

## 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. The model includes the pre-contract stage, and the implementation of the agreement until the end of the agreement is imbued with the values of Pancasila.*

**Keywords:** Agreement, Pancasila, and subsidized mortgage

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### INTRODUCTION

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 19<sup>th</sup> 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

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and enliven liberalism. In the 20<sup>th</sup> 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 13<sup>th</sup> 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. Pangabean (2012), (Sutan Remi:2009) claim that standard clause materialis 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 that is influenced by the principle of freedom contract so it is necessary to develop a credit agreement extracted from the noble values of Pancasila. Pancasila for the nation of Indonesia is the basis of philosophy whose values need to be explored and developed in the life of the nation and among others in the credit agreement of ownership of subsidized housing. This research will develop a credit agreement, especially subsidized housing credit which is an internalization of Pancasila values.

#### **PROBLEMS**

1. How is the implementation of subsidized mortgage agreement?
2. How to develop a credit agreement for the ownership of subsidized housing that matches the value of Pancasila?

#### **OBJECTIVE**

1. To investigate the implementation of subsidized mortgage agreement.
2. To develop a credit agreement for subsidized housing ownership in accordance with Pancasila value.

#### **RESEARCH METHOD**

Form of descriptive research with interactional / micro approach with qualitative analysis (Setiono: 2005). The form of research is empirical juridical legal research in the field of credit ownership of subsidized houses. Data source is primary data obtained through observation, interview and focus group discussion. Data analysis techniques using interactive analysis model. The data obtained in the analysis by doing data reduction in accordance with the purpose of research, then do the conclusion and verification.

#### **THE STUDY**

##### **1. Implementation of Subsidized Mortgage Agreement**

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. 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-article (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.

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.

Article 1320 of the Civil Code requires the requirement of the validity of the agreement that there must be a certain skill, agreement, a certain matter and a halal cause. In the development of the law of agreement is known the existence of doctrine undue influence and doctrine unconscionability which is a misuse of circumstances in an agreement. According to Bryan Garner: (1999) the doctrine of improper influence or misuse of circumstances is a doctrine that teaches that a contract can be aborted because there is no conformity of will due to an attempt by one party, because of its particular position (such as its dominant position).

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).

Based on previous research, the standard conditions in the credit agreement of the bank place the bank in a strong position, especially having the authority to change, reduce and even stop the credit facility given to the customer at any time only based on the considerations considered good by the bank alone (Dina Setyabudi: 2012 ).

Previous research by Sutan Remi Syahdeini: (2015) in his dissertation entitled "Balanced Freedom of Contract and Protection for Parties in the Credit Agreement of Banks in Indonesia" concludes that the balance of the parties will only materialize if it is in an equally strong position. Mariam Darus Badruzaman (2009) in his dissertation on "Credit Agreement Bank" concludes that the relationship of banks and customers, puts the customer in a weak position so that it needs to be protected by intervention from the Government on the substance of the credit agreement of the bank.

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.Pangabean: 2012).

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.

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 stages of an agreement consisting of pre-agreement, the implementation of the agreement on the credit agreement of ownership of subsidized housing is similar to the standard standard agreement (Dora Kusumastuti: 2015). At the pre-agreement stage of the debtor in this case, the low-income people are unable to change the provision of the subsidized standard housing

loan agreement, the debtor has only the opportunity to agree on the agreement or cancel the intention of owning the house if it does not agree to the agreement.

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.

The implementation of the subsidized ownership credit agreement refers to the specific provisions set by the government through the people's housing ministry. The specifics are specially intended for low income people such as Rp. 5.000.000,00 (Five Million Rupiah), with interest of 0.5 a year and mass of credit up to 20 years.

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 Monique (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.

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.

The role of government in the regulation of subsidizing low income households in housing ownership in the form of down payment, interest rates and loan periods can provide relief to low income communities. The effort is able to realize a protection to the debtor so that the position between the debtor and the creditor is more balanced when compared with the standard credit agreement in general.

## 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. (*machsstaat*). 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.Ashidiqie:2011).

Stahl states that at least there four elements of *rechtsstaat*, namely: 1) guarantee of human rights; 2) division of power (*sclding 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 Grondslag*). 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).

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 (Kaelan: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.

In the sense of the value of Pancasila, the value of Pancasila contains spiritual values, which recognize the material value, and the vital value. In the value of Pancasila contained vital value, truth value, aesthetic value and ethical value, and religious. The essence of Pancasila is value, as the guidance of the state is the norm, while the actualization or experience is a concrete realization of Pancasila.

The substance of Pancasila with its five is a value system. The basic principle is the ideals of the Indonesian nation, and is transformed into social tertip in society. Value in Pancasila has a level in terms of quantity and quality, and is complementary and is a value in the form of a unity, and mutually inspiring with value on other principles of Pancasila.

The value contained in Pancasila is the highest spiritual value and the value is the value of divinity, humanity value, unity value, the value of democracy and the value of justice.

The Divine Values of the Almighty mean the beliefs and acknowledgments expressed in the form of deeds against the single, most perfect Substance. This God Almighty value gives freedom to the believers in accordance with their beliefs, there is no compulsion and between religions must respect each other.

A fair and civilized humanitarian value implies an awareness of attitudes and behavior that conforms to the moral values of living together on the basis of the absolute demands of the conscience by treating something as it should be. The value of the second precepts implies the recognition of the existence of human dignity, the fair recognition of human beings who have creativity, taste and intention.

The value of the fourth precept implies that a people's government by means through certain bodies for consensus, for the righteousness of God, in harmony with common sense, and considering the will of the people and the sense of humanity to achieve the good of living together. Taking a decision through consensus of consensus becomes the main priority, that is by using Pancasila democracy is democracy which is led by wisdom of wisdom in representatives deliberation, with emphasis on kinship effort.

