



Necessity of Regulation Governing the Establishment of Sharia-Based Cooperative Insurance Agency in Case of Bankruptcy

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Abstract

The data of the Ministry of Cooperative and Micro, Small, and Medium Enterprises (MSMEs) on 31 December 2021 reported that there were 27,100,372 cooperatives, with active cooperatives accounting for 127,846 and inactive ones representing 47,115. Inactive cooperatives leave implications on the members as the creditors in terms of bankruptcy in cashing money of the members of cooperatives. This research aims to study the regulation concerning a deposit insurance agency for sharia-based cooperatives and the concepts of a deposit insurance agency for sharia cooperatives not specifically outlined in law Number 25 of 1992 concerning Cooperatives. The establishment of a deposit insurance agency guaranteeing the existence of sharia cooperatives is inevitable, and the establishment of this insurance organization is deemed urgent, which takes into account the revision of laws concerning cooperatives by assigning a deposit insurance agency to guarantee cooperatives.

Keywords: *Deposit Insurance Agency; Sharia Cooperative; Bankruptcy; Indonesia*

A. Introduction

Human beings in living their life are always inseparable from all aspects of life, recalling that humans need materials to support their physical demands.¹ Cooperatives in the Indonesian economy play an essential role and are positioned in a determining position in changing course and growing the economy of the people of Indonesia.² Conventional cooperatives perform functions similar to those of

¹ Arie S Hutagalung, *Condominium dan Permasalahannya*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 1998, hlm 2.

² Agustia Tuti. Kusnadi Nunung. Harianto. "Studi Empiris Perilaku Usaha Koperasi: Kasus Koperasi di Dataran Tinggi Gayo Provinsi Aceh" *Jurnal Manajemen & Agribisnis* Vol. 14 No. ,1 (Maret 2017): 12

sharia-based saving and loan cooperatives that are simultaneously backed up by cooperative services. The slight difference is that these cooperatives comply with sharia rules.³

The 1945 Constitution of the Republic of Indonesia (henceforth referred to as the Constitution) serves as the highest rule within the hierarchy of legislation in Indonesia. In addition to its role as a political constitution, the Constitution also serves as an economic constitution. Article 33 of the Constitution is the fundamental framework for economic development policies, intended to reach social justice and general welfare as mandated in the Constitution.

The Constitution is also referred to as an economic constitution because Article 33 of the Constitution mentions the following:

“Article 33

- (1) The economy is to be structured as a common endeavor based on familial principles.*
- (2) Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state.*
- (3) The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people.*
- (4) The organization of the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy.*
- (5) Further provisions regarding the implementation of this article are to be regulated by law”⁴*

The above provisions indicate that all efforts either done individually or collectively uphold familial values, not only for the sake of the welfare of individuals but also for the prosperity of all.

Along with the current development, both conventional and sharia-based cooperatives in Indonesia are quite lucrative. This is obvious because the number of cooperative members as of 31 December 2021 reached 27,100,372, with active cooperatives accounting for 127,846. This development also indicates that Indonesian citizens understand and are aware of the essence of cooperatives in developing individuals and the population as a whole and in participating in economic development for the people according to the principle of justice and welfare for all people as mandated by *Pancasila*.

The data issued by the Ministry of Cooperatives and MSMEs of the Republic of Indonesia reported that both conventional and sharia cooperatives in Indonesia increased in number every year, reaching 27,100,372 cooperatives all over 35 regions in Indonesia on 31 December 2021. This number represents a 3.31% increase from the number in the previous year. This increase also represents support to the national economy.⁵

This growth is not without issues coming from either internal or external factors, where some cooperatives had to face close down due to bankruptcy. Bankruptcy is understood as a process where cooperatives as debtors face difficulties paying back loans, and this situation leads to the declaration of bankruptcy given by a court following charges filed by the parties concerned. Such financial difficulties can be caused by economic failure, where the income of the companies cannot cover the total cost.

