Umum & Permasalahannya*, P.T.Citra Aditya Bakti, Bandung, 1996, Hlm. 11.

Article 1338 paragraph (1) of the Civil Code, which states that: "All contracts (agreements) that are made legally, apply as a law for those who make it."

The word "all" in the article indicates that people can make any agreement, not limited to the types of agreements regulated in the Civil Code, and the agreement will be binding on the parties making it.[23] The term "all" also contains a principle known as the principle of partial autonomy. The principle of freedom of contract means a person's freedom to make any kind of agreement and contain anything in accordance with their interests, within the limits of decency and public order.[24]

The words all in Article 1338 of the Civil Code also need to be linked to Article 1319 of the Civil Code, which states that "all agreements, whether they have a specific name or are not known by a specific name, are subject to the general regulations contained in this chapter and other chapters."[25] Furthermore, when linked to Article 1320 of the Civil Code, the word "legally" means that what is agreed upon is legal. This means that it does not conflict with the law, public order, and decency. All agreements are made according to law or legally, as regulated in Article 1320 of the Civil Code that "for valid agreements, four conditions are required, namely the agreement of those who are binding themselves, the ability to make an agreement, a certain thing, and a lawful cause."

When an agreement is made based on the conditions stated in Article 1320 of the Civil Code, it is binding as law on the parties. The provisions of Article 1320 of the Civil Code here reflect the realization of the principle of legal certainty. Therefore, referring to these regulations, freedom of contract is the basis for carrying out repo transactions.

Islam gives freedom to parties who have the ability to carry out the contracts they wish, as long as the matters contracted for are something that is not prohibited by sharia'. The hadith relating to freedom in entering into contracts and placing conditions in contracts was narrated by Bukhari, Abu Dawud and Al Bukhari, Abu Dawud, and At-Turmudzi, that the Prophet Muhammad SAW, said, which means:

"Muslims may enter into contracts by making all conditions, except conditions that make lawful what is haram and forbid what is halal."

This hadith provides an understanding that the legal origin of all forms of contracts and conditions is permissible. The Hambali and Maliki schools of thought state that transactions

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[23] H.Toto Tohir Suriaatmadja dan Ujang Charda, *Transformasi Hukum Perdata Indonesia Dari Kodifikasi Ke Sektoral*,Fakultas Hukum Universitas Subang, 2017, Hlm. 131

[24] Ghansam Anand, "*Prinsip Kebebasan Berkontrak Dalam Penyusunan Kontrak", Yuridika*, Volume 26 No. 2 Mei- Agustus 2011, Hlm. 89.

[25] H.Toto Tohir Suriatmadja dan Ujang Charda, *Op.Cit*, Hlm. 131.

and conditions are free, so nothing is forbidden, except for those indicated as forbidden by Islamic teachings, with express arguments or qiyas.[26]

Repo can also be said to be a securities sales contract with an agreement to buy it back within a certain period of time, both the value and the purchase period are mutually agreed upon. Generally, this repurchase is carried out at a higher price or can also be done with an agreement containing certain conditions at a certain price.

In order to provide legal certainty to Repo transaction actors, the Financial Services Authority (OJK) has issued Regulation Number 9/POJK.04/2015 concerning Guidelines for Repurchase Agreement Transactions for Financial[27] Services Institutions which will be implemented effectively starting January 1, 2016. Financial Institutions are a source of growth because of their central function which helps the accumulation of financial resources for production.[28]

Article 1 paragraph (1) POJK Repo states that:

"A repurchase agreement transaction, hereinafter referred to as a repo transaction, is a securities sale and purchase contract with a promise to buy or sell again at a predetermined time and price."

A repo transaction results in a change in ownership of securities, from the seller to the buyer through a valid transaction on the Stock Exchange. The provisions for the transfer of ownership are regulated in Article 3 paragraph (1) POJK Repo which states that "every repo transaction must result in a change in ownership of securities", and Article 4 paragraph (1) POJK Repo regulates that "a Repo transaction agreement must contain the transfer of rights on securities ownership”. Stock transactions as mandated by UUPM aim to create an efficient, fair, and honest capital market by means of transparency, in order to guarantee investor protection.[29]

Article 3 paragraph (1) POJK Repo states that every repo transaction must result in a change in ownership of securities. If we examine the agreement that has been made and agreed upon between the initial share seller and the share buyer/repo holder, then both are bound by the agreement and the agreement becomes law for them as regulated in Article 1338 paragraph (1) of the Civil Code.

