



## Qardhul Hasan Financing: Study on the Pattern of Legal Relationships in the Sharia Savings and Loans Cooperative (KSPPS) in Karanganyar Regency

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### **Abstract**

This study aims to describe the pattern of legal relationships that occur in financing activities through qardhul hasan in the Sharia Savings and Loans Cooperative (KSPPS) located in Karanganyar Regency, based on the doctrinal (normative) approach method which prioritizes secondary data and analysis based on deductive logic. Based on the results of the research and discussion conducted, it was found that the norms used to regulate legal subjects, legal objects, rights and obligations of recipients of financing, KSPPS rights, Submission of Collateral, breach of contract, legal remedies and dispute resolution in general were in accordance with the norms -applicable norms and MUI DSN fatwas, although in some parts there are some things that are not in accordance with positive law and MUI DSN fatwas.

**Keywords:** *Qardhul Hasan; KSPPS; Patterns of Legal Relations*

### **A. Introduction**

Sharia Savings and Loans Cooperative (KSPPS) --- formerly known as the Sharia Financial Services Cooperative (KJKS) --- as a metamorphosis of Baitul Maal wat Tamwil (BMT), is a form of microfinance originating from Islam and developing specifically in Indonesia.

The emergence of KSPPS (BMT) is the result of changes in the relationship between the state and Islam, as a result of changes both originating from the government and Muslims, then metamorphosed into a series of accommodative steps.,<sup>1</sup> The existence of "freedom" to create and develop Islamic

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<sup>1</sup> Bahtiar Effendy. *Islam dan Negara: Transformasi pemikiran dan Praktik Politik Islam Di Indonesia*. Jakarta: Penerbit Paramadina dan Yayasan ibn Sina. 1998.

economic institutions such as showing the accommodation of the political, economic and social interests of Muslims.<sup>2</sup>

The application of Islamic law in the context of the Indonesian legal system has had its ups and downs. At one time, there were times when Islamic law was recognized as a law that had binding power to the people of Indonesia<sup>3</sup>, although it is limited to only regulating issues within the scope of family and inheritance law.<sup>4</sup> Other times, Islamic law is only recognized as law, if it becomes part of another law.<sup>5</sup>

In such a context, it is not surprising that the emergence of KSPPS (formerly known as Baitul Maal wat-Tamwil (BMT))<sup>6</sup> that is so rapid in Indonesia, which is used as a symbol of melting and reducing tensions and "hostiles" that have been going on between Islam and the state, is then expected to function as an integrating mechanism that can accommodate and resolve differences in interests, so that it will create a productive collaboration in society.

However, because of the presence of Baitul Maal wat-Tamwil in the national economy, it cannot be seen as a result of consensus among the various interest groups that exist, so it is not surprising that the existence of Baitul Maal wat-Tamwil is still filled with various opposing interests, both substantially or in terms of direction.

There is a tug of war between the various interests as mentioned above, which is then implicated in the actions and interactions of the parties involved in the establishment and operation --- namely the founders, the coaching, monitoring and development institutions, as well as the management and members as well as government --- Baitul Maal wat-Tamwil, which still shows differences in determining: (1) the form of the institution to be used as a forum for its business activities, as well as aspects of the business activities to be carried out by the institution.<sup>7</sup>

The existence of these differences is nothing but a reflection of the desire of (some) Muslims who want to implement the syar'ah in its entirety, in various aspects of the activities of Baitul Maal wat-

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<sup>2</sup> Bahtiar Effendy. *Islam dan Negara : Transformasi pemikiran dan Praktik Politik Islam Di Indonesia*. Jakarta: Penerbit Paramadina dan Yayasan Ibn Sina. 1998, hal. 125-174; 269-319.

<sup>3</sup> Soepomo (I). *Sistem Hukum di Indonesia: Sebelum perang Dunia II*. Cet. Ketigabelas. Jakarta: Pradnya Paramita. 1988. Soepomo (II). 1982. *Sejarah Politik Hukum Adat: Jilid I (Dari Zaman Kompeni Sehingga Tahun 1848)*. Cet. Kedua. Jakarta: Pradnya Paramita. 1982; Soepomo (III). 1982. *Sejarah Politik Hukum Adat: Jilid I (Masa 1848 – 1928)*. Cet. Kedua. Jakarta: Pradnya Paramita.

<sup>4</sup> Sjadzali, Munawir. 1994. *Landasan Pemikiran Politik Hukum Islam dalam Rangka menentukan Peradilan Agama di Indonesia*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia: Pemikiran dan Pratek*. Cet. Kedua. Bandung: Remaja Rosdakarya, hlm. 42-48; Manan, Bagir. 1994. *Peranan Peradilan Agama dalam Pembinaan Hukum Nasional*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia: Pemikiran dan Pratek*. Cet kedua. Bandung: Remaja Rosdakarya, hlm. 146-150; Ramulyo, Idris. 1985. *Beberapa Masalah tentang Hukum Acara Perdata Peradilan Agama dan Hukum Perkawinan Islam*. Jakarta: Ind – Hill, Co, hlm. 110 –117.

<sup>5</sup> Thalib, Sajuti. 1985. *Receptio A Contrario: Hubungan Hukum Adat dengan Hukum Islam*. Jakarta : Bina Aksara, hlm. 4-8 ; Salman, Otje . 1993. *Kesadaran Hukum Masyarakat terhadap Hukum Waris*. Bandung : Alumni, hlm. 14-15 dan 23; Ichtiando, S.A. 1994. *Pengembangan Teori Berlakunya Hukum islam di Indonesia*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia : Perkembangan dan Pembentukannya*. Cet kedua. Bandung : Remaja Rosdakarya, hlm. 101-102.

<sup>6</sup> Riyadi, Agung. 1997. *Koperasi Baitul Maal wat-Tamwil Sebagai Format Lembaga Ekonomi Usaha Kecil*. Tesis Program Studi Ilmu Ekonomi dan Studi Pembangunan Jurusan Ilmu-Ilmu Sosial. Program Pasca Sarjana Universitas gadjah Mada Yogyakarta. Tidak dipublikasikan, hlm. 10).

<sup>7</sup> Perwataatmadja, Karnaen A. dan Muhammad Syafi'i Antonio. *Apa dan Bagaimana Bank Islam*. Yogyakarta: Dana Bhakti Wakaf; Perwataatmadja, Karnaen A. 1993. *Peluang dan Strategi Bank Tanpa Bunga Dengan Sistem Bagi Hasil Dalam Bisnis perbankan Di Indonesia*. Dalam Hamid Basyaib dan Mursyidi Prihantono (Ed.). *Bank Tanpa Bunga*. Yogyakarta: PT Mitra Gama Widya. Lestiadi, Suhadi *et. al.* 1998. *Panduan Unit Usaha Simpan Pinjam Syariah*. Jakarta: Departemen Koperasi Pengusaha Kecil dan menengah dan Bank Muamalat Indonesia.

Tamwi, which are then faced with the "must" to adjust aspects - Structural and substantial aspects of activities attached to Baitulmal Wattamwil, with the structure and substance of activities, which are deemed to be able to accommodate and fill business entities, which are recognized in the rule of law originating from the state

The tug-of-war to make arrangements that rely on syar'ah as a whole, with the necessity to adapt to legal norms derived from state law, was seen, among other things, when KSPPS in Karanganyar Regency carried out qardhul hasan business activities. For this reason, it is necessary to study the patterns of legal relationships that occur in financing activities through qardhul hasan at the Sharia Savings and Loans Cooperatives (KSPPS) in Karanganyar Regency..

## ***B. Research Method***

This study is based on a doctrinal approach, prioritizing secondary data in the form of documents from (1) KSPPS Prima Dinar; (2) KSPPS Rejo Suko Mulyo, compiled by literature study. Secondary data which is then supported is supported by primary data in the form of information from various parties (founders, administrators and members who participate in the implementation of qardhul hasan financing) in (1) KSPPS Prima Dinar and; (2) KSPPS Rejo Suko Mulyo, which was collected through free guided interviews. The processed data was then analyzed using a qualitative normative method, based on deductive logic, so that in the final stage the in-concreto law would be known.

