

MODEL OF OBLIGATION REGULATORY CONSTRUCTION AS LEGAL PROTECTION EFFORT TO CAPITAL MARKET INVESTORS BASED DIGNITY JUSTICE

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Abstract

The research objective is to create a model for regulation of construction obligations as a form of legal protection against Indonesian capital market investors based on dignity justice which is a new strategy for strengthening the role of government in the regulation of the obligation yield. The resulting model in this study in particular has a purpose as an offer or alternative solutions both a legislative function in the realm of the executive and Parliament to produce a obligation regulation. The method that will be used through the stages include: mapping existing condition of construction which has been used, the mapping of potential executives (leading sector) and the Council, evaluating regulations that have been produced so far, identify and evaluate the constraints faced in stage construction policy , identify opportunities and strategies and formulate a model of construction that can be developed, p enekanan in order construction regulations do executive and Parliament in order to generate regulatory-based justice and legal certainty.

Keyword: *Based Dignity Justice, Construction Obligation Regulatory, Legal Protection.*

A. INTRODUCTION

Investments in obligations in Indonesia be more promising because lately there were many cases of default and cause harm, especially for investors. Cases of default are emerging, such as the PT. Mobile-8 Telecom Tbk., Who defaulted on coupon obligations, maturing in March

2013 and was declared in default by the obligation value of Rp. 675.000.000.000.-, Bakrie Telecom, which issued obligations amounting to Rp. 3.800.000.000.000.- with coupons not paid Rp. 218.000.000.000.- maturing in May 2015, to the company Berlian Laju Tanker and its subsidiaries,

which issued obligations amounting to Rp. 421.428.000.000.000.- maturing in February 2012 and was declared in default.¹

Obligation investors require legal protection of its investments, especially investments in obligations. Act that have not enough to provide certainty and fairness to capital market investors.

Investors holding obligations have not been adequately protected if the issuer only Gives a general guarantee in accordance with provisions in Article 1131 of the Civil Code and Article 1132 of the Civil Code. In Article 1131 and Article 1132 Civil Code, it is explained that the obligationholders are investors who will share with other creditors According to values of receivables of each creditor. Fulfillment of receivables of investors or obligationholders will be prioritized by the issuer if there are reasons to do it or they have privileges in accordance with Article 1133 paragraph (1) of the Civil Code. Investors or obligationholders who have the status as unsecured creditors will be less protected Because The assets of issuers that will be auctioned will not be Able to meet debt repayments to them.²

1 Elvira Fitriyani Pakpahan, *Rekonstruksi Pengaturan Obligasi di Pasar Modal Indonesia Berbasis Keadilan*, (Semarang: Disertasi, 2017), p. 23.

2 Tommy Leonard, Elvira Fitriyani, Heriyanti, *Legal Protection for Defaulted Bonds Based on Values of Justice*, International Journal of Business, Economics and Law, Vol. 11, Issue 4 (Dec.2016) ISSN 2289-1552, p.43

Economy is one of the three main pillars of development in the social and political side.³ Currently, Indonesia is a developing country in implementing national development. Indonesian National Development focused on efforts to improve the quality of man, and the people of Indonesia, which is done in a sustainable manner, based on national capabilities, by leveraging advances in science and technology and with regard to global challenges. The government at that time aware of its significance to also contribute to crowdfunding in Indonesia. This is a strategic plan given the large number of people in Indonesia. The Union and the use of public funds also aims to optimize public funds for development.

Legal certainty for businesses is very important at this time for any investor is essentially want the security of the investment that has been done. For businesses who often face many challenges and risks, lack of certainty of law is very important. The existence of the device legislation is clear, transparent, will provide an opportunity

3 M. Irsan Nasrudin dan Indra Surya, dan Arman Nefi, 2007, *Aspek Hukum Pasar Modal Indonesia*, Cet.6, Kencana, Jakarta.p.77

for anyone community members to conduct business activities.⁴

Case of default by the issuer the issuer company is very detrimental to investors holding the obligations, the contractual relationship of the parties in the obligation agreement thus does not reflect the relationship that is based on justice. In effect the contractual relationship can not be released in conjunction with the issue of justice. Contract as a container that reconcile the interests of one party with another party to form a fair exchange of interests. In contractual between the issuer issuer to investor obligationholders essentially be based on basic principles of contract law and the theory of justice as a foundation in the contract.