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[26] Ibn Taimiyah dalam Juhaya S Praja, *Ekonomi Syariah*, CV. Pustaka Setia, Bandung, 2015, Hlm. 117
[27] Peraturan Nomor 9/POJK.04/ 2015 tentang Pedoman Transaksi *Repurchase Agreement* bagi Lembaga Jasa Keuangan selanjutnya disebut POJK Repo
[28] O.K. Saidin dan Yessi Serena Rangkuti, *Hukum Investasi dan Pasar Modal*,Prenada Media,Jakarta , 2019, Hlm. 105.
[29] *Ibid*, Hlm 157.

A repo transaction is assumed to be a sale and purchase agreement with a promise to buy back in general, where everything is adjusted to the agreement made by the parties.[30] This kind of agreement is a reflection of the freedom of contract that is utilized by sellers and buyers, so that with this freedom the parties can make variants of the sale and purchase agreement that are different from what usually occurs. This is permissible and legal as long as the parties agree, bearing in mind that there is another goal that is specifically to be achieved.

In practice, there have been cases of the resale of shares by repo holders to third parties without the knowledge of the original shareowners before maturity, resulting in losses for the original shareowners. As in the PT share repo transaction. Hanson Internasional Tbk, between Benny Tjokro and Platinum Partner Value Arbitrage Fund. Benny Tjokro as one of the Directors of Newrick Holding Ltd. signed an agreement to sell 575 million shares of PT. Hanson Internasional Tbk (listed on the IDX with issuer code MYRX) to the Platinum Partner Value Arbitrage Fund in August 2014.

The buyback of PT Hanson Internasional Tbk shares by Benny Tjokro was due in December 2016. However, without Benny Tjokro's knowledge, PT Hanson Internasional Tbk shares had been sold by the Platinum Partner Value Arbitrage Fund to Goldman Sachs International in February, March, and December 2015 on the Indonesia stock exchange. Goldman Sachs admitted that it did not know Benny Tjokro and was not aware of the repo agreement between Newrick Holding Ltd and Platinum Partner Value Arbitrage Fund. Next, Benny Tjokro filed a lawsuit against Goldman Sachs.

In another case, namely the repo of PT shares. Global Mediacom Tbk, PT. The Indonesian Central Securities Depository (KSEI) has blocked PT shares. Media Nusantara Citra Tbk (issuer code MNCN) is owned by PT. Global Mediacom Tbk (issuer code BMTR) which has been registered with the Citibank Custodian Bank. The blocking of shares was carried out at the request of MNCN in December 2017, after KSEI received instructions from Polda Metro Jaya, that shares belonging to PT. Global Mediacom Tbk was traded unilaterally and not transparently by Nomura PB Nominees Ltd to third parties without the knowledge and permission of PT. Global Mediacom Tbk on 7 and 8 December 2017 amounted to 19 million shares, which resulted in failure to deliver at the agreed time. Furthermore, PT. Global Mediacom demands a settlement with compensation amounting to Rp. 16 Billion to Nomura PB Nominees Ltd.

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[30] Christa Andystone Ginting dkk,"Perlindungan Investor Dalam Transaksi Repurchase Agreement (Repo) Saham Yang Gagal Bayar", *Diponegoro Law Journal* ,Vol 6 No.1 2017.Hlm. 5.

Based on this description, according to the author, research is necessary, because stock repo regulations are still limited to repo transactions with financial institutions, while repo transactions between issuers are technically not yet regulated by the OJK, and currently implementation is based on the principle of freedom of contract. Legal principles have two foundations, namely being rooted in the reality of society and in the values chosen as guidelines for life together. The function of legal principles in law is to legitimize and have a normative influence and is binding on the parties. The nature of abstract legal principles means that they are generally not stated in concrete regulations or articles, although there are also legal principles that are stated in the form of concrete regulations, as abstract legal principles, even though they have been stated in the form of concrete regulations, they cannot be directly applied. to concrete events.[31]

The function of legal rules is essentially to protect human interests and public order. If human interests are protected, society will be orderly. Legal principles are basic thoughts that are abstract, so legal rules in the narrow sense are values that are more concrete than legal principles.[32] Likewise, with shared repo transactions between issuers, it is not enough to just have the principle of freedom of contract, concrete arrangements are needed, such as repo transactions with financial services institutions, in order to provide certainty and fairness for all parties.

In the first quarter, second quarter, and third quarter of 2021, the volume, value, and frequency of Repo trading transactions increased, respectively amounting to IDR 351.60 trillion (29.64%), IDR 367.08 trillion (32.13 %), and 88 times (3.28%), compared to the previous quarter. This shows that repo transactions are in great demand by investors as an alternative to stock investment.