## ***C. Discussion***

### **1. Qardhul Hasan Financing at KSPPS Prima Dinar**

#### **a. Subjects That Make Aqad Qardhul Hasan**

The arrangements regarding the subject of the qardhul hasan contract at KSPPS Prima Dinar are:

- 1) In the clause governing the subject, it is stipulated that, as the first party is the manager of KSPPS Prima Dinar acting for and on behalf of KSPPS Prima Dinar. Thus, the party to the contract is KSPPS Prima Dinar. This is in accordance with the prevailing norms, namely Articles 9, 30 (2), 32 (1) and (3) of Law no. 25 of 1992; Article 2 (1), 5 (1) Article 8 (1) (2) (3) PP No. 9 of 1995; and Kepmenkop No. 351/Kep/M/XII/1998.
- 2) The second party is the KSPPS member. Article 1320 (2) of the Civil Code stipulates that the condition for a valid agreement is "the ability to make an engagement". The people who are considered capable are: (a) children who have grown up; (b) persons who are not under custody; (c) married women in matters prescribed by law and in general all persons who are prohibited by law from making certain agreements. (Article 1330 of the Civil Code). If this is related to Article 18 (1) of Law no. 25 of 1992 which stipulates that: "Any Indonesian citizen who can become a member of a Cooperative who is able to take legal action...", it can be seen that all members who make a mudharabah financing agreement have met the requirements as stipulated in Article 1320 (2) Civil Code. The arrangement regarding the subject in this qardhul hasan contract is also in accordance with the qardhul hasan pillars and requirements as specified in the National Syari'ah Cou ncil Fatwa no: 19/DSN-MUI/IX/2000, regarding al-Qardh (Qardhul Hasan)

### **b. Aqad Qardhul Hasan Object**

Based on the clause in the contract which reads; "The first party has agreed to provide benevolence financing to the second party to be used for..." It can be seen that the object in this contract is money (benefit financing).

If the object of qardhul hasan is related to activities (business fields) that can be carried out by cooperatives, the object is in accordance with Article 44 of Law no. 25 of 1992 in conjunction with Article 19 (1) PP no. 9 of 1995, which determines that the activities of cooperatives are; "*provide loans to members, prospective members, other cooperatives and or their members.*"

Thus, qardhul hasan which is the object of money to be owned by the recipient of the financing as happened in the borrow-to-use agreement (see Article 1755 of the Civil Code), is in accordance with the main activities of the cooperative.

At KSPPS Prima Dinar qardhul hasan, sourced from: ZIS which is sourced from KSPPS Prima Dinar customers, and the community, as well as from baitul maal activities that come from infaq 2.5% of the profits that come from its baitultamwil activities, which are distributed to traders small.

The principle of Al-Qardhul Hasan can be interpreted as the principle of lending virtue without additional costs. This qardhul hasan financing model, apart from being a financing without any compensation, is also a type of financing which must then be returned to KSPPS by the recipient (although without any additional/reward).

Thus, if the object of qardhul hasan is related to the source of funding, it can be seen that:

#### **1) The Object of Qardhul Hasan Originating from Zakat Funds**

The object of the Qardhul hasan contract at KSPPS Prima Dinar, in the form of money used solely for working capital and investment to increase business, is basically not in accordance with the zakat distribution scheme according to Islamic law, because as stated in Surat At-Taubah (9) verse 103: "*Take zakat from some of their wealth. . . .*" Likewise in Surah QS. Adz-Dzariyat: 19, which emphasizes: "*And in their wealth there is a right for the poor who ask and the poor who do not get a share,*" it can be understood that zakat is a right for eight asnaf as mentioned in the QS AT-Taubah: 103 If it is a right, then the person who receives it (mustahiq) has no obligation to return the zakat.

Thus the distribution of zakat through aqad qardhul hasan, where mustahiq is positioned as a debtor who is obliged to return what he has received, is not in accordance with the nature of zakat which places mustahiq as a person who is entitled to receive zakat assets from the muzakki.

The existence of such a zakat distribution scheme, may be influenced by the Fatwa of the Indonesian Ulema Council (Fatwa Commission) dated February 2, 1982, regarding the Mentasharufkan Zakat Fund for productive activities and the benefit of the Ummah.

This is reinforced by what is stipulated by Law no. 38 of 1999 concerning Zakat in conjunction with the Minister of Religion Decree No. 581 of 1999 concerning the Implementation of Law no. 38 of 1999 concerning Zakat Management. In Article 16 (2) of Law N0. 38 of 1999 concerning Zakat which stipulates: the utilization of zakat collection results based on a priority scale of mustahiq needs and can be used for productive businesses.

In the explanation of the article, it is stated that the Mustahiq eight ashnaf are the indigent, poor, amil, convert, riqab, gharim, sabilillah, and ibnussabil, which in its application can include people who are the most economically helpless such as orphans, the elderly, people with disabilities, people who are

studying, Islamic boarding schools, abandoned children, people who are in debt, displaced refugees, and victims of natural disasters. This is in line with Article 28 of the Ministry of Religion No. 581 Year 1999

The substance of Article 16 of Law No. 38 of 1999 in conjunction with Article 28 of the Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999, became the basis for the distribution of zakat for productive businesses (which will be carried out if the distribution of zakat for eight asnaf as stipulated in Surat At-Taubah (9) paragraph 60, has been This provision is fulfilled, although on the one hand it can be based on considerations so that zakat funds can be more developed and functional. This can also be made aware of the opinion of Yusuf Qardhawi, which states, sadaqah that has a long useful life is prioritized. wider in scope, then it is more desired and prioritized by Allah SWT and His Messenger. Likewise with work that is longer and has lasting effects. Whenever an action lasts longer, the work is more important and more beloved to Allah SWT..<sup>8</sup>

## 2) Qardhul Hasan Object Originating from Infaq and Shadaqah Funds

*Infaq and shadaqah are basically sincere gifts solely for the sake of Allah SWT, thus the giver of infaq and shadaqah does not expect that what has been infaq and shadaqah will return.*

*However, because the distribution of infaq and shadaqah funds is carried out through an institution (KSPPS) that feels they have a mandate so that the infaq and shadaqah funds that they have managed to collect are truly useful and do not expect the funds they have received will stop, they cannot benefit people. many meanings but will only benefit those who receive them, and the use of infaq and shadaqah funds cannot be enjoyed by the recipients for a long period of time (because they are used more for meeting consumptive needs than productive), and most importantly they (the KSPPS managers) are feel that they have a mandate so that the infaq and shadaqah funds that they have managed to collect are truly useful, so in order to maintain this trust, the infaq and shadaqah funds, distributed through the qardhul hasan scheme, can be justified, because as stated by Yusuf Qardhawi, the long useful shadaqah more preferred.*

*This is also in accordance with what has been stipulated in Article 17 of Law No. 38 of 1999 in conjunction with Article 30 of the Minister of Religion No. 581 of 1999, because in Law No. 38 of 1999 in conjunction with the Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999 there is no prohibition against binding parties receiving infaq and shadaqah with qardhul hasan, especially considering the requirements that must be met for parties who will distribute ZIS for productive activities as stated in Article 29 Ministry of Religion No. 581 of 1999.*

*This is relatively different from the DSN-MUI Fatwa No: 19/DSN-MUI/IX/2000, which stipulates that al-Qardh funds can be sourced from: (a) LKS capital share; (b) LKS profits set aside; and (c) other institutions or individuals who entrust their infaq distribution to LKS. The fatwa does not confirm the existence of zakat, infaq and shadaqah as a source of funds.*

### a) Obligations of the Recipient of Financing in Qardhul Hasan

For the obligations of the recipient of financing from aqad at KSPPS Prima Dinar, it is determined that:

<sup>8</sup> Yusuf Qardhawi, *Fiqh Prioritas*, Sebuah Kajian Baru Berdasarkan Al-Qur'an dan As-Sunnah, Jakarta: Robbani Press, Cetakan pertama, Rajab 1416H/Desember 1996 M, hal. 35.

The Second Party has agreed and promised to

1. pay installments: Rp. ....
2. pay infaq: Rp. ....
3. due date: .....
4. The first installment starts on: .....

The Second Party agrees to pay all costs arising from this agreement

1. which include: Biaya Administrasi: Rp. ....
2. stamp duty: Rp. ....
3. notary fees: Rp. ....
4. Credit Insurance Fee: Rp. .... And must be paid upfront

The existence of such an obligation is in accordance with the characteristics of qardhul hasan, which imposes an obligation on the recipient to return back what he has received (without any additions), in installments according to the contract.

In this qardhul hasan, the borrower is obliged to return the principal of the loan. However, the benevolent fund management unit cannot demand a return of more than the loan principal except for the sincerity of the borrower.<sup>9</sup>

This is in accordance with the obligations of the borrower in the lease-to-use agreement as stipulated in Article 1763 of the Civil Code, which stipulates: "Whoever borrows an item is obliged to return it in the same amount and condition and at the agreed time."

The clauses contained in the aqad above are in accordance with the Fatwa of the National Sharia Council of the Indonesian Ulema Council no: 19/DSN-MUI/IX/2000, concerning al-Qardh (Qardhul Hasan).