³ Nur S Buchori, *Koperasi Syariah Teori dan Praktok* (Tangerang Selatan: Pustaka Aufa Media, 2012), hlm.3.

⁴ Pasal 33 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

⁵ Kementerian Koperasi dan UKM Republik Indonesia, *Rekapitulasi Data Koperasi Per 31 Desember*, (Jakarta: Kemenkopukm 25 Januari 2022), Artikel diakses pada 12 januari 2022 dari Kementerian Koperasi dan Usaha Kecil dan Menengah-kemenkopukm.go.id

Business failure brings the cooperatives concerned to a halt due to bankruptcy. Technical insolvency is the situation of failing to fulfill the responsibility to pay the payable loans, while insolvency in bankruptcy is defined as a situation where the amounts of debts exceed the asset value. Moreover, legal bankruptcy is defined as a situation where one is legally bankrupt and has been charged for bankruptcy under the law concerned.

Bankruptcy in cooperatives is inseparable from internal and external factors given as follows:

First, the bankruptcy faced by Sharia cooperative Yassalam is caused by a lack of knowledge and skill in managing the business, dealing with non-performing loans, capital issues, difficulties in obtaining the needed materials, and less potential locations, while reviving the cooperative may require communication and discussion with other business owners who once had a similar experience. Another measure that can be taken may involve the involvement of professionals as the third party, business aid from the regional governments, and the recruitment of new and competent employees. In other words, such a failure is probably caused by the lack of effective business concepts, which may lead to less optimal business management.⁶

Second, the sharia-based saving and loan cooperative BMT Fi Sabilillah failed to cash the deposit of the members, contrary to the agreement made by the two parties. The cooperative ensured its members that the money would be paid back soon after it received financial backup from other parties. The cooperative was found to have more than one creditor, and some creditors are liable to payable debt from which the deposits of the members can be cashed and paid.⁷

Third, BMT Bina Ekonomi Umat faces bankruptcy due to a lack of proper management, improper financial reports, expenses not relevant to the planning set, huge amounts of expenses paid to *mudharib*, insufficient funds to keep the business running, poor market conditions, low public purchasing power, unfair loan services, and too demanding government policies.⁸

The above factors show that the issues of bankruptcy faced by cooperatives often come from insufficient resources necessary to keep the business running. Most bankruptcy cases elaborated on above have often been caused by poor management and poor business elements. Moreover, Law Number 25 of 1992 under which sharia cooperatives are governed does not govern the deposit insurance agency in cooperatives, unlike in banking. In conventional banking, deposit insurance matters are governed by Law Number 24 of 2004 concerning Deposit insurance agencies.

The increasing number of cooperatives that went bankrupt and stopped operating put the cooperative members in jeopardy since they cannot claim the return of the deposit following the closedown. Law Number 25 of 1992 concerning Cooperatives covers 16 sections and 67 articles, none of which mentions the establishment of an insurance agency that guarantees sharia and conventional cooperatives, spoiling the trust of the public, considering that there is no legal protection that guarantees the safety of deposit in cooperatives.

⁶ Agustine, "Faktor-Faktor Yang Menyebabkan Kegagalan Koperasi Syariah Yaa Salam", Skripsi Universitas Islam Negeri Syarif Hidayatullah 2016, hal.5

⁷ Dewi Jamilah, "Hak Pekerja Dalam Proses Kepailitan dan Penyelesaiannya pada KSP Syariah BMT Fi Sabilillah Wonogiri Perspektif Hukum Islam", Skripsi Universitas Islam Negeri Walisongo Semarang 2020, hal 7.

⁸ Izzatul Athiyah, "analisis Pengembalian Dana Anggota Dalam Keadaan Pailit Di BMT Bina Ekonomi Umat Kecamatan Sedan Kabupaten Rembang", Skripsi Sekolah Tinggi Agama Islma Negeri Kudus 2016, hal IX.