Repo transaction regulations are contained in POJK Number 9/POJK.04/2015 T concerning Repurchase Agreements for Financial Services Institutions. In principle, legal norms aim to protect unprotected human interests. The content of legal norms is aimed at human attitudes and actions. Legal norms are aimed at concrete perpetrators. Legal norms are the power that regulates and maintains order and limits the space for individual movement. Humans have a natural moral obligation to protect and defend their lives as something noble and valuable, defending their own lives, and pursuing personal interests is seen as a manifestation of moral obligations, as well as respecting the lives of others.

[31] Nieuwenhuis, dikutip dalam Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Liberty,Yogjakarta, 2000, Hlm 6
[32] Sudikno, *Ibid,* Hlm 7

The application of the principle of justice as a rule of the game will create reciprocal benefits for the perpetrators. Every human being has the right to freedom which cannot be taken away by anyone without a valid reason. Freedom of contract is a natural human right. Government interference in both personal affairs and economic activities cannot be avoided, especially in the context of upholding justice.

Justice according to Aristotle, John Rawls, Pancasila, and Adam Smith which was presented in the previous chapter, can be compared as follows:[33]

Aristotle's theory of justice, in accordance with the three types of human rights, namely human rights, the rights of society or the state, and the rights of citizens, justice according to Aristotle is divided into three, namely commutative and justice, legal justice, and distributive justice. Commutative justice requires us to respect the rights of others as individuals, legal justice requires us as citizens to respect the rights of society and the state, and distributive justice requires society or the state to respect our rights as citizens.

John Rawls concluded that there are two principles of justice that will be unanimously agreed upon by members of society, namely:[34]

1. Everyone should have an equal right to the broadest comprehensive system of basic freedoms. This principle concerns the distribution of basic freedoms that need to be distributed equally to everyone. These basic freedoms include the right to vote and hold state office, freedom of speech and assembly, freedom of conscience, freedom of thought, personal freedom, the right to own private property, and freedom from arbitrary detention and arrest.
2. Social and economic differences should be arranged in such a way that: (a) provide the greatest benefit to those in the most disadvantaged position, and (b) relate to positions and positions that are open to everyone based on adequate equality of opportunity.

Justice in the Pancasila system, justice can be seen as demands and norms. As a demand, justice demands that everyone's rights be respected and that all humans be treated equally. Justice is the main norm for reasonable conflict resolution, a norm that can support peace and stability in community life. Justice is a basic moral principle that is essential to maintaining human dignity as human beings. Justice demands that humans respect all people as creatures with value in themselves, who may be used merely as tools to achieve further goals.

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[33]B. Arief Sidharta, *Meuwissen tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum*, diterjemahkan oleh:, PT Refika Aditama, Bandung: 2009

[34] John Rawls, *A Theory of Justice (Revised Edition*). Harvard University Press, Cambridge-Massachusetts, 2003

Adam Smith stated in the previous chapter that by implementing the principle of justice as the rule of the game, spontaneous reciprocal benefits will be created for each actor.[35] Even though a free market economy upholds individual freedom, this economy must be run with the principle of justice as the main rule of the game, and give it a proper place. It is very central to the government's role in upholding justice. Consequently, every aspect of state administration must always be based on the values of justice. From the concepts of justice described above, what is more appropriate and relevant to apply in forming regulations in the Indonesian capital market is justice according to the Pancasila legal system.

The concept of justice in the fifth principle of Pancasila states that in the realization of living together (society), nation and state, there are 3 aspects of the justice relationship, namely the nation's community and the state as parties that are obliged to fulfill justice towards their citizens by providing their rights (distributive justice); community members or citizens as parties who are obliged to fulfill justice towards their community, nation and state, obedient justice (legal justice); justice relations that are realized between fellow citizens of society, nation and state, in the sense of a reciprocal obligation to fulfill each other's justice (commutative justice). Rights and obligations are essential elements in the realization of justice.

The legal justice that the Indonesian nation has is justice that humanizes humans. Justice is based on the second principle of Pancasila which is called dignified justice, namely that even though someone is legally guilty, they must still be treated as a human being, so that dignified justice is justice that balances rights and obligations. The aim of the law is to achieve balance so that relations created by the interests of society do not cause chaos and justice is created. In the justice to be achieved by a legal system there is also certainty and efficiency or usefulness. The existence of certainty shows that the law has authority and legality from society and individuals.