Obligations issued by the government is emerging in Indonesia.

In the context of national independence, the potentials available in the country should be optimized to carry out economic activities and fund development activities. In connection with this, the Government should be given the opportunity to explore the increase

4 Dody Rudianto, 2002, *Pembangunan dan Perkembangan Bisnis di Indonesia, Perspektif Pembangunan Indonesia dalam Kajian Pemulihan Ekonomi*, Golden Trayon Press, Jakarta, p. 63.

of access to potential sources of financing for development and strengthening the domestic investor base. The financing will be secured if the mobilization of public funds is paired with the workings of the financial system, Including the efficient banking system, money markets and capital markets. The creation of diversity in the mobilization of funds can generate a strong financial system and provide an alternative for investors.⁵

Article 8 paragraphs 2 and 3 of Act No. 24 of 2002 concerning Government Obligation declared Paragraph (2) The Government shall pay interest and principal each Government Securities at maturity. Paragraph (3) Funds to pay interest and principal as referred to in paragraph (2) is provided in the State Budget every year until the end of the obligations. It is already showing legal certainty for investors who will invest in state obligations.⁶ However, for private or corporate obligation investment regulations regarding inadequate obligation. Basically, stock and

5 Elvira Fitriyani Pakpahan, Tommy Leonard, and Heriyanti, *Legal Analysis On Bond Issuance Of The Retail (Ori)*, International Journal of Business, Economics and Law, Vol. 11, Issue 4 (Dec. 2016) ISSN 2289-1552, p.28.

6 Elvira Fitriyani Pakpahan, 2010, *ORI dalam Perspektif Hukum di Indoneisia*, La Tansa Pers, medan, p.9.

obligation trading difference lies in the trustee as a third party bridge between investors and issuers. And in the trade must be a trustee contract is in accordance with Article 52 of Act No. 8 of 1995 on Capital Markets stating the issuer and trustee trustee must make a contract in accordance with the provisions made by Bapepam.

The article indicates that the obligation transactions in the capital market to make a contract as a benchmark. Because it is a legal protection for investors, when something happens as a result of wanprestasinya issuers to investors. The interesting thing to note is the sound of Item 4 of Regulation No. VI.C.4 In order to protect and represent the rights of the holders of debt securities, the Trustee shall make a contract with the Issuer Trustee which contains at least: a. The identities of the parties, b. Debt Principal, c. Debt Maturity Principal, d. Flowers, e. Warranties (if any), and others. Bapepam decision is deemed not give legal certainty to investors because it makes no warranties points becomes imperative. Whereas in the credit clearly stated the elements of the

unsecured loans. Debt has a time span element, and did not rule out new things will happen with the time span for example, the company insolvent and unable to pay interest and principal. Of course it becomes anxiety for investors due to the lack of legal certainty.

Preamble of 1945 opening the second paragraph states that, "And the struggle of the Indonesian independence movement had reached the moment happy with the survivors halcyon deliver the people of Indonesia to the gate of the independence of Indonesia, independent, united, sovereign, just and prosperous." Later in the preamble of the Constitution NRI 1945 stated that, "Indonesian nation-building is to protect the entire Indonesian nation and the entire homeland of Indonesia and to realize the general welfare, educating the nation and participate in creating world peace and lasting peace based on social justice".

Against the background of the benchmark ideals embodied in the phrase "fair and prosperous", the construction has been selected as the only way it considers most appropriate to bring the Indonesian nation towards

prosperity. In this case, since the last three decades the government has made in the field of economic development as the backbone of national development. The attitude of a government can be seen from the policies issued by the government to achieve the national interests of his country.

In accordance with the purpose of the State of Indonesia to advance the general welfare of the investment policy of the government, especially in the field of obligations needed reconstruction of the legislation in the field of obligations and is expected in a model construction regulations obligations as a form of legal protection against Indonesia capital market investors based on justice and legal certainty. Grundnorm Pancasila as the basis for the reconstruction of the legislation in the field of obligations. In order to create the essence of the state in the implementation of legislation in the field of obligations fairness should contain "legal justice" because the law should contain justice (*ius quia iustum*) that contains an order harmoniously. Justice is an ideal / of great value which must be upheld in the agreement

relating to the obligations. Starting from the establishment of regulation (*Regeling*), decision makers or in the form of material action in the field of government obligations, both procedural and substantial action.