Cooperatives have to be made responsible to pay back their members in different ways especially when they are dismissed, liquidated, or declared bankrupt, and paying back the deposits can be performed according to Article 54 of law Number 25 of 1992 concerning Cooperatives:

“Using the rest of the asset to pay back those who have helped as promised”

This helped the creditors when they expected their deposits to be returned by the cooperatives. In conventional banking, speculative shares as a banking program for banks were performed by the deposit insurance agency and Micro Finance (LPS-LKM) in 2004, where the deposits were insured to cover the loss caused by the debtors, and clients would receive compensation worth Rp. 2,000,000,000 (two billion rupiahs) back in 2004 under Law Number 24 of 2004 concerning the Deposit insurance agency, and the certificate/Rp. 100,000,000 was given to every client. This policy was amended in 2008 when the mortgage value for bank clients rose to Rp. 2,000,000,000.

If the cooperatives are bankrupt, the bankruptcy could be filed to be declared as an alternative resolution to the financial issues faced by the cooperatives. The state of being incapable of paying back the debts can be reached through the charges filed to the court.⁹ That is, there is a legal loophole in Cooperative Law regarding the essence of a sharia cooperative insurance agency in case of bankruptcy.

B. Discussion

1. The Necessity of Regulation governing the Establishment of Insurance Organization for Sharia Cooperatives

The concept of saving and loans provided by sharia-based cooperatives in Indonesia was initiated with the emergence of sharia-based banks and sharia-based non-bank organizations (sharia cooperatives). Regarding this issue, the context of saving and loans complies with sharia law agreed upon by Fiqh Ulama. In performing its role, the organization dealing with saving and loans mainly refers to the principle of justice and preventing usury or personal gain practices or benefit gain for a certain group of people. It has been observed that sharia-based saving and loan cooperatives always aim to grow the economic potential of the members by expanding partnership networks to give access to self- or business development. Saving and loan cooperatives, according to Article 19 Paragraph (1) of Government Regulation Number 9 of 1995 concerning Saving and Loan Activities supported by Cooperatives (henceforth referred to as Gov Reg 9/1995), aim to raise funds from and provide loans for the members, candidates, other cooperatives and their members. The funds provided by cooperatives help people meet their daily needs. That is, being members of cooperatives can give them access to financial aid to help set up their businesses through the loan service.

Principally, loans are provided by cooperatives to those who are financially capable of paying back the debts under a debt contract between a creditor and a debtor.¹⁰ Providing loans by cooperatives complies with the provisions outlined in Article 19 Paragraph (2) of Government Regulation Number 9 of 1995, requiring the cooperatives that provide saving and loan services to consistently adhere to the principle of healthy loan provision by taking into account the appropriateness and financial capability of debtors. To find out this appropriateness, cooperatives are required to assess the characteristics, capacity, capital, collateral, and prospect of the businesses run by the clients.

⁹ Nyoman Ratih Kemala Sandy, Ni Gusti Ayu Dyah Satyawati, “Implikasi Hukum Pembubaran Koperasi Yang Diputus Pailit”, *Journal Ilmu Hukum*, ISSN 2303-0569 Vol 6, No 10, May 2018, hal. 3.

¹⁰ Gunawan Widjaja dan Ahmad Yani, 2000, *Jaminan Fidusia*, PT. Raja Grafindo Persada, Jakarta, h.1

Providing loans under the contract agreed upon by both parties could hold the two parties liable for rights and responsibilities. Cooperatives are held liable for giving amounts of money agreed by the two parties, and this money must be returned along with interest by the time outlined in the contract.

A credit contract is governed by Article 1313 of the Civil Code highlighting an action done by a person or more to bind themselves to another person or more. The contract set between the two parties is outlined in a stamped underhand deed binding for the two parties. The loans rely on trust, causing growing concern among cooperatives, in which there is a likelihood of insolvency.