### c. Breach of Promise

In the qardhul hasan contract carried out by KSPPS Prima Dinar, there is a clause that regulates if the recipient of the financing defaults (default), the contents of which are as follows: the first party must be paid by the second party

As befits an agreement, every debtor who does not fulfill the obligations that are his obligations can be sued for compensation. This is based on Article 1243 of the Civil Code. Likewise in Islamic law, the parties involved in a contract are obliged to keep their promises and have good intentions, this is based on the word of Allah SWT in QS. Al Maidah (5): 1

الَّذِينَ آمَنُوا وَالْعُقُودِ

In Islamic law itself regarding the provision of sanctions to parties who do not fulfill their obligations is allowed as long as the sanctions are based on the principle of ta'zir, which aims to make customers more disciplined in carrying out their obligations. Sanctions in Islamic law can be in the form

<sup>9</sup> Moh. Rifai, *Konsep Perbankan Syari'ah.... Loc. Cit*

of a fine of a sum of money, the amount of which is determined on the basis of the agreement and made when the contract is signed. This is in accordance with the rules of fiqh, which states:

أَصْلُ الْمُعَامَلَاتِ الْإِبَاحَةُ لِأَنَّ لِيَأْتِيَ ا

Thus, there is a clause regarding the imposition of responsibility in the form of compensation to the recipient of the financing who has breached the contract in accordance with Article 1243 of the Civil Code, and the texts of the Qur'an as written above.

#### **d. Legal Effort**

Legal remedies here are defined as a series of actions taken by one of the parties if the opposing party (the promised partner) does not fulfill the obligations that have been determined and agreed upon in the contract.

In the qardhul hasan contract carried out by KSPPS Prima Dinar, there is a clause that regulates legal remedies, the contents of which are as follows:

If the second party fails to pay/fulfill its obligations as mutually agreed upon, then all billing fees and power of attorney of the first party must be paid by the second party, with the following conditions:

- 1) KSPPS Prima Dinar will give the first warning after one week from the installment schedule to complete its obligations.
- 2) There is an administration fee of Rp. 25.000,- paid if twenty five days after the first warning there is no change, which in the end the money will be put in LAZIS KSPPS Prima Dinar
- 3) If two months after the first warning the Second Party has not carried out its obligations, then KSPPS Prima Dinar has the right to sell the collateral provided by the Second Party to KSPPS Prima Dinar.

In the Civil Code, legal remedies (sommatie (ingebrekestelling) are an effort to determine whether there is a default, as regulated in Article 1238 of the Civil Code.<sup>10</sup> A negligence statement is a notification by the creditor to the debtor containing a provision that states at the latest when the creditor requests the fulfillment of the achievements that must be made by the debtor. That's all considering the appropriateness (property) means that it must also take into account it is not too late to receive and so on.

In an agreement to give or carry out something, the parties can determine a grace period for the implementation of the fulfillment of the achievement. If the deadline for fulfilling the performance is not determined, the debtor should be given a warning so that he can fulfill his achievements. However, if the time limit for the fulfillment of the achievement is determined, then according to article 1238 of the Civil Code, it is stated that the debtor is considered negligent by the lapse of the specified time limit. It's just that in the Civil Code, there are no further details on how the juridical technicality of the sommatie is.

If after being given a sommatie, the recipient of the financing still does not carry out its obligations, then KSPPS Prima Dinar will make further efforts, namely:

*"Administration fees of Rp. 25.000,- paid if twenty-five days after the first warning there is no change, which in the end the money will be put into LAZIS KSPPS Prima Dinar."*

<sup>10</sup> CST. Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia*, Balai Pustaka, Jakarta, 1998, hal, 247

The existence of this clause confirms that for the recipient of the financing who, even though he has been given a *sommatie*, does not carry out his obligations, he will be charged an administration fee of Rp. 25,000. The administrative costs referred to in the contract are fines, which are imposed to force the customer receiving the *qardhul hasan* financing to pay off his obligations immediately.

Fines as a form of responsibility for parties who have defaulted (default), are an instrument that is actually only known in the realm of procedural/formal law, as stipulated in Article 606a. Civil Procedure Regulations (*Reglement op de Rechtsvordering*). Thus the determination of the existence of a fine (administrative fee) of Rp. 25.000,- if twenty five days after the first warning there is no change, it is not in accordance with article 606a Rv, as well as theory and practice in procedural law.

Apart from that, with regard to the fines in this agreement, the Supreme Court in its decision No. 2027 K/Pdt/1984 dated 23 April 1986 decided that the penalty agreed by the parties for late payment of the loan principal and others was essentially a disguised interest, so based on the principle of justice, this could not be justified.

The considerations given by the Supreme Court include the following:

*.....even though the issue of fines and other costs was agreed upon, but according to the Supreme Court the fine was essentially a hidden interest that was too large in amount, so based on justice it could not be justified, therefore it was rejected..*

In Islamic law itself regarding sanctions or fines is allowed as long as the sanctions are based on the principle of *ta'zir*, which aims to make customers more disciplined in carrying out their obligations. Sanctions in Islamic law can be in the form of a fine of a sum of money, the amount of which is determined on the basis of the agreement and made when the contract is signed. This is in accordance with the rules of *fiqh*, which states:

أَصْلُ فِي الْمَعَامَلَاتِ الْإِبَاحَةُ إِلَّا أَنْ يَدُلَّ دَلِيلًا عَلَى تَعْرِيمِهَا

The provision of fines for recipients of financing who do not heed the *sommatie* from the KSPPS can be justified by the MUI as seen in the DSN-MUI Fatwa on *al-Qardh*.

It's just that in the implementation of the provision of *Qardhul Hasan* financing loan funds, if the customer has difficulty paying the loan/installment, it is necessary to review the results/profits generated by the customer, then rearrange the installment amount and payment time by KSPPS. If the customer is still having difficulties and is unable to repay the loan, due to certain things that are beyond the limits of his business and ability, the customer can apply for a *Qardhul Hasan* financing loan exemption to KSPPS. If this happens, the KSPPS will review the causes of the inability of the customer's business.

If KSPPS Prima Dinar accepts, the customer will be immediately released from the *Qardhul Hasan* financing debt loan. This is because KSPPS Prima Dinar has independent funds obtained from the community who channel their ZIS to KSPPS. The law governing *Qardhul Hasan* financing also obliges to release and forgive the customer if he is unable to fulfill his obligations, not because of intentional but due to factors beyond the ability of the customer.

What has been done by KSPPS Prima Dinar is in accordance with Islamic teachings as stated in:

وَإِنْ كَانَتْ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ  
لَكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ

What has been done by KSPPS Prima Dinar is in accordance with the DSN-MUI Fatwa regarding Qardhul Hasan

### 1) Dispute Resolution

In the contract made by KSPPS Prima Dinar, it is stated that if there is a dispute between the two parties, it will be endeavored to resolve it by deliberation first, before taking legal action.

The settlement as stated in the contract is a pattern that is usually followed, for the disputing parties in Indonesia. This provision is also in accordance with the DSN-MUI Fatwa regarding Qardhul Hasan

### 2) Financing Qardhul Hasan at KSPPS Rejo Suko Mulyo

The qardhul hasan financing at KSPPS Rejo Suko Mulyo involves three parties, namely KSPPS Rejo Suko Mulyo, the recipient of the financing and the party who acts as an intermediary between KSPPS and the recipient of the financing (channel partners).

If the data regarding the contract of qardhul hasan that occurred between KSPPS Rejo Suko Mulyo and the traders above are related to existing legal norms, it can be described as follows:

### 2. Subject of Aqad Qardhul Hasan

The arrangement on the subject that makes this type of qardhul hasan contract can be seen in the clause that stipulates:

Baitul Maal wat Tamwil Al Huda Universitas Sebelas Maret Surakarta, domiciled at... in this case represented by....., as the President Director of Baitul Maal wat Tamwil Al Huda UNS, thereby acting for and on behalf of Baitul Maal wat Tamwil Al Huda UNS, hereinafter referred to in this Letter of Agreement as the FIRST PARTY.

....., having the address ..... Surakarta representing Market traders ..... Surakarta acting as a Financing Channel Partner for Qordhul Hasan Baitul Maal wat Tamwil Al Huda Universitas Sebelas Maret Surakarta, hereinafter referred to in this Agreement as the SECOND PARTY.

The SECOND PARTY stipulates WITNESS III as written in this agreement letter as the party responsible for all rights and obligations attached to the SECOND PARTY, and is obligated to all process of financing settlement if the SECOND PARTY is unable, dies or is under guardianship.

WITNESS III makes a written statement to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is unable to, dies or is under guardianship and becomes an inseparable document with this Agreement.