B. DISCUSSION

Legal protection for the people is a universal concept, in the sense adopted and implemented by each country that puts itself as a state of law, but as mentioned Paul E. Lotulung, "each country has its own ways and mechanisms on how to realize the protection of the law, and also the extent to which the legal protection granted".⁷

The theory is a theory of legal protection were examined and analyzed on their form or shape and purpose of protection, protected legal subject and object of protection, the protected legal subject and object of protection granted by law to the subject. This theory was developed by Roscoe Pound, Sudikno Mertokusumo and Antonio Fortin.⁸

7 Paulus E. Lotulung, 1993, *Beberapa Sistem tentang Kontrol Segi Hukum terhadap Pemerintah*, Citra Aditya Bakti, Bandung, p. 123

8 Salim, 2013, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Raja Grafindo Persada, Jakarta, p.3

Categories of legal protection for the people, that is the legal protection of preventive, repressive, dam curative. On the preventive legal protection, people are given the opportunity to raise objections (*inspraak*) or his opinion before a decision is government got a definitive shape. This means that preventive legal protection aims to prevent disputes, whereas the repressive protection aims to resolve the dispute. While the curative protection given to provide awareness to be aware of and willing and able to improve in the future so it does not happen again. Preventive legal protection of great significance for government action based on the freedom of action.

Forms of legal protection preventive given by the government is through legislation that is in Article 85, Article 86 paragraph (1), Article 87 paragraph (1), and Article 89 paragraph (1) Capital Market Law that governs the disclosure of information either by issuer or trustee. Preventive legal protection provided by item 4 letter e Kep. Bapepam 412 regarding bail and number 4 letter f Kep. Bapepam 412 on the rights primacy (seniority) of debt

securities. The regulation provides guidelines that can be used to prevent defaults on corporate obligations by issuers. The trustee must submit a report to the FSA in accordance with provisions of article 85 of the Capital Markets said "The stock exchange, clearing house and underwriting, settlement and depository institutions, mutual funds, securities companies, investment advisory, securities administration bureau, bank custodian, trustee and other parties who have obtained a license, approval, or registration of Bapepam shall submit a report to Bapepam. "The provisions of the article explains that the trustee as deputy and acting on behalf of investors holding obligations shall submit all the reports of all legal proceedings had done. Submission of the report serves as an update to the FSA, to easily supervise the activities of the trustee and the issuer. "The provisions of the article explains that the trustee as deputy and acting on behalf of obligationholders investor is required to submit all reports on all legal proceedings had done. Submission of the report serves as an update to the FSA, to easily supervise the activities of

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Article 85, Article 86 paragraph (1), Article 87 paragraph (1), and Article 89 paragraph (1) of the Capital Market Law adheres to the principle of disclosure. The concept according to Irsan Nasarudin disclosure, transparency or openness is an investor protection to obligationholders. From the juridical, transparency is a guarantee for the public's right to continue to gain access to important with barriers or sanctions for negligence by the company. Preventive legal protection in the form of inspection and investigation also provided the FSA with the Capital Market Law. FSA inspection by the authority contained in Article 100 paragraph (1) of the Capital Market Law which states "Bapepam to conduct examination on any party suspected of committing or being involved in a violation of this law and its

implementing regulations. "Article 100 paragraph (1) of the Act authorizes the FSA Capital Markets as the Indonesian capital market watchdog to conduct an examination of the alleged issuer in default of the investor obligationholders. This examination is a form of prevention and handling of the alleged violation. FSA action in the prevention and penanganan terhadap initiated by a report alleged violations of the trustee.

Government through Bapepam / FSA not only provides preventive legal protection, but also protection of repressive laws. Protection of repressive laws that can be provided by the government, namely through Article 102 paragraph (1) Capital Market Law which states "Bapepam impose administrative sanctions for violations of this law and its implementing regulations made by each party to obtain a permit, approval, or registration of Bapepam. "FSA may impose sanctions against those who have obtained permission from the FSA in particular issuers who violate the Capital Market Law or in default of the investor obligationholders.