The value contained in the fifth precept is based justice, imbued with the essence of human justice that is justice in human relations with itself, human beings with other human beings, people with society, nation and state.

Pancasila as the basis of state philosophy is the highest legal foundation described in the regulations below. Efforts to build a subsidized home ownership credit agreement in accordance with Pancasila values are implemented by implementing the values of Pancasila into the stages of making the agreement.

1. The stages in the agreement

- a. Pre-agreement stages

In pre-agreement stages the parties must meet in an atmosphere of mutual respect, without distinction. Subsidized mortgage debtors who are low-income people, are still treated as normal debtors without exception. The meeting was held by deliberation to discuss the rights and obligations contained in the agreement clause. The distribution of rights and obligations is based on the principle of justice. The creditors explain in detail and detail the rights and obligations of the parties to the agreement. The creditor explains honestly the object of the agreement, and the debtor is obliged to examine the object of the agreement with great care.

In this stage prospective debtors or subsidized housing consumers must fulfill the five C: (character), capital (capital), capacity, colateral (collateral), and condition of economy) principles. In the first element the character of a debtor is a good citizen. As a good citizen can be proven whether the prospective debtor has been in trouble with the law. So to prove against these requirements need to be made a letter from the judiciary or from the police that the prospective debtor is never in trouble with the law.

The Bank as the financing implementer of Kemenpera must be able to ensure the willingness of the housing developer for the infrastructure of places of worship (such as mosque or church), burial place and also the house which become the object of credit of ownership of subsidized house is a decent house.

It takes a kind of Deposit Insurance Agency (LPS) that aims to guarantee the object of the agreement, with the monthly fee borne by the debtor to minimize the risks to the object of the agreement.

#### B. Stage of implementation the agreement

Implementation of the agreement emphasizes the contents of the agreement that is the rights and obligations of the parties both creditors and debtors. The bank as a creditor exercises his rights and acts well, and does not burden the debtor with more expenses than necessary. Subsidized mortgage debtors perform their obligations well and do not make credit collection complicated. Debtors and creditors work together to realize the welfare of the Indonesian nation. In the stages of execution of the agreement, if there is a legal problem solved by deliberation.

In the implementation the contract of ownership subsidized housing to accommodate the protection of the debtor's rights from low-income communities, the debtor should be provided with assistance by a legal expert provided by the state to provide assistance to the guarantee of the rights of the debtor and to minimize the risks and potential problems that will arise.

Scott J. Burnham (1987) formulates in the agreement there are at least seven elements to be met, the element is :

1. *Description of the instrument.*
2. *Caption/ exordium*
3. *Recitals*
4. *Transition (language of agreement)*
5. *Definition*
6. *The body of contract*
7. *Closing/ testimoni.*

Based on the anatomy of the above contract and serve as an analysis of the subsidized housing loan agreement as follows: Description of the instrument is the title of an agreement. In the subsidized KPR credit agreement at each title of the agreement already contains the title of the agreement. Caption / exordium is when an agreement is made and agreed upon, and indicates the time and place determined by the credit agreement of ownership of subsidized house based on the agreement of both parties. Recitals are the background of the parties agreeing to enter into an agreement. The background is based on the real condition of the parties. The function of Recitals is to explain the background of the formation of subsidized housing credit agreements. Recitals in the form of narrative should clearly explain the condition the creditors of subsidized housing ownership and the bank as a distributor the financing of housing liquidity facility. Transition (language of agreement) is the language used in the agreement. The language used in the agreement, preferably is a standard language, and easily understood by the parties, especially the creditors of the ownership of subsidized housing. Definition is the definition or explanation of each article in a treaty. This definition should be able to explain in detail to each of the contents of the clause in the agreement. The body of contract contains the object of the agreement, the manner or exercise of the achievements, rights and obligations of the parties, default, compensation, and term of agreement containing clauses governing the object of the agreement, the manner and performance of the obligations, rights and obligations of the parties, arrangements concerning the event of default, loss and compensation, and term of agreement. The rights and obligations in this section reflect the balance principle in harmony with the values of Pancasila. The implementation of a treaty contains the rights and obligations of the parties. Each party has rights and obligations in the agreement, and not only one party is liable. Closing / testimony is the closing or termination of an agreement. The closing of the agreement contains the endorsement of the notary as an official of a treaty.

## CLOSING

### Conclusion

1. Based on previous research that standardized or standardized agreement there is no balance in it, where the party who has stronger economic position will be in a position of power while the weak parties have no bargaining position in drawing up the agreement. 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. In the previous research that the implementation of the agreement will be influenced by the pre-contract stage, where the parties in formulating the agreement is based on the principle of good faith, so that the agreement will balance the bargaining position between the parties that make it. Although the debtors' position of the subsidized housing loan credits is more balanced due to the intervention of the government which provides subsidies on down payment, loan services,

and the mass of credit, it is necessary to develop a model of subsidized housing loan agreement extracted from Pancasila values. The model includes pre-contract stages to formulate the contents of the agreement, and execution of the agreement until the termination of the agreement. In the pre-agreement stage imbued by the noble values of Pancasila, in the stages of execution of the agreement the parties implement all the contents of the agreement, and until the expiry of the agreement if there is wanprestasi then resolved by using deliberation according to the value of Sila 4 Pancasila.

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## Ordinance

Indonesian Civil Code

Regulation the Ministry of Public Housing the Republic of Indonesia Number: 3 of 2014 regarding Housing Finance Liquidity Facility through Prosperous Mortgage

The 1945 Constitution

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