To reduce this risk, sharia-based saving and loan cooperatives should apply good governance by implementing healthy loan provisions for the members, as governed in Article 19 Paragraph (2) of Government Regulation Number 19 of 1995, stating:

“Saving and loan cooperatives or units must assess the financial capability and appropriateness of the debtors before providing loans. How this assessment is delivered is elaborated in Article 19 Paragraph (3) of the Regulation of the Minister of Cooperatives and MSMEs of the Republic of Indonesia Number 19/K.MUKM/IX/2008 concerning Guidelines of Saving and Loan Provision by Cooperatives, stating that providing loans must be preceded by assessments of the clients regarding their characteristics, financial capability, capital, mortgage, and the prospect given by the chiefs of cooperatives”

Problems are inevitable for sharia cooperatives. There are internal and external factors causing issues faced by the heads of cooperatives. The internal factors are represented by problems arising inside the cooperatives, or the management in charge of the cooperatives, coordinators, or staff involved in the cooperative management. The internal factors are elaborated in the following:

- a. Weak policies governing loan provision
- b. Problems in the signing of the documents, archiving and cashing
- c. Poor training and supervision

In addition, external factors causing the problems involve the following:

- a. Natural disaster

A natural disaster is unplanned and unexpected, such as an earthquake, flood, volcanic eruption, storm, and so forth.

- b. Inconsistent economic conditions

These unstable conditions may result from the changing government policies including devaluation or energy crises that cause problems for debtors

- c. War

War is the destruction caused by humans

- d. Technology development

Cutting-edge technology may contribute to the problems where businesses utilizing technology will be more competitive, leaving behind the debtors that still adhere to conventional ways, and it slows down their income.¹¹

Those internal and external factors may lead sharia-based cooperatives concerned to face bankruptcy and close down. Article 54 and 55 of Law Number 25 of 1992 concerning Cooperatives explains:

Article 54 of Law Number 25 of 1992 concerning Cooperatives

“Cooperatives have the following rights, authorities, and responsibilities:

- a. Taking all legal actions for and in the name of cooperatives “cooperatives in resolution”;
- b. Obtaining all information needed;
- c. Summoning coordinators, members, and particular former members, either individually or collectively;
- d. Obtaining, assessing, and referring to records and archives available in cooperatives;
- e. Setting and implementing all the prioritized payments and other debt payments.
- f. Using the rest of the assets of cooperatives have to settle the problems;
- g. Returning the surplus to the members;
- h. Drafting declaration of events.”

Article 55 of Law Number 25 of 1992 concerning Cooperatives:

“In terms of the dismissal of a cooperative, its members are held liable to initial deposit, compulsory deposit, and participation of equity owned”.

The above factors indicate that the involvement of insurance organizations for sharia-based cooperatives is highly necessary, considering that sharia cooperatives are protected under Law Number 25 of 1992 concerning Cooperatives. This law does not elaborate on the matters of the deposit insurance agency like those in banking activities, while such an agency has been existing and is governed by Law Number 24 of 2004 concerning Deposit Insurance Agency. Breach of contract by the debtors or creditors is also governed by this law. Cooperatives, therefore, are required to run good corporate governance to anticipate the return of the funds to the members and to prevent any likelihood of dismissal, liquidation, or bankruptcy declared by authorities or other consequences that may affect the health of cooperatives and to assure the trust of the members.

2. The Conceptualization of Insurance Organization for Sharia Cooperatives

Law is an institution aiming to assure justice, welfare, and happiness for the people.¹² National law is made, constructed, and developed to maintain the social life in Indonesia. National law is intended to engineer all aspects of the life of the people.¹³ Therefore, the construction of law is a never-ending endeavor to encourage improvement for the sake of justice, welfare, and happiness for the people. This is closely related to all aspects of the development of national law, especially the deposit insurance agency for sharia cooperatives. The national law comes with the legislation made and enforced to gain fundamental objectives and the concept of the law of a state.¹⁴ In this context, therefore, the construction

¹¹ Edy Putra Tje'Aman, *Kredit Perbankan Suatu Tinjauan Yuridis*, Liberty, Yogyakarta, hal 185.