Government through Article 111 of the Capital Market Law and trustee agreement also provides legal protection repressive. Repressive legal protection given to investors in the form of obligation holders the opportunity to perform an action or claim for compensation to the issuer through the courts in the event of default risk will be determined by the judge's decision. Opportunity investor obligationholders to pursue a lawsuit through the courts there is Article 111 Capital Market Law states "Any party who suffer losses as a result of a violation of this law and its implementing regulations can sue for damages, either individually or together with the others who have similar claims, against those responsible for such violations. "Article 111 of the Capital Market Law provides an opportunity for investors obligationholders to seek redress through the courts on the risk of default by the issuer. The provisions of article 111 of the Capital Market Law only applies in general because in the event of default risk corporate obligations, lawsuits and claims for compensation through the courts filed by the trustee.

The trustee may use Article 1365 Civil Code as the legal basis for filing a lawsuit and a claim for compensation to the issuer through the courts. Civil Code require that a person who causes harm to provide compensation as set forth in Article 1365 Civil Code which states "Each act is unlawful, that brings harm to another person, require a person who because of his fault publish those losses, to replace those losses." Article 1365 of the Civil Code that provides orders to issuers defaulted corporate obligations to provide compensation to the injured party in this case the investor obligationholders. Compensation can be given throughout the loan principal or principal and interest.

The legal protection granted by the Capital Market Law is not sufficient to protect the rights of investors holding the obligations in case of default risk. Specifically, the legal protection of investors holding obligations contained in the trustee agreement was not fully protect investor obligationholders. The weakness of the trustee agreement currently exists on the provisions, especially provisions on guarantees regulated by the FSA as in item 4 letter

E Kep. Bapepam 412 which is still too common. Conditions of bail in number 4 letter E Kep. Bapepam 412 is only limited provision of information, not a necessity.

The legal protection of repressive sanctions and a lawsuit through the courts is one of protection is guaranteed if a time issuers in default in the form of obligation defaults company although this does not fully restore the rights of investors holding obligations as a whole. It is not too supported by the trustee agreement for the trustee agreement determines that the dispute be resolved through negotiation or BAPMI. In addition, legal protection in the form of specific guarantees clear and detailed a form of effective prevention pursuant to Article 1133 Civil Code section (1) which states "The right to precedence among those indebted issue of privilege, of the pledge, and of mortgages. "The provisions of Article 1133 paragraph (1) of the Civil Code explains that creditors have a higher level of accounts receivable if it has the privilege of receivables of the other creditors. Creditors in this case investors holding corporation that has privileges such as

liens or mortgages can be prioritized in the fulfillment of its receivables by the issuer if there's ever a risk of default on corporate obligations.

Investors obligationholders have not been adequately protected if the issuer only provides general collateral in accordance with provisions in Article 1131 Civil Code which states "All the material of the debt, whether movable or immovable, either existing or yangbaru will exist in the future, be dependent on any perikatannya individuals . "the arrangement of the guarantee in article 1132 Civil Code mentions" became collateral material together for everyone who mengutangkan him; sales revenue of objects was divided according to the size of the individual receivable, unless among indebted that there are legitimate reasons to take precedence. "

In Article 1131 and Article 1132 Civil Code, it is explained that the investor obligationholders will share with other creditors in accordance receivable value of each creditor. Fulfillment of investor accounts obligationholders will be prioritized by the issuer if there are reasons to come

first or have the privilege pursuant to Article 1133 paragraph (1) Civil Code. Investors obligationholders who have status as concurrent creditors will be less protected because of the wealth of issuers that will be auctioned will not be able to meet debt repayments to investors obligationholders.

Capital Market Law does not specifically regulate the content of trustee agreement. Considering Article 1, point 30 The trustee is the party that represents the interests of holders of debt securities, is a party that has a very important role in the issuance of debt securities by the issuer. Article 52 of Capital Market Law states the Issuer and the Trustee shall make a trusteeship contract in accordance with the provisions stipulated by Bapepam. In the explanation of Article 52 of Capital Market Law is declared, defined as conditions that must be set Bapepam in this paragraph are the things that must be included in the contract between the issuer trustee and trustee, among others:

- a debt principal and interest and other benefits of the issuer;
- b maturity;
- c warranties (if any);

d payment agent;

e duties and functions of the trustee.