Share repo transactions are included in real contracts because their formation is not only based on (an agreement) between the parties but requires the delivery of the object of the agreement, namely shares. Likewise, repo transactions based on the way the agreement is written are classified as formal contracts because the form is regulated in OJK Regulation No. 9/POJK.04/2015 that a repo agreement must be made in writing which includes, among other things, the transfer of securities ownership rights, the obligation to adjust the value of securities to fair value, initial margin and/or securities haircut, margin maintenance, rights

[35] Adam Smith dalam Rustam Dahar KAH , *Teori Invisible Hand Adam Smith Dalam Perspektif Ekonomi Islam*, Jurnal Economica, Volume II / Edisi 2/ Nopember 2012, Hlm. 57

and obligations of the parties including implementation time and taxes, failure events, settlement procedures, failure events and the rights and obligations that follow, agreements subject to Indonesian law, the position of financial services institutions in repo transactions as agents acting for themselves, confirmation procedures for repo transactions or material changes related to repo transactions. Apart from being made in writing, repo transactions must apply the GMRA (Global Market Repurchase Agreement) issued by the International Capital Market Association.

The GMRA provisions do not regulate the obligation to make publications for parties carrying out repo transactions. This situation can of course result in the resale of shares being repo to third parties (investors), and the third party does not know the status of the shares. This situation has the potential for losses suffered by third parties (investors), such as in the case of PT Hanson Internasional shares (Benny Tjokro vs. Platinum), which in the decision of the District Court and the High Court stated that the share sale and purchase agreement between Platinum and Goldman Sachs was declared void. Due to this decision, Goldman Sachs suffered a loss because it had bought 425 million shares of PT Hanson Internasional, and when making the purchase/repo of shares, Goldman Sachs did not know that the shares were being repoed even though the transaction was carried out on the Indonesian Stock Exchange. This incident occurred because there was no publication by the parties carrying out the repo transaction.

The provisions of GMRA Indonesia and OJK Regulation No.9/POJK.04/2015 does not yet regulate publication obligations in repo transactions. This has the potential to result in ignorance from the public and investors about the status of the shares offered to them, which ultimately results in the purchase.

Basically, a public company is a company that meets the provisions of Article 1 point 8 of the PT UUPT. A public company cannot be categorized as an issuer if the public company has not made a public offering, while an issuer can be considered a public company if the number of shareholders and capital meet the provisions of Article 1 point 22 of the Company Law. With many shareholder conditions, the consequences are that the company must have openness in running its business because it receives supervision from shareholders, and company management must be run professionally so that there are no conflicts of interest and can provide certainty for the issuer and shareholders/investors.

The existence of the UUPM is expected to provide order, justice, and transparency as well as openness of information in every transaction that occurs in the capital market, as is the aim of the law to achieve justice, certainty, and efficiency. However, according to the author, the implementation of share repo transactions has not provided the intended legal objectives, because even though there is POJK No. 9/2015, GMRA as well as Article 55 paragraph (1) UUPM which regulates the settlement of exchange transactions that the transfer of rights occurs at the time of delivery of securities or when securities are deducted from one account and then added to another account, which is carried out by the Indonesian Central Securities Custodian (KSEI). These provisions do not yet regulate the obligation of transparency in share repo transactions, as happened in the case of PT shares. Hanson (Benny Tjokro vs. Platinum), which was repo but the share repo transaction process was not reported to the OJK and was not published, so investors when buying the shares did not know the shares were being repo and resulted in investors experiencing losses because the agreement was canceled by the court.

Lawrence Friedman, as explained in the previous chapter, states that law is a set of written or unwritten rules or norms regarding right and wrong, behavior, duties, responsibilities, and rights. The legal system consists of three components, namely structure (legal structure), substance (legal substance), and culture (legal culture), so the formation of legal regulations in the capital market sector is greatly influenced by the three aspects above. The capital market is a system in which there are various policies in order to formulate laws to provide justice, certainty, and ease of doing business for shareowners, repo holders, and investors in the Indonesian capital market. The regulation of share repo transactions in the capital market must be able to provide hope of justice for all parties, this is based on the reasons of the players in the capital market. Firstly, for issuers, the benefit of the capital market is to obtain and utilize public funds with the aim of expanding their business, improving their capital structure, and transferring shareholders. Second, for repo holders and investors, the opportunity to invest in the capital market aims to obtain dividends, trade, and have an interest in company ownership. Thirdly, for OJK, the existence of the capital market is expected to increase business opportunities for all parties which can ultimately create improved economic growth in Indonesia.