When viewed from the clause on the subject contained in the qardhul hasan contract at KSPPS Rejo Suko Mulyo, it can be seen that as the first party is KSPPS represented by the KSPPS manager who is authorized to do so and acts for and on behalf of KSPPS. Because the KSPPS manager who agreed and signed the contract was acting for and on behalf of the KSPPS, the party to the contract was the KSPPS. Thus, the determination that the subject of this contract is KSPPS and the existence of managers acting for and on behalf of KSPPS are in accordance with applicable norms, namely Articles 9, 30 (2), 32 (1) and (3) of Law no. 25 of 1992; Article 2 (1), 5 (1) Article 8 (1) (2) (3) PP No. 9 of 1995; and Kepmenkop No: 351/Kep/M/XII/1998.

The arrangement regarding the second party in the qardhul hasan contract stipulates that in this case the second party is the market trader represented by the Channel Partner.

This Channel Partner is an individual, for which he submitted an application to KSPPS Rejo Suko Mulyo to become a Channel Partner. It is this Channel Partner who proposes and recommends prospective financing customers for Qardhul Hasan to KSPPS Rejo Suko Mulyo. In addition to Channel Partners, customers must also obtain a recommendation from the Ta'mir Masjid in their respective areas (this is done by KSPPS to further ensure that the recipient of this financing is indeed a person who is truly entitled).<sup>132</sup>

This is then confirmed in a clause in another part of the contract, which reads:

*Whereas the SECOND PARTY will act as Channel Partners in the context of smooth operation of the financing management of Qordhul Hasan Baitul Maal wat Tamwil Al Huda Sebelas Maret University, Surakarta.*

The existence of representation (granting power of attorney) in making an agreement as stated in this contract is made possible by law as stated in Article 1792, 1800 jo 1807 of the Civil Code

Based on the norms above, it can be seen that an agreement is made by the recipient of the power of attorney, then the recipient of the power of attorney will act for and on behalf of the power of attorney, thus basically it is the power of attorney who will be bound by the agreements that arise from the agreement. made by the beneficiary. Thus the aqad qardhul hasan clause is in accordance with the norms in the Civil Code. regarding the power of attorney agreement.

It's just that in Islamic law, the position of such channel partners is not based on the granting of power, but on the individual guarantee institution (kafalah). In this kafalah, there is one party who bears (the guarantor / kafil), all the obligations of the debtor (the debtor / ashiil, makfuul 'anhu), if the debtor is unable to carry out its obligations properly to the creditor (the debtor / debtor). sorry). This is also in accordance with the DSN-MUI Fatwa no: 11/DSN-MUI/IV/2000, concerning Kafalah, which stipulates that the Guarantor (Kafil), must have reached puberty (adult) and of sound mind and has the full right to take legal action in property matters and are willing (pleased) with the dependents of the kafalah, while for the debtor (Ashiil, Makfuul 'anhu), they are able to submit their dependents (receivables) to the guarantor and are known by the guarantor.

In a positive legal perspective, this individual guarantee is in accordance with borgtoch (individual guarantee) as an agreement in which a third party in the interest of the creditor binds himself to fulfill the debtor's engagement, if the debtor does not fulfill his engagement (Article 1820 of the Civil Code), because in the kafalah, the guarantee has been stated expressly, and is not extended to exceed the provisions that became the conditions when the contract was made (Article 1824 of the Civil Code), this guarantee is not limited to a principal engagement, including all consequences of the debt, even also the costs of the lawsuit filed against the main debtor and all costs incurred after the debt guarantor was warned about it (Article 1825 of the Civil Code), in this case the second party who is required to provide an insurer, has proposed someone who is capable of binding himself in the agreement, as well as to fulfill the agreement and domiciled in Indonesia (Article 1827 of the Civil Code), and the guarantor is not obliged to pay to the creditor unless the debtor fails to pay his debt, in that case the debtor's property must be confiscated and sold first to pay off the debt (Article 1831 of the Civil Code).

Furthermore, in the aqad it is also stated that:

The SECOND PARTY stipulates WITNESS III as written in this agreement letter as the party responsible for all rights and obligations attached to the SECOND PARTY, and is obligated to all process of financing settlement if the SECOND PARTY is unable, dies or is under guardianship.

WITNESS III makes a written statement to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is unable to, dies or is under guardianship and becomes an inseparable document with this Agreement.

This clause was then followed up with a statement letter made by Witness III, as described below:

**Statement Letter**

The undersigned below;

Name :  
Place/date of birth :  
Nationality :  
Religion :  
Marital status :  
Address :  
proof of self :  
Relationship with the SECOND PARTY :

In this statement, acting as WITNESS III in the Qordhul Hasan Financing Agreement between Baitul Maal wat Tamwil Al Huda, Sebelas Maret University Surakarta and ....., as stated in Article 13, that;

THE SECOND PARTY stipulates WITNESS III as written in this agreement letter as the party responsible for all rights In this statement, acting as WITNESS III in the Qordhul Hasan Financing Agreement between Baitul Maal wat Tamwil Al Huda, Sebelas Maret University Surakarta and ....., as stated in Article 13, that;

The SECOND PARTY stipulates WITNESS III as written in this agreement letter as the party responsible for all rights and obligations attached to the SECOND PARTY, and is obligated to all process of financing settlement if the SECOND PARTY is unable, dies or is under guardianship.

WITNESS III makes a written statement to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is unable to, dies or is under guardianship and becomes an inseparable document with this Agreement.

Stating ready to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is absent, dies or is under custody.

Thus, I have made this statement in truth and full awareness without any pressure and/or coercion from any party. an obligation attached to the SECOND PARTY, and is obliged to all processes of financing settlement if the SECOND PARTY is unable to, dies or is under guardianship.

WITNESS III makes a written statement to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is unable to, dies or is under custody and becomes an inseparable document with this Agreement.

Stating ready to continue and/or take over the rights and obligations of the SECOND PARTY if the SECOND PARTY is absent, dies or is under custody.

Thus, I have made this statement in truth and full awareness without any pressure and/or coercion from any party. Surakarta; ..... H

..... 2003

\_\_\_\_\_  
(Name and sign)

The position of the third party here is a guarantor if the second party (channel partner) does not carry out its obligations properly to KSPPS Rejo Suko Mulyo. Thus, the position of the third party is basically the same as the position of channel partners who are guarantors for traders around campus who have obtained financing from KSPPS Rejo Suko Mulyo..

### 3. Object of Aqad / Qardhul Hasan Agreement

When viewed from the clauses in the qardhul hasan contract at KSPPS Rejo Suko Mulyo, it can be seen that the object of this contract is money (benevolence financing) and responsibilities for all obligations and all financing settlement processes from channel partners. This is stated in a clause which reads:

That the FIRST PARTY is willing to provide Qordhul Hasan financing which will be distributed by the SECOND PARTY to Merchants Around the Campus.

The amount of financing for Qordhul Hasan funds from the FIRST PARTY to the SECOND PARTY as Channel Partners is Rp.....

The amount of the kafalah which is a contra-interpretation or return for the benefits received by the Campus-around Merchant that must be paid by the SECOND PARTY to the FIRST PARTY is ..... from the kafalah which is a contrapretation or return on the benefits of the loan provided by the Campus-Around Trader to the SECOND PARTY as a Partner The channel after deducting the administration fee of Rp.....

The financing received by Merchants Around the Sebelas Maret University, Surakarta Campus through the SECOND PARTY as the Channel Partner along with the kafalah which is a contra-interpretation or return for the financing benefits will be returned by the SECOND PARTY in installments in accordance with the schedule for returning the money loan as stipulated in the attachment which is an integral part of this agreement.

Thus, there are actually two contract objects that can be normatively separated from each other, namely objects in the form of money (benefit financing) and dependents for all trade obligations to KSPPS Rejo Suko Mulyo, as well as all financing settlement processes by channel partners.

For the first object, the legal subject is KSPPS Rejo Suko Mulyo with the merchant receiving the financing (which in this case is represented by the channel partner), while for the object the second legal subject is the channel partner with the merchant receiving the financing.

In this case, it appears that there is ambiguity in the definition of the second party, when viewed in the existing clauses (as will be discussed below), with the title of the agreement "*aqad qardhul hasan* between KSPPS Rejo Suko Mulyo and a trader, then the second party should be defined as a trader, it's just that in the contract the second party is often defined for channel partners (not traders who receive financing).

Apart from the ambiguity in the definition of the subject, the object of such a contract is in accordance with the characteristics of *qardhul hasan* as a principle of lending virtue without any additional costs. This institution is basically a type of full or partial financing, which is a bailout both in cash and for the procurement of goods, accompanied by an obligation to return the amount received (without any additions), with a deferred payment system or in installments, according to the agreement. Apart from that, the object in this contract is in accordance with the object of *kafalah* in Islamic law and *borgtoch* in the Civil Code, namely material guarantees from the insurer against all obligations of the recipient of financing.