Noting Rule No. VI.C.4 on general provisions and trustee contract debt securities above, it is apparent at point 4 letter e trustee contract. warranties (if any) indicates that the trustee agreement is considered as a form of legal protection of investors have yet to provide legal certainty. This is precisely the weakness of the trustee agreement. Considering the obligation trading (debt securities) have a variety of risks, one of which is the default. Investors in investing certainly requires legal certainty so clear protection that would be accepted if there is a risk of default. It's not impossible in the event of default obligation trading, given the number of cases of failure to pay the end of 2012.

Although Article 53 of Capital Market Law stated Trustee is obliged to provide compensation to the holders of debt securities for losses due to negligence in the performance of its duties as stipulated in this Law and its implementing regulations as well as the trustee contract. This is certainly a rights holder of debt securities for compensation to trustees were

negligent in performing their duties which causes damages to the holders of the debt securities. But not necessarily the article is a form of legal protection even legal certainty to investors because if observed closely VI.C.4 above rules on the letter g. sanctions " provisions on sanctions related to non-fulfillment of contractual obligations trustee of debt securities issued shall be stipulated clearly. This means that there are no rules clearly in the Capital Market Law and the Implementation Regulations and contract regarding the sanctions. Weak regulation is certainly a direct impact on investors. Although the trustee in making the contract, the parties namely the trustee in this case represents the interests of holders of debt securities by issuers can use the principle of freedom of contract. With the principle of freedom of contract of course the parties freely their opinions regarding the content of the trustee contract. With reference to the applicable legislation. With no details about the contents of the contract obligation arrangement, especially regarding collateral trustee to use the word if there is, then the trustee and the issuer does not emphasize the

certainty of investments offered to investors. Because it does not rule out the possibility the event of default due to bankrupt issuers, investors certainly are the most disadvantaged because there are no guarantees for investors in terms of payment of principal and interest on the obligations. And already should load on the settlement of damages suffered by investors in accordance with the provisions of the letter r state of neglect, point 3 which states that the provisions on resolving on condition negligent or otherwise issuer default shall be clearly. the trustee and the issuer does not emphasize the certainty of investments offered to investors. Because it does not rule out the possibility the event of default due to bankrupt issuers, investors certainly are the most disadvantaged because there are no guarantees for investors in terms of payment of principal and interest on the obligations. And already seharusnya load on the settlement of damages suffered by investors in accordance with the provisions of the letter r state of neglect, point 3 which states that the provisions on resolving on condition negligent or otherwise issuer default

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C. CONCLUSION

Implementation arrangements Indonesian obligations in the capital market does not provide justice for all parties involved in the trade of obligations, which the Issuer, the Trustee and the Investors in accordance with the precepts of the second and fifth Pancasila and the 1945 Constitution, Article 33 and Article 28 D Paragraph 1. The decision of Bapepam-LK No. 412 / BL / 2010 on general provisions and Contract Trustee that refer to specific provisions on guarantees in number 4 letter E still too common. Conditions of bail in number 4 letter E Kep. Bapepam 412 is only limited provision of information, not a necessity. Password Security (if any) does not provide legal certainty for investors obligations in case of default.

The shortcomings of the arrangement of obligations in the

capital markets due to Indonesia among others, the functions and duties of the Trustee stated in the Capital Market Law. There has been no implementation arrangements so that it is difficult in the conduct of the trustee. The legal consequences provided by the Capital Market Law to the Trustee is in the form of an obligation to compensate the holders of debt securities for losses incurred because of negligence, carelessness or conflicts of interest in the performance of its duties. Besides the absence of guidelines / standards in the preparation of the trustee contract. Trustee contracts are generally

prepared on the initiative of the issuer as a joint debtor underwriters prior to the public offering conducted. The involvement of holders of debt securities as creditor when it can not be done directly, but rather represented by the Trustee. Thus the holders of debt securities depend entirely on the Trustee in negotiations on the terms of the trusteeship contract. This resulted Trustee underprivileged include provisions that are useful to protect the interests of investors if the issuer objected to provisions, obligations or restrictions proposed Trustee.

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