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DEVELOPING SUBSIDIZED MORTGAGE AGREEMENT BASED ON THE JUSTICE VALUES OF PANCASILA (INDONESIAN STATE PHILOSOPHY)

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ABSTRACT

The objectives of this research are to investigate the implementation of subsidized mortgage agreement and to develop subsidized mortgage agreement based on the justice values of Pancasila through the development of a model of subsidized mortgage agreement. The research used descriptive method with the interactional/micro approach with qualitative analysis. The sources of data were interview and forum group discussion. The data were collected through in-depth interview and observation. They were validated by means of the source and method triangulations. They were then analyzed by using the interactive model of analysis.

The result of research shows that the subsidized mortgage agreement drawn up in a standardized format by banks makes the consumers of subsidized mortgage in a fragile position when dealing with banks which provide the services to fulfill their desire to have houses. The subsidized mortgage agreement currently has not been based on the basic values of Pancasila, and therefore a model of subsidized mortgage agreement as an elaboration of the values of Pancasila is required.

Keywords: Agreement, Pancasila, and subsidized mortgage

A. Background

Article 28 H Sub-article (1) of the 1945 Constitution states that every person shall have the right to live in physical and spiritual prosperity, to have a home, and to enjoy a good and healthy environment, and shall have the right to obtain medical care.

According to the result of agreement of Rio de Janeiro Declaration initiated by the United Nations Centre for Human Settlements as contained in Agenda 21 and Habitat Declaration II, Home is a basic need of human beings, and it is the right of every person to live in it as an adequate and affordable shelter for all. In Agenda 21, the importance of home is emphasized as the right of human beings to live in as contained in Law Number: 1 of 2011 regarding Housing and Settlement Area.

As an effort of materializing a simple house, which is feasible for the low income communities, housing ownership liquidity facility is provided as contained in Regulation of the Ministry of Public Housing Number: 3 of 2014 regarding Housing Finance Liquidity Facility through Prosperous Mortgage, which regulates the implementation of subsidized mortgage. In order to achieve the public prosperity in housing-need fulfillment, the involvement of government is required. The government, therefore, shall provide subsidy to low income communities.

The low income communities based on Regulation of the Ministry of Public Housing Number: 3 of 2014 regarding Housing Finance Liquidity Facility through Prosperous Mortgage are those with or without fixed income at most amounting to Rp4,000,000 (four million) per month.

The provision of subsidy is implemented through finance managed by bank financial institutions. Thus, the institutions are to administer the subsidy program of the government to the communities through subsidized mortgage. The agreement drawn up by banks and communities is based on the freedom of contract, which is a reflection of liberal economic ideology spearheaded by Adam Smith in the 19th century. The ideology states that the state shall not involve itself to the formulation of the contents of agreement. However, in its progress, the freedom of contract brings about injustice as the parties in the agreement have unbalanced bargaining power (Sutan Remi: 2009).

Adam Smith with his theory based his rationale on the doctrine of natural law, which later became the rationale of Jeremy Bentham with utilitarianism. The theory of utilitarianism and that of laissez faire are regarded as complimentary ones each other and enliven liberalism. In the 20th century, a criticism occurred on the freedom of contract. As a result, it shifted into legal propriety, not freedom without limitation anymore. The limitation of freedom of contract was influenced by the doctrine of good faith. The good faith in a contract was derived from Roman law, and then adopted in civil law (Ridwan Khairandy: 2004) .The doctrine of good faith in the 13th century was influenced by the thoughts of Aristotle and Thomas Aquinas. Aristotle claims that contract ethic is a form of

justice, whereas Thomas Aquinas says that the contract drawn up under duress or deception is not only cruel but also invalid (Ridwan Khairandy: 2011).

The use of standardized contract is frequently practiced with practicality and efficiency reasons. The subsidized mortgage agreement also uses standardized one. Munir Fuadi (2007) and H.P. Pangabea (2012), (Sutan Remi:2009) claim that standard clause material is not the result of an agreement but that of coercion toward other parties to accept or not to accept it. As a result, unbalanced conditions occur between the business actors and their consumers, and the consumers are usually at the weak position.

Pancasila as a philosophy of life of the Indonesians has noble values that can be used as a role model or reference for the national and state life. The current credit agreement is an agreement which is influenced by the principle of freedom of contract, and which is not based on the values of Pancasila. Therefore, a model of standardized agreement which reflects the values of Pancasila is required for general credit agreement and for subsidized mortgage agreement.

B. Problem Statement Formulation

1. How is the implementation of subsidized mortgage agreement?
2. How should subsidized mortgage agreement be developed based on the values of Pancasila?

C. Objective

1. To investigate the implementation of subsidized mortgage agreement.
2. To develop a balanced subsidized mortgage agreement based on the values of Pancasila through the development of a model of impartial subsidized mortgage agreement.