Such an object is also in accordance with: (a) DSN-MUI Fatwa No: 19/DSN-MUI/IX/2000, concerning *al-Qardh* (*Qardhul Hasan*); (b) DSN-MUI Fatwa No: 11/DSN-MUI/IV/2000, regarding *Kafalah*, because the object of the guarantee (*makful bihi*), in the form of a liability for all obligations of the channel partner, can be carried out by the guarantor, is a binding receivable (common), and it is not possible to delete it unless after being paid or released, the value, amount and specifications are clear, and do not conflict with the *Shari'ah* (forbidden).

Furthermore, in another part of this contract it is determined that:

*The Qordhul Hasan financing by the FIRST PARTY to Traders Around the Campus through the SECOND PARTY as Channel Partners is solely intended for working capital and investment to increase the business of Merchants Around the Sebelas Maret University, Surakarta Campus.*

*Whereas the SECOND PARTY in relation to the business development of Merchants Around the Campus has submitted an application for financing to the FIRST PARTY which will be used to increase working capital and investment in order to increase the business of Merchants Around the Campus.*

From this clause, it can be seen that the financing disbursed by KSPPS Rejo Suko Mulyo is the object of money which is used solely for working capital and investment to increase the business of Merchants around KSPPS.

As stated above, the source of *qardhul hasan* funding at KSPPS Rejo Suko Mulyo comes from: (a) LAZNAS BSM People of Bank Syariah Mandiri (BSM). Ummah. This fund is a deposit of zakat funds from BSM Ummah in the amount of Rp. 30,000,000,- with a payback period of ten months; (b) *Qardhul Hasan* financing funds originating from Zakat, Infaq, and Shodaqoh of its customers through Baitul Tamwil.

Thus, if the object of *qardhul hasan* is related to the source of funding, it can be seen that:

#### **a. The Object of Qardhul Hasan Originating from Zakat Funds**

The object of *Qardhul hasan* in the form of money that is used solely for working capital and investment to increase business, is basically not in accordance with the zakat distribution scheme according to Islamic law, because as stated in Surat At-Taubah (9) paragraph 103: "*Take zakat of some of their property. . .*" Likewise in Surah QS. Adh-Dzariyat: 19, which emphasizes: "And in their wealth there is a right for the poor who ask and the poor who do not get a share," then it can be seen that zakat is

basically a right for the eight asnaf as mentioned in the QS AT- Taubah: 103. As is customary with rights, if the person has received it, there is no obligation for mustahiq to return the zakat.

Therefore, the distribution of zakat through the qardhul hasan scheme which emphasizes the relationship aspect (in the language of the agreement according to western law) between debtors and creditors, where mustahiq is positioned as a debtor who is obliged to return the achievements that he has received, is not in accordance with the nature of zakat which places mustahiq as a person. who are entitled to receive zakat assets from muzakki who have met the requirements in accordance with sharia.

The emergence of the zakat distribution scheme through qardhul hasan, seems to be influenced by the Fatwa of the Indonesian Ulema Council (Fatwa Commission) dated February 2, 1982, regarding Mentasharufkan Zakat Funds for productive activities and the benefit of the Ummah.

This is reinforced by Article 16 of Law no. 38 of 1999 concerning Zakat in conjunction with Article 28 of the Ministry of Religion Number 581 of 1999 concerning the Implementation of Law Number 38 of 1999 concerning Management of Zakat.

In the explanation of Article 16 92) of Law N0. 38 of 1999 it is emphasized that the eight asnaf Mustahiq are the indigent, poor, amil, convert, riqab, gharim, sabilillah, and ibnussabil, which in its application can include people who are the most economically helpless such as orphans, the elderly, people with disabilities, people who are studying, Islamic boarding schools, abandoned children, people in debt, displaced refugees, and victims of natural disasters

Based on Article 16 of Law N0. 38 of 1999 in conjunction with Article 28 of the Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999, opening opportunities for zakat to be utilized for productive businesses (which will be carried out if the distribution of zakat for eight asnaf as stipulated in Surat At-Taubah (9) paragraph 60, has been This provision is fulfilled, although on the one hand it can be based on considerations so that zakat funds can be more developed and functional. This can also be made aware of the opinion of Yusuf Qardhawi, which states, sadaqah that has a long useful life is prioritized. wider in scope, then it is more desired and prioritized by Allah SWT and His Messenger. Likewise with work that is longer and has lasting effects. Whenever an action lasts longer, the work is more important and more beloved to Allah SWT.<sup>11</sup>

It's just that when viewed from the opinion of Shaykh Taqiyyuddin An Nabhani, who stated: zakat assets are placed in a special baitul maal treasury, and are not given except for the eight asnaf (groups) that have been mentioned in the Qur'an. Not the least of the zakat assets may be given to other than the eight asnaf, both for state affairs and for the affairs of the people. The Imam (Khalifah) may give the zakat assets based on his opinion and ijtihad to anyone from among the eight asnaf. The Imam (Khalifah) is also entitled to give the property to one or more asnaf, or to distribute it among all of them,<sup>12</sup> then it will be seen that there is a discrepancy with Shaykh Taqiyyuddin An Nabhani.

### **b.Objek *Qardhul Hasan* Yang Berasal Dari Dana Infaq Dan Shadaqah**

As mentioned above, if infaq and shadaqah are defined as sincere gifts solely for the sake of Allah, then of course the giver of infaq and shadaqah will never expect that what has been infaq and shadaqah will return.

<sup>11</sup> Yusuf Qardhawi, *Fiqh Prioritas*, Sebuah Kajian Baru Berdasarkan Al-Qur'an dan As-Sunnah, Jakarta: Robbani Press, Cetakan pertama, Rajab 1416H/Desember 1996 M, hal. 35.

<sup>12</sup> M Shiddiq al-Jawi, *Merekonstruksi Sistem Kehidupan Islam (Telaah Kitab Nizham Al-Islam)*, Op. Cit. Hal 16.

However, because the distribution of infaq and shadaqah funds is carried out through an institution (KSPPS) that feels they have a mandate so that the infaq and shadaqah funds that they have managed to collect are truly useful and do not expect the funds they have received will stop, they cannot benefit people. many meanings but will only benefit those who receive them, and the use of infaq and shadaqah funds cannot be enjoyed by the recipients for a long period of time (because they are used more for meeting consumptive needs than productive), and most importantly they (the KSPPS managers) are feel that they have a mandate so that the infaq and shadaqah funds that they have managed to collect are really useful, so in order to maintain this trust, the infaq and shadaqah funds, distributed through the qardhul hasan scheme, can be justified, because as stated by Yusuf Qardhawi, the long useful shadaqah more preferred.

This is also in accordance with what has been stipulated in Article 17 of Law No. 38 of 1999 in conjunction with Article 30 of the Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999, which does not prohibit binding parties who receive infaq and shadaqah with qardhul hasan, especially considering the requirements that should be met for parties who will distribute ZIS for productive activities as which is stated in Article 29 of the Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999 which stipulates: The procedure for utilizing the results of zakat collection (including infaq and shadaqah, see article 30) for productive businesses is stipulated as follows: (a) conducting a feasibility study; (b) determine the type of productive business; (c) provide guidance and counseling; (d) carry out monitoring, control and supervision; (e) conduct evaluations, and; (f) make a report.

Apart from that, if the object of qardhul hasan is associated with activities (business fields) that can be carried out by cooperatives, it can be seen that the object of the contract is in accordance with Article 44 of Law no. 25 of 1992 in conjunction with Article 19 (1) of PP No. 9 of 1995

Based on this understanding, the qardhul hasan activity which has the object of money to be owned by the recipient of the financing as happened in the loan-use agreement (see Article 1755 of the Civil Code), is in accordance with the main activities of the Cooperative.

### **c. Rights and Obligations of the Second Party in Qardhul Hasan**

As for the rights of the second party (channel partners?) in the qardhul hasan contract are:

The SECOND PARTY is entitled to a kafalah which is a contra-interpretation or return on the financing benefits received by Merchants Around the Sebelas Maret University, Surakarta Campus for business improvement and development amounting to... of the total kafalah which is a contrapretation or return on the financing benefits received after deducting administrative costs of . ....

This clause wants to explain that both channel partners as parties who "guarantee" traders around KSPPS Rejo Suko Mulyo who have channeled financing to traders, are equally entitled to receive compensation in the form of money (which in this contract is called kafalah).

In this case, there seems to be confusion in mentioning and determining the legal subjects that should be involved in the contract. As discussed in point (a) regarding the legal subjects involved in the qardhul hasan contract, with the mention: ". . . representing Market traders ..... acting as Qordhul Hasan financing channel partners. . . ." then the legal subject and therefore referred to as the second party are the traders who receive financing from KSPPS Rejo Suko Mulyo, not channel partners.

Because the legal subject is the trader who receives the financing, the rights (and also the obligations) that should be regulated in this contract are solely the rights (and also the obligations) of the merchant receiving the financing, not the channel partner, while the channel partner who are not parties to

the agreement (and therefore should not be called the second party), their rights and obligations cannot be regulated in this contract.