¹² Sadjipto Rahardjo, *Hukum Progesif Sebuah Sintesa Hukum Indonesia*, (Yogyakarta: Genta Publishing, 2009), Hlm.2

¹³ Soetandyo Wignjosobroto, *Hukum-Paradigma, Metode dan Dinamika Masalah*, (Jakarta: Elsam dan Huma, 2003), Hlm.173.

¹⁴ Moh. Mahfud MD, *Membangun Hukum Menegakan Konstitusi*, (Jakarta, Rajawali Press, 2010), Hlm.21

of national law must comply with Pancasila and the Preamble of the Constitution as the sources of national law.

The making of legislation concerning deposit insurance agencies for sharia cooperatives must comply with Pancasila and the Constitution as the bases that bring the welfare for all people in Indonesia. Every law is positioned as an instrument of state goals.¹⁵ The founding fathers, as in the Constitution, suggested that the government protect the whole people of Indonesia and the entire homeland and advance general prosperity for the people of Indonesia to form a state. Soenarjati Hartono, as cited by R Soeroso, argues that comparative law is a method of investigation and it does not represent a branch of knowledge as most people have thought.¹⁶ On the other hand, R Soeroso argues that comparative law is the branch of knowledge of law using a comparative method to find proper solutions to concrete legal problems.¹⁷

Safety assurance in a financial system is the priority for the state to allow for trust building regarding the funds deposited in both conventional and sharia cooperatives. The existence of the regulations concerning deposit insurance agencies for sharia cooperatives will surely leave positive influences on the stability of the financial system and assure the safety of those depositing their funds. The existence of a deposit insurance agency has so far been focused on banking and it has not fit other lending activities. Article 1 point 8 of Law Number 24 of 2004 concerning Deposit insurance agencies states that this guarantee is performed by a deposit insurance agency for the deposited funds of the clients in a bank.

This regulation is intended to give a sense of safety to the clients regarding the funds deposited in a bank. This law is also intended to prevent a bank run. The establishment of a deposit insurance agency is intended to assure the safety of the deposit of the clients and to actively maintain the stability of banking systems according to their authority. The scope of the Deposit Insurance Agency Law that is only limited to banks has left non-bank companies off the radar. The amount insured by the organization has changed from Rp. 100,000,000 (one million rupiahs), according to Article 11 Paragraph (1) of the Law concerning Deposit insurance agencies, to Rp. 2,000,000,000 (two billion rupiahs) according to Article 11 of Government Regulation in Lieu of Law Number 3 of 2008 concerning Amendment to Law Number 24 of 2004 concerning Deposit insurance agencies. This change departed from the financial crises that take place globally which could affect the stability of the national financial system, and this change could boost the trust of the people in banking.

This shifting amount is the highest among other Asian countries, exceeding Singapore, Malaysia, and Thailand. The amount of deposit covered by insurance in Singaporean banks is Rp. 500,000,000 (five million rupiahs), Malaysia Rp. 200,000,000 (two million rupiahs), and Thailand. To date, Cooperative Law has not established a deposit insurance agency for cooperatives, and this condition has raised concern among creditors depositing their funds and the members of cooperatives. Article 51 of Law Number 25 of 1992 concerning Cooperatives implies that for the interest of creditors and members of cooperatives, cooperative dismissal may take place, and Article 54 of the Law concerning Cooperatives states that the problem solvers will use the rest of the asset of the cooperatives to pay off the rest of payable debt.

The problem-solving mentioned above does not cover all the risks of uncertainty that may lead to loss that both the creditors and the members of cooperatives have to face. Cooperative