D. Research Method

This research used the descriptive method with the interactional/micro approach with qualitative analysis (Setiono: 2005). Its data sources were interview and forum group discussion. The data of research were gathered through in-depth

interview and observation. They were validated by using the source and method triangulations. The data were analyzed by using the interactive model of analysis comprising data reduction, systematic data display, and conclusion drawing.

E. Result and Discussion

1. Implementation of Subsidized Mortgage Agreement

The Indonesian government through the Ministry of Public Housing provides fund in the form of housing finance liquidity facility. The fund is managed by the Center for Housing Finance in cooperation with implementing banks which have housing finance cooperation with the Ministry of Public Housing.

The operation of prosperous mortgage is differentiated into the following portions: the portion of fund of housing finance liquidity facility and that of fund of implementing banks are to 75% and 25% respectively of the subsidized mortgage. The fund comes from the Center for Housing Finance and is managed by the implementing banks with the subsidized mortgage tariff of 0.5% (zero point 5 percent) per year. The fund of housing finance liquidity facility is disbursed by the implementing banks for the term of credit of 20 years. Such a fund is disbursed by the Center for Housing Finance to the low income communities through the implementing banks by using the executing pattern in which the implementing banks are responsible for the risks of the non-performing credit of the fund of housing finance liquidity facility. The tariff imposed to the implementing banks on the subsidized mortgage is 0.5% (zero point five percent) per year. The fund is disbursed by the implementing banks for the maximum term of credit of 20 years.

The law relation between creditors and debtors in the subsidized mortgage agreement is bound with a written agreement, which is generally drawn up in a standard format. The agreement has usually been prepared by the creditors, therefore possibly there is a small chance to amend its clauses (H.P. Pangabeau: 2012).

Bank credit agreement according to the British laws belongs to loan of money (Sutan Remi:2011). The law relation between banks and their customers is based

on trust which is bound in a certain agreement.³ In accordance with the principle of agreement that the parties involved in an agreement bear rights and obligations within such a law relation (Sentosa Sembiring: 2012). The law relation between banks and customers refers to the contract law, and the agreement drawn up binds the related parties (Subekti:2002).

In relation to a credit agreement, banks implement the principles of prudence. The implementation of the principles of partnership between banks and customers aims at creating a sound and prudent banking system and an ability to protect the fund deposited by communities to banks by disbursing it back to communities through credits. The relation between banks and debtors is based on the principles of prudence with an objective that banks are able to pay back the money that customers deposit.

Based on Article 1313 of Indonesian Civil Code and Article 1338 Sub-article¹⁹ (1) of Indonesian Civil Code, if there is an agreement to bind themselves, then the agreement shall bind all the parties that draw up it. The debtors of subsidized mortgage will be bound in an agreement based on the agreement with the creditors of banks. Article 1339 states that an agreement binds not only matters firmly stated but also all matters according to the nature of agreement required by legal propriety, customs, and laws.¹⁸

The principles of freedom of contract as contained in Article 1338 Sub-article (1) of Indonesian Civil Code state that an agreement legally drawn up shall apply as a law for the parties that draw it up. The principle of freedom of contract is materialized if the bargaining position of both the debtors and the creditors of subsidized mortgage is balanced. In this case, there is not any stronger bargaining position, and therefore the clauses of the subsidized mortgage agreement shall not be influenced by any power.³

Theory of Rawls (2009) is based on two principles, namely: equal right and economic equality. The two principles are complementary each other to materialize justice. Herbert Spencer (2008) claims that every person is free of what he or she is committed to do provided he or she does not break the same freedom of others. The freedom shall be contained in the subsidized mortgage

agreement, which is a reflection to draw up an agreement. The formulation of freedom to draw up the agreement shall not violate the freedom of the low income communities.

One condition prone to misuse is economic power (*economish overwicht*) owned by one party, which disrupts the balance of bargaining power of the two parties. As a result, the existence of free will to give approval, which is one of the requirements for approval validity, is absent (will defect) (J.Satriyo:2001). Yahya Harahap (1992) argues that the worthily implemented contract means implementing all of the obligations worthily, harmoniously, and feasibly according to the ones agreed in the contract.

Principle of good will means the agreement shall be implemented on the principle of *redelijkheid en billijkheid*. *Redelijkheid* means reasonable or in correspondence with common sense. *Billijkheid* (*equity*) means worth. Therefore, good will is a provision which is based on justice as propriety (R.Khairandy:2007).

The phase of agreement implementation begins with the execution of agreement contents made by the related parties. This phase emphasizes the contents of agreement, namely: rights and obligations of creditors and debtors. Creditors implement their rights and act soundly. They do not impose debtors with cost, which is higher than the required one. Meanwhile, debtors execute their obligations well and do not make the loan collection convoluted. The agreement shall be done with good will and bind not only matters firmly stated in the agreement but also all matters which require that the contract contents shall be executed under the principles of balance, propriety, and justice.