However, if you look at the clause above, it turns out that what is meant by the second party is actually the channel partner, this is clearly not in accordance with the party who should be the second party in this contract.

Apart from this confusion, there is a right of channel partners as guarantors (kafiil) to receive rewards, although it is not prohibited, but there are no norms that explicitly regulate both Islamic law and positive law (Civil Code). Even if there are provisions governing the existence of compensation for parties representing other people, in the Civil Code it is contained in the power of attorney agreement (Article 1794 of the Civil Code). Apart from that, there is actually a norm that regulates the rights of this guarantor, namely the DSN-MUI Fatwa on Kafalah, which in the general provisions section stipulates that in a kafalah contract, the guarantor can receive a fee as long as it is not burdensome.

Likewise for KSPPS that distribute qardhul hasan financing, the right of KSPPS to receive rewards (kafalah), although it is not prohibited, but there are no norms that explicitly regulate both Islamic law and positive law (Civil Code). There is no such provision in the DSN MUI Fatwa regarding al-Qardh, even in the general provisions it stipulates: al-Qardh customers can provide additional (donations) voluntarily to LKS as long as it is not agreed upon in the contract.

As for the obligations of channel partners, in the qardhul hasan contract made by KSPPS Rejo Suko Mulyo, it is stipulated:

- 1) The SECOND PARTY must distribute the said financing solely in accordance with the aims and objectives as referred to in Article 1 of this Agreement.
- 2) The SECOND PARTY is not allowed to transfer the money financing in question to a Third Party and/or transfer all or part of the rights and obligations arising under this Agreement to a Third Party, without the written approval of the FIRST PARTY.
- 3) The SECOND PARTY is obliged to make periodic reports or records regarding installments and kafalah which is a contra-interpretation or return for the benefits of financing received from Merchants Around the Campus of Sebelas Maret University Surakarta and the business progress that has been achieved on the said financing.
- 4) If there is a delay in payment of installments from Merchants Around the Campus, the SECOND PARTY is obliged to bail out or close the installment obligations from Merchants Around the Campus.

If you look at the obligations of the channel partners in points a, b and c above, it shows that those who have a direct legal relationship in this contract are the first party KSPPS Rejo Suko Mulyo with the second party channel partners, this is clearly not in accordance with the determination of who is the legal subject in the contract which stipulates that the channel partner is actually acting on behalf of (for and on behalf of) the merchant receiving the financing.

Apart from this error, the obligation imposed by KSPPS Rejo Suko Mulyo to the second party (channel partner), does not have any support at all in the overall construction of the existing contract.

As is known in this contract (even though it was constructed incorrectly), there are two agreements, namely between KSPPS Rejo Suko Mulyo and the merchant who receives the financing (for the qardhul hasan contract) and between the trader who receives the financing and the channel partner (in

the kafalah contract). Thus, there is no direct legal relationship between KSPPS Rejo Suko Mulyo and channel partners.

However, in the clause that regulates the rights and obligations of the second party, it turns out that there are obligations for channel partners (to KSPPS Rejo Suko Mulyo/first party), which are not related at all to the rights and obligations between KSPPS Rejo Suko Mulyo and traders who receive financing (aqad qardhul hasan) and/or between merchants receiving financing and channel partners (aqad kafalah).

The obligations as stated in points a, b and c above, show that channel partners are "representatives" of KSPPS Rejo Suko Mulyo to distribute and withdraw qardhul hasan funds given to traders who receive financing by KSPPS Rejo Suko Mulyo. Such obligations, in fact, are more accurately constructed as an agreement to grant power of attorney between KSPPS Rejo Suko Mulyo and channel partners (as regulated in Articles 1792 – 1819 of the Civil Code). However, this matter was never directly agreed upon between KSPPS Rejo Suko Mulyo and the channel partners in this contract.

The existence of such an obligation is in accordance with the characteristics of qardhul hasan, which imposes an obligation on the recipient of the financing to return the amount received (without any additions), with a deferred payment system or in installments, in accordance with the agreement..

*Furthermore, in point (d) it is stated that:*

*If there is a delay in payment of installments from Merchants Around the Campus, the SECOND PARTY is obliged to bail out or close the installment obligations from Merchants Around the Campus.*

The clause stipulates that as guarantor (kafiiil) for all obligations of the trader receiving the financing, if the trader receiving the financing does not fulfill his obligations, the channel partner as the guarantor must fulfill these obligations. This is in accordance with the kafalah construction, where the party who bears (the guarantor / kafiiil), all obligations of the debtor (the debtor / ashiil, makfuul 'anhu), has the obligation to fulfill existing obligations if the debtor is unable to carry out the obligations as stated in the law. should be to the creditor (the party who owes / makfuul lahu). This is in accordance with Article 1820 of the Civil Code.

#### **d.First Party Rights in Qardhul Hasan**

The rights of the first party in the qardhul hasan contract are:

- (1) The FIRST PARTY has the right at any time to supervise and examine the records or books and business activities of the SECOND PARTY in connection with the financing as referred to in Article 2 of this Agreement.
- (2) The FIRST PARTY has the right at any time to stop financing in the event that the use of the financing deviates from the purposes and objectives of the financing as referred to in Article 1 of this Agreement.
- (3) The FIRST PARTY at any time based on its own considerations may decide unilaterally, for this reason the SECOND PARTY is obliged to return the remaining remaining financing along with penalties or fines due to negligence within ..... calendar days from the date of notification from the FIRST PARTY.

The rights owned by KSPPS Rejo Suko Mulyo as the first party are related to the implementation of the obligations of the second party (traders who receive financing) namely point (a) and there are

related to the responsibilities of the second party (traders who receive financing), namely points (b) and (c).

The existence of the right to (at any time) supervise and examine the recording or bookkeeping and business activities of the second party in relation to the financing that has been provided, is a manifestation of the form of supervision carried out by KSPPS to the recipient of the financing, this is relatively reasonable, because as a party who has handed over the financing to another party, feels an interest so that the financing that has been submitted is realized and managed properly in accordance with its objectives.

There is the right of KSPPS Rejo Suko Mulyo to (at any time) stop financing in the event that the use of the financing deviates from the purposes and objectives of the financing as referred to in Article 1 of this Agreement (point b), and based on its own considerations, it can decide unilaterally, for that the second party is obliged to return the remaining remaining financing along with a penalty or fine due to negligence within calendar days from the date of notification from the first party (point c)

Such rights are rights that are usually owned by a creditor if the debtor does not carry out the promised obligations, so the debtor must be responsible. Against such a clause can be described as follows:

- 1) For the rights as contained in point b, the right of KSPPS Rejo Suko Mulyo to stop the financing at any time, is a legal consequence that arises because KSPPS Rejo Suko Mulyo cancels (unilaterally) the ongoing agreement. The existence of such legal rights and consequences in the Civil Code is based on Article 1266 of the Civil Code.
- 2) If you follow what is regulated in Article 1266 of the Civil Code, it can be seen that the creditor does have the right to cancel (including terminating) the agreement unilaterally, if the debtor does not carry out his obligations, it is only what needs to be considered, such rights can be used when: (a) the agreement is a reciprocal agreement; (b) the termination of the agreement is not legally enforceable but must be requested for its cancellation to the court (This request must also be made, even though the void condition regarding non-fulfillment of obligations is stated in the agreement).
- 3) If the provision is related to *aqad qardhul hasan*, then it can be seen that it is seen from its nature as a unilateral agreement and the right of KSPPS Rejo Suko Mulyo to cancel the agreement unilaterally without going through a court, then the clause as contained in point (b) is not in accordance with Article 1266 of the Civil Code.
- 4) The existence of the right as stated in point (c), basically wants to use the same logic as point (b), except that apart from giving KSPPS Rejo Suko Mulyo the right to cancel the agreement unilaterally, then if the merchant who receives the financing defaults, the clause It also gives KSPPS Rejo Suko Mulyo the right to demand the return of the remaining financing, including a penalty or fine.

The existence of the right of KSPPS Rejo Suko Mulyo to cancel the unilateral agreement (same as the discussion in point (1) above, clearly not in accordance with Article 1266 of the Civil Code, and as a consequence it is the responsibility of the merchant who receives the financing to return the remaining financing that is still there has no legal basis at all, while the responsibility of the merchant who receives the financing is to pay the fine, as discussed above (when discussing the penalty for the *qardhul hasan* contract at KSPPS Prima Dinar, the existence of a fine stipulated in the contract as part of material law does not according to article 606a Rv/

It's just that if you look at it further, the existence of such a clause becomes relatively redundant, because if what is meant by the second party in the clause is the merchant who receives the financing (not the channel partner as contained in the other clauses), then if the merchant who receives If the financing partner does not carry out its obligations, there is no channel partner as a guarantor who will guarantee the fulfillment of the rights of the merchant who receives the financing, even if the channel partner does not carry out its obligations to guarantee (fulfill) these obligations, there is still witness III who has also promised to become guarantor of channel partners. Thus, the fulfillment of the obligations of the merchant receiving the financing should have been completely guaranteed, and there should no longer be a need for a clause as contained in points b and c.