The formation of legal regulations in the capital market must be dynamic in accordance with needs and able to respond to any changes and developments because the law must guarantee certainty in business. This certainty is really needed because the law shows its authority. The legal authority of the capital market will become stronger if the legal awareness of shareholders, repo holders, and investors as well as actors in the capital market strengthens. The legal awareness of policymakers in the capital market and the OJK must understand that the authority of the law increases if its actions are orderly according to its authority and respect and protect all actors in the capital market.

The formation of regulations in the capital market sector, especially the regulation of share repos between issuers, must comply with legal rules. Sudikno stated that the function of legal rules is essentially to protect human interests and public order, meaning here to protect the interests of actors in the capital market in order to create order. If the interests of capital market players are protected, the capital market will run orderly, creating certainty and justice. In order to realize justice in the capital market, the most appropriate concept of justice to use is Pancasila justice. Pancasila as the basis of the state and national ideology can provide fundamental provisions for the formation of the legal system in Indonesia.

The legal system is developed based on the values of Pancasila, the legal system shows its meaning as far as realizing justice, the legal system has the function of maintaining the dynamics of national life and the legal system guarantees the process of self-realization for citizens, in this case the capital market players in the process of developing the nation's economy. Indonesia. In line with the function of the capital market as a meeting place for capital market players, investors, and issuers who are expected to work together to realize the welfare of the Indonesian people. In the Pancasila ideology that the goal of social justice is a balanced and orderly structure of society/state through which all its citizens have the opportunity to build a decent life, social justice requires the state to promote the physical and spiritual welfare of all its citizens, and the state gives rights to its citizens.

Bagir Manan stated in the previous chapter that legislation is rules of behavior that contain provisions regarding rights, obligations, functions, status, or an order. Legislative regulations provide more real legal certainty because the rules are easy to identify and easy to find again.[36]

So based on this, according to the author, the arrangements for good share repo transactions carried out with financial services institutions as regulated in POJK No. 9/POJK.04/2015, as well as those carried out between issuers, must be published. The publication process should be carried out by the OJK as an institution that develops, regulates, and supervises activities in the capital market. This publication obligation must be regulated strictly in OJK regulations so that it can provide certainty and justice for issuers/shareholders, repo holders, and investors in accordance with legal objectives.

[36] Bagir Manan, dkk, *Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia*, Bandung: Alumni, 2001, Hlm.26.

Publication obligations in repo transactions, in this case, the OJK must also optimize the duties and functions of KSEI which provides central custodian services and settlement of securities transactions in an orderly, fair, and efficient manner so that its existence can be utilized by investors, also KSEI must be able to provide information that can be verified as true, in accordance with applicable regulations and present data and information transparently so that investors/third parties as in the case discussed previously will not experience losses due to the absence of information regarding the status of the shares sold to them.

OJK as an institution that develops, regulates, and supervises the capital market in implementing capital market regulations must be supported by officials who have integrity in accordance with the oath of office and moral responsibility based on values and norms that originate from the state philosophy, namely Pancasila, so that certainty and justice in the capital market sector will be realized.

CONCLUSION

The share repo holder is civilly liable to the owner and purchaser (third party) of shares if the shares repo to him are transferred back to a third party before maturity because he has committed an act of default on the agreed share repo agreement. The responsibility to the share owner is to return the shares at maturity accompanied by a repurchase by the owner if the delivery fails they can be required to return the shares along with compensation for having defaulted, while the responsibility to the buyer/investor (third party) is to return all costs. which has been issued by the investor/third party because the transaction was carried out against the law (without rights) and the investor/third party did not know that the shares they purchased were being repoed. The model for regulating share repo transactions, whether carried out with financial service institutions or between issuers, should include in its mechanism a publication obligation carried out by the OJK, so that every share repo transaction carried out can be known by anyone interested in investing in the capital market and most importantly can provide certainty and fairness for issuers/share owners, repo holders The model for regulating share repo transactions, whether carried out with financial services institutions or between issuers, should include in its mechanism the obligation to publish by OJK by optimizing KSEI to convey information that can be verified as true, accompanied by accurate and transparent data, so that every share repo transaction carried out can be known by anyone who is interested in investing in the capital market and most importantly can provide certainty and justice for issuers/share owners, repo holders and investors in accordance with the objectives of capital market law. Arrangements in share repo transactions should not only be aimed at financial services institutions but also share repo transactions carried out between issuers so that losses can be monitored as a result (failure handover) can be minimized. OJK added a mechanism for reporting and publishing repo transactions so that this event is known to the public and anyone who is interested in investing in it the capital market knows the status of shares in the repo.

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