An agreement shall not be based on one's incapability such as the defect of will due to threat (*bedreiging*), fraud (*bedrog*), abuse of circumstances, (*misbruik van omstandigheden*), emergency (*noodtoestand*), one's lack of experiences, and physical or practical dependence on others. If the drawn up agreement is in conflict with propriety, the agreement then is null.

Balance according to Header' theory (1958) in Monigue (2009) will be achieved if the elements within such a situation coexist and do not bear any

oppression. Banks as creditors and communities as debtors co-exist, and the absence of any oppression from the parties with stronger power will create balance of the related parties in the subsidized mortgage agreement.

The functional structures of communities are divided into groups, and each group makes the system into balance. Low income communities and banks in the subsidized mortgage agreement are a part of system within society. The system materializes the balance, and when the balance works well, none is able to ruin it.

Contract shall be done with good will (*zij moten te goeder trouw worden ten uitver verklaart*) and bind not only matters firmly stated in it, but also all matters according to the nature of agreement required by legal propriety, customs, and laws (R.Khairandy:2007).

The inequality of agreement is due to the doctrine of *undue influence* and that of *unconscionability*. The undue influence exists when there is a secret relation with another party in the contract, in which the party which has a special position has used the persuasive ways, not the “coercion” or “deception” ways, to get unfair profits from the counterpart.

Pitlo classifies a standardized agreement as coercion contract (*dwang contract*). Although the standardized agreement according to juridical theory does not fulfill the provisions of the prevailing laws, and are rejected by several law experts, in fact the need of communities is in the opposite direction of the desire of law (Ahmadi Miru:2011).

Sluiter claims that a standardized agreement is not an agreement because the position of businessmen in the agreement serves as a maker of private law (*legio particuliere wetgever*)(Roni Boko:2006).

It is possible that in the subsidized mortgage agreement which has been standardized by banks, there is a shift in the risks, and the rights and obligations of the related parties are probably are unbalanced. Besides, it is also impossible to amend the contents of the agreement as it has been standardized. The clause of the agreement which is subject to amendment is only the term of credit payment, which affects the amount of installment per month. The consumers of subsidized mortgage have a weak position in an attempt to have a house when dealing with

banks which provide credit.

2. **Balanced Subsidized Mortgage Agreement based on the Values of Pancasila**

In accordance with the ideals of the founding fathers, Indonesia is a state which is based on law (*rechtsstaat*) and is not based on the sheer power. (*machtsstaat*). A.V. Dicey uses the term of rule of law and mentions that there are three important characteristics in the rule of law, namely: supremacy of law, equality before the law, due process of law (J.Ashidique:2011).

Stahl states that at least there four elements of *rechtsstaat*, namely: 1) guarantee of human rights; 2) division of power (*scliding van macht*); 3) law and regulation-based government; and 4) independent state administrative court (J.Stal: 1998).

The tasks of law state not only maintain order but also achieves the welfare of its people as a form of justice (*welfare state*) (A. Sulistyono:2008). The 1945 Constitution bears the doctrine that Indonesian sovereignty includes the aspects of political democracy and economic democracy, and therefore, a balanced and sturdy system of democracy is developed. In executing its functions within social democracy, state serves as a welfare state.

Pancasila as the Indonesian philosophy of life means that the noble values of Pancasila are used as a benchmark for basic and perpetual matters in human life. Pancasila as the philosophy of life has a basic concept toward what is aspired by the nation. Pancasila as the basis of state of the Republic of Indonesia is frequently mentioned as the state's philosophical basis (*Philosophische Gronslog*). In this sense, Pancasila is the ideology of state (*Staatsidee*) which becomes the basis for values and norms to regulate the state administration, and therefore all of the prevailing laws and regulations are solely sourced from Pancasila (Kaelan:2001).

As the source of all sources of laws and regulations or as the highest rule of law, Pancasila is contained in the preamble of the 1945 Constitution, is further elaborated in the basic thoughts, which include mystical atmosphere of the 1945 Constitution, and then is materialized respectively in the articles of the 1945

Constitution and other positive laws.

Mahfud MD claims that Pancasila is a law ideal that has to animate all of the basis of state with juridical connotation, meaning that it bears various laws and regulations arranged hierarchically (Winarno:2011).