#### **e. Breach of Contract**

In the qardhul hasan contract carried out by KSPPS Rejo Suko Mulyo, there is a clause that regulates if the recipient of the financing is in breach of contract (wanprestasi), the contents of which are as follows:

- 1) The First Party terminates this agreement unilaterally with prior written notification not later than ..... calendar days.
- 2) In the event of unilateral termination of the agreement by the first party as referred to in Article 7 paragraph 7.2 of this Agreement, the provisions as referred to in Article 5 paragraph 5.3 shall apply. this Agreement.
- 3) The FIRST PARTY has the right to unilaterally terminate this Agreement with prior written notification, not later than 7 (seven) calendar days in the event that:
  - (1) THE SECOND PARTY does not fulfill its obligations under this Agreement.
  - (2) THE SECOND PARTY shall use the said financing outside of the purposes and objectives as referred to in Article 1 of this Agreement.
  - (3) THE SECOND PARTY provides untrue information which may harm the FIRST PARTY in connection with the said financing.
  - (4) THE SECOND PARTY has been imposed a fine or penalty due to negligence as referred to in Article 9 of this Agreement.
  - (5) THE SECOND PARTY transfers the said financing to a Third Party and/or transfers all and/or part of the rights and obligations under this Agreement to a Third Party, without the written approval of the FIRST PARTY.
  - (6) If there is a delay in the payment of the financing installments and/or kafalah as a contrapretation or return of the financing benefits, the SECOND PARTY will be subject to a fine of 1% (one percent) of the remaining principal financing..

The above clause is basically intended to determine the forms of default from the second party along with the legal consequences that arise (the responsibility that must be borne by the second party). It's just that since the beginning there has been confusion about who exactly is meant by the second party in this contract, then in this clause the confusion is repeated again. The clause contains mixed forms of default from traders who receive financing (points c: 1, 2, 3 and 4) with channel partners point c: 5).

Regardless of the ambiguity, if it is seen that the forms of default of the merchant receiving the financing as stated in the clause, it can be described as follows: :

- (1) If the SECOND PARTY does not carry out (pay) the principal installments of financing and/or kafalah
- (2) THE SECOND PARTY does not fulfill its obligations under this Agreement.
- (3) THE SECOND PARTY shall use the said financing outside of the purposes and objectives as referred to in Article 1 of this Agreement.
- (4) THE SECOND PARTY provides untrue information which may harm the FIRST PARTY in connection with the said financing.
- (5) If there is a delay in payment of installments of financing and/or kafalah

The form of default in points a and b, is in accordance with the form of default according to R. Subekti, namely not doing what he is promised to do. The form of default in points c and d, is in accordance with the form of default according to R. Subekti, namely doing something that according to the agreement is not allowed to be done, while the form of default in point e, is in accordance with the form of default according to R. Subekti, namely doing what was promised but late.

Meanwhile, the form of default from channel partners, as stated in the clause is:

*The SECOND PARTY transfers the said financing to a Third Party and/or transfers all and/or part of the rights and obligations under this Agreement to a Third Party, without the written consent of the FIRST PARTY.*

This form of default is in accordance with the form of default according to R. Subekti, namely doing something that according to the agreement is not allowed to be done.

As a legal consequence of default: for traders who receive financing if they default as mentioned in points a, b, c and d, while for channel partners who default as mentioned above, KSPPS Rejo Suko Mulyo has the right to unilaterally terminate the agreement.

As mentioned above, the right of KSPPS Rejo Suko Mulyo to unilaterally terminate this agreement is based on Article 1266 of the Civil Code. It's just that when viewed from the nature of the qardhul hasan agreement which is a one-sided agreement and the right of KSPPS Rejo Suko Mulyo to cancel the agreement unilaterally without going through a court, then the clause that regulates the legal consequences of default of the merchant who receives the financing and the channel partner is not in accordance with Article 1266 of the Civil Code.

As for the legal consequences that arise due to delays in payment of financing installments and/or kafalah from merchants who receive financing, in the form of imposition of a fine of 1% (one percent) of the remaining principal financing, this is not in accordance with article 606a Rv.

In Islamic law itself regarding sanctions or fines is allowed as long as the sanctions are based on the principle of ta'zir, which aims to make customers more disciplined in carrying out their obligations. Sanctions in Islamic law can be in the form of a fine of a sum of money, the amount of which is determined on the basis of the agreement and made when the contract is signed. This is in accordance with the rules of fiqh, which states::

أَلْأَصْلُ فِي الْمُعَامَلَاتِ الْإِبَاحَةُ إِلَّا أَنْ يُدَلَّ دَلِيلًا عَلَى نَعْرِيمِهَا

#### **f. Force Majeure ( Overmacht)**

In the qardhul hasan contract carried out by KSPPS Rejo Suko Mulyo, there is a clause that regulates in the event of a force majeure, the contents of which are as follows:

- 1) The FIRST PARTY and the SECOND PARTY are each released from responsibility for any delay or failure in carrying out obligations under this Agreement due to circumstances/events or other matters beyond the reasonable control of the Party concerned, which is usually called Force Majeure.
- 2) What is meant by Force Majeure conditions according to this agreement are among others: earthquakes, floods, fires, epidemics, civil wars, riots, blockades, and regulations issued by the government which are directly related to the implementation of this agreement.
- 3) In the event of a Force Majeure, the SECOND PARTY is obliged to notify the FIRST PARTY in writing no later than within...
- 4) Upon notification of the SECOND PARTY, the FIRST PARTY will agree or reject in writing the force majeure situation within a period of no later than ..... since the notification is received by the FIRST PARTY.
- 5) If the Force Majeure situation is rejected by the FIRST PARTY, the SECOND PARTY is obliged to continue the implementation of the agreement in accordance with the terms and conditions of this Agreement.
- 6) If the Force Majeure situation is accepted by the FIRST PARTY, a negotiation will be carried out on the schedule for the payment of the financing installments along with fines or penalties due to negligence.

The clause that regulates force majeure mentioned above, shows that there is confusion, in the first part it is stipulated that in the event of force majeure then "the first party and the second party are each freed from responsibility for any delay or failure in implementation", but in this part of the clause it is stipulated that: "negotiations will be carried out on the schedule for the implementation of financing installment payments along with fines or penalties due to negligence." Thus, in the same clause, two different consequences are defined.

Regardless of the ambiguity, based on the contract, it can be seen that the determination of the presence or absence of force majeure as defined in the contract itself was ultimately determined by KSPPS Rejo Suko Mulyo.

With this force majeure (in the sense that if the force majeure proposed by the second party is accepted by the first party), then the legal consequences will be negotiations on the schedule for the implementation of financing installment payments along with fines or penalties due to negligence (or each of them is released from responsibility).

In the civil law code, coercive circumstances are regulated in articles 1244 and 12445. The basis for the legislators are: Forced circumstances are a reason to be released from the obligation to pay compensation.<sup>19</sup> According to Subekti, in order to be said to be a coercive situation (*overmacht*), in addition to that situation, outside of the debtor's control and coercion, the situation that has arisen must also be in the form of a condition that could not be known or could not be predicted at the time the agreement was made.<sup>20</sup>

The *overmacht* provisions contained in Article 1244 jo 1245 of the Civil Code apply to unilateral agreements. Thus, if the clause contained in the qardhul hasan contract is associated with existing norms, it can be seen that the events defined as force majeure in the contract have been in accordance with what is stipulated in Article 1244 in conjunction with 1245 of the Civil Code.

<sup>19</sup> Subekti, *Loc., Op Cit*, hal 55

<sup>20</sup> Subekti, *Pokok – Pokok Hukum Perdata*, P. T Intermedia, Jakarta; 1985, hal. 155

As for the legal consequences that arise from the force majeure, namely: negotiations will be carried out on the schedule for the implementation of financing installment payments along with fines or penalties due to negligence or each of them is released from responsibility.

As for the legal consequences, theoretically it will depend on the type of force majeure, if the force majeure is permanent, then with the force majeure the agreement is automatically terminated, and the parties return to their original state, because in a permanent overmacht, the agreement is not can be carried out forever and at any time the fulfillment of achievements is no longer possible, therefore the most logical consequence is the abolition of the agreement. Meanwhile, if the force majeure is temporary, the legal consequences will only be and are to delay the implementation of the fulfillment of the agreement. If the force majeure situation has disappeared, the debtor is required to return to carry out the pending obligation. Thus, temporary force majeure does not annul the agreement, but delays the implementation of the agreement.<sup>13</sup>

Thus the legal consequences stipulated in this qardhul hasan contract, namely the negotiation of the schedule for the implementation of financing installment payments along with fines or penalties due to negligence, is only appropriate if the force majeure that occurs is temporary, but if the force majeure is permanent, then the legal consequences that is not in accordance with the existing doctrine.

#### **g. Dispute Resolution**

In the contract made by KSPPS Rejo Suko Mulyo, it is stipulated,

*If there is a dispute in the implementation of this agreement, basically it will be resolved by deliberation.*

*If the dispute cannot be resolved amicably by both parties, then both parties agree to resolve the dispute through the Surakarta District Court.*

The settlement as stated in the contract is a pattern that is usually followed, for the disputing parties in Indonesia. It's just that this provision is not in accordance with the MUI DSN Fatwa on Qardhul Hasan, which stipulates: If one party does not fulfill its obligations or if there is a dispute between the parties, then the settlement is carried out through the Syari'ah Arbitration Board after no agreement is reached through deliberation..

### **Conclusions and Recommendations**

#### **1. conclusion**

The patterns of legal relationships that occur in financing activities through Qardhul Hasan, at KSPPS Prima Dinar and KSPPS Rejo Suko Mulyo, are as follows:

- a. The norms used to regulate legal subjects in the overall financing carried out, seen from the perspective of the laws and regulations governing cooperatives are in accordance with positive law. It's just that the clause that regulates the subject who receives financing in the qardhul hasan contract at KSPPS Rejo Suko Mulyo, although in accordance with the MUI DSN Fatwa regarding Kafalah and borgtoch (individual guarantees) as regulated in Articles 1820 – 1850 of the Civil Code, but relatively not in accordance with the power of attorney agreement in the Civil Code

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<sup>13</sup> Ibid.

- b. The norms used to regulate legal objects are generally in accordance with the Fatwa of the DSN MUI of the national sharia board
- 1) For the object of qardhul hasan at KSPPS Prima Dinar which originates from zakat funds and comes from infaq-shadaqah funds and is used for productive purposes, it is in accordance with the Fatwa of the Indonesian Ulema Council (Fatwa Commission) dated February 2, 1982, concerning Mentasharufkan Zakat Funds for productive and The benefit of the Ummah, as well as positive law.
  - 2) There is confusion in determining the object of qardhul hasan at KSPPS Rejo Suko Mulyo, this is due to an error in determining who is actually the subject of this contract. However, the determination of the object in this aqad is in accordance with the characteristics of qardhul hasan and the MUI DSN Fatwa on Qardhul Hasan and kafalah in Islamic law, borgtoch in the Civil Code and the MUI DSN Fatwa on Kafalah.
- c. The norms used to regulate the rights and obligations of the recipients of financing in the entire contract in the two KSPPS, are in accordance with the DSN fatwa. The obligation of the recipient of financing in the qardhul hasan contract at KSPSS Prima Dinar is in accordance with Article 1763 of the Civil Code. However, there is confusion in determining what are the rights and obligations of the recipient of the financing in the qardhul hasan contract contained in KSPPS Rejo Suko Mulyo, this is due to an error in determining who is actually the subject of this contract, so that in the contract This includes rights and obligations that are not directly related to this contract.
- d. The norms used to regulate the rights of KSPPS are in accordance with the DSN MUI fatwa, only the inclusion of the right from KSPPS to cancel the agreement unilaterally if the recipient of the default is not in accordance with Article 1266 of the Civil Code, as well as the clause that stipulates rights. BMT to demand the return of the remaining financing that is still there along with a penalty or fine. Not in accordance with article 606a Rv.
- e. . The norms used to regulate the delivery of collateral are in accordance with the DSN MUI Fatwa and positive law. It's just that the norms in the positive law above basically refer more to the provisions governing banking activities, which contain very thick elements contained in the borrow-to-use agreement rather than syirkah/partnership.
- f. The norms used to regulate breach of contract are in accordance with Islamic law and positive law, only the clause governing breach of contract in the qardhul hasan contract contained in KSPPS Rejo Suko Mulyo, in addition to showing regulatory confusion caused by the existence of an error in determining who is actually the subject of the contract, is also not in accordance with Article 1266 of the Civil Code and Article 606a Rv.
- g. The norms used to regulate legal remedies that can be taken by KSPPS if the recipient of the default is in accordance with positive law.
- h. The norms used to regulate legal remedies and dispute resolution in general are in accordance with applicable norms and the fatwa of DSN MUI.

## **2. Recommendation**

The existence of KSPPS with various sets of norms that regulate it has its own characteristics that are relatively different from business entities that have been known in Indonesia. This difference is mainly due to the norms underlying the formation of KSPPS to regulate aspects of its business activities referring to Islamic law rather than positive law (which refers to western civil law). Thus, it is necessary

to consider accommodating Islamic legal norms into Indonesian positive law to regulate the institutional aspects and business activities of KSPPS.

### References

- Bahtiar Effendy. *Islam dan Negara : Transformasi pemikiran dan Praktik Politik Islam Di Indonesia*. Jakarta : Penerbit Paramadina dan Yayasan Ibn Sina. 1998.
- CST. Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia*, Balai Pustaka, Jakarta, 1998
- Ichtianto, S.A. 1994. *Pengembangan Teori Berlakunya Hukum islam di Indonesia*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia : Perkembangan dan Pembentukannya*. Cet kedua. Bandung : Remaja Rosdakarya
- Lestiadi, Suhadi *et. al.* 1998. *Panduan Unit Usaha Simpan Pinjam Syariah*. Jakarta : Departemen Koperasi Pengusaha Kecil dan menengah dan Bank Muamalat Indonesia.
- Manan, Bagir. 1994. *Peranan Peradilan Agama dalam Pembinaan Hukum Nasional*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia : Pemikiran dan Pratek*. Cet kedua. Bandung : Remaja Rosdakarya.
- Perwataatmadja, Karnaen A. dan Muhammad Syafi'i Antonio. *Apa dan Bagaimana Bank Islam*. Yogyakarta : Dana Bhakti Wakaf;
- Perwataatmadja, Karnaen A. 1993. *Peluang dan Strategi Bank Tanpa Bunga Dengan Sistem Bagi Hasil Dalam Bisnis perbankan Di Indonesia*. Dalam Hamid Basyaib dan Mursyidi Prihantono (Ed.). *Bank Tanpa Bunga*. Yogyakarta : PT Mitra Gama Widya.
- Ramulyo, Idris. 1985. *Beberapa Masalah tentang Hukum Acara Perdata Peradilan Agama dan Hukum Perkawinan Islam*. Jakarta : Ind – Hill, Co
- Riyadi, Agung. 1997. *Koperasi Baitul Maal wat-Tamwil Sebagai Format Lembaga Ekonomi Usaha Kecil*. Tesis Program Studi Ilmu Ekonomi dan Studi Pembangunan Jurusan Ilmu-Ilmu Sosial. Program Pasca Sarjana Universitas gadjah Mada Yogyakarta. Tidak dipublikasikan.
- Salman, Otje . 1993. *Kesadaran Hukum Masyarakat terhadap Hukum Waris*. Bandung : Alumni
- Sjadzali, Munawir. 1994. *Landasan Pemikiran Politik Hukum Islam dalam Rangka menentukan Peradilan Agama di Indonesia*. dalam Tjun Surjaman (Ed.). *Hukum Islam di Indonesia : Pemikiran dan Pratek*. Cet. Kedua. Bandung : Remaja Rosdakarya,
- Soepomo (I). *Sistem Hukum di Indonesia : Sebelum perang Dunia II*. Cet. Ketigabelas. Jakarta : Pradnya Paramita. 1988.
- Soepomo (II). 1982. *Sejarah Politik Hukum Adat : Jilid I (Dari Zaman Kompeni Sehingga Tahun 1848)*. Cet. Kedua. Jakarta : Pradnya Paramita. 1982.
- Soepomo (III). 1982. *Sejarah Politik Hukum Adat : Jilid I (Masa 1848 – 1928)*. Cet. Kedua. Jakarta: Pradnya Paramita.
- Subekti, *Pokok – Pokok Hukum Perdata*, P. T Intermedia, Jakarta; 1985, hal. 155



Thalib, Sajuti. 1985. *Receptio A Contrario : Hubungan Hukum Adat dengan Hukum Islam*. Jakarta: Bina Aksara

Yusuf Qardhawi, *Fiqh Prioritas*, Sebuah Kajian Baru Berdasarkan Al-Qur'an dan As-Sunnah, Jakarta: Robbani Press, Cetakan pertama, Rajab 1416H/Desember 1996 M

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