Pancasila serves as a philosophical system, a product, and a philosophy of life in a practical sense. In the other side, Pancasila is *genectivus objectivus* meaning that Pancasila has a position as an object which can scientifically be studied by using the theoretical framework of the West. Koento wibisono (1992) states that the field of philosophy of Pancasila can be differentiated into two, namely: philosophy of Pancasila as *genectivus objectivus* and that of Pancasila as *genectivus subjectivus*. The philosophy of Pancasila as *genectivus objectivus* means that the values of Pancasila become the material objects in the philosophical study. In such a study, the conclusions are drawn as follows: (1) as fellow creatures of God, human beings shall respect each other including others' rights; (2) as citizens, each person has an equal position and treatment based on the principle of a just and civilized humanity; (3) as communities, each individual bears the same rights and obligations, and therefore shall work together as to materialize national unity; (4) deliberation and consensus shall be implemented to determine all matters related to the fulfillment of rights and obligations so that the a balanced collective objective can be achieved; and (5) the state is responsible for the creation of justice in the communities so that prosperity can be manifested.

Pancasila as *genectivus subjectivus* means making Pancasila as a philosophical system so that it can be used as a point of view to elaborate each study. In this sense, Pancasila can be developed into populist economic system as to investigate whether the economic system of Indonesia has been based on the values of Pancasila.

Economic system of Indonesia is not capitalist economic system (Y.Kunio:1990), but economic democracy and social market economy so as to achieve the prosperity of its nation. Therefore, it is necessary to conduct a certain limitation as the implementation of the concept of welfare state (Utrech: 1962) and the national economic system based on the 1945 (J.Ashidique:2012). Various

forms of regulation and limitation to promote the ¹²public welfare and to materialize social justice for all Indonesian people as mandated in the preamble of the 1945 Constitution. Welfare state is born in relation to the harmony between freedom and justice.

Understanding on the national economic system related to the rights of state control is very important due to the growing strength of economic liberation wave in which many Indonesian people are still poor, which indicates that the economic development cannot necessarily promote the general welfare and ¹⁴social justice for all Indonesian people. Pancasila as the basis and spirit of state shall stay alive. It also supports and “colors” the prevailing state pillars, namely: Proclamation, ⁹the 1945 Constitution, the Unitary State of the Republic of Indonesia, and Unity in Diversity (Swasono Edi:2013).

Pancasila (Sugito:2012) is the basis of state philosophy and the philosophy of life of Indonesian people. Therefore, it is a moral responsibility to implement it in daily life of society, nation, and state. The national and state life of Indonesian people is based on the values contained in the moral principles of Pancasila, which philosophically is the philosophy of Indonesian people to establish Indonesian state (Kaelen:2011). As a consequence for the state life, the values of Pancasila shall become the sole source for every aspect of the state life. Even its legislation system shall be resourced from Pancasila.

Democratic economy is a new concept of economic system in reaction to capitalist economic system (B.Limbong:2011). It refers to the improvement of prosperity and welfare of human beings. Mubyarto (1987) in his thoughts claims that Pancasila economy is an economic system which is imbued by the ideology of Pancasila, namely: an economy which is ⁴a joint effort based on the principle of mutual cooperation and the principle of national kinship. In the capitalist economy, the economy is merely driven by economic stimuli, whereas in the Pancasila economy, it is driven not only by economic stimuli but also social and moral stimuli.

Democratic economy proposed by Mubyarto (1991) is an economic system which is based on the economic democracy in an attempt to achieve the total

prosperity of the nation maximally, not the individual or group prosperity, but the democracy economy which is based on the joint effort to reach the collective prosperity across the nation.

Democratic economic system is a sub-system of the Pancasila economic system, which is arranged as a joint effort based on the principle of kinship. This system is a deliberation-based democratic economic system (Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives (Mubyarto:1999).

In the globalization era influenced by capitalism, a system that refers to the values of Pancasila is required as to maintain the national resilience by developing Pancasila Economy which is generally in favor of the welfare of all Indonesian people, not individual or group welfare.

The current subsidized mortgage agreement has not been based on the basic values of Pancasila, and therefore a model of subsidized mortgage agreement as an elaboration of the values of Pancasila is required.

Scott J. Burnham (1997) claims that at least seven elements shall be fulfilled when drawing up an agreement, namely: (1) description of the instrument; (2) caption/exordium; (3) recital; (4) transition (language of agreement); (5) definition; (6) the body of contract; and (7) closing/ testimony. The sections of the agreement are elaborated according to the values of Pancasila, and the rights and obligations of creditors and debtors in the subsidized mortgage agreement shall surely be made balanced.

F. Conclusion

1. The subsidized mortgage agreement which has been standardized by banks possibly brings about the shift of risks and the unbalance of rights and obligations of the related parties. In addition, it is also impossible to amend the contents of agreement because it has been standardized. The consumers of subsidized mortgage have a weak position when dealing with the finance implementing banks.
2. The current subsidized mortgage agreement has not been based on the values

of Pancasila so that a model of subsidized mortgage agreement as an elaboration of the values of Pancasila is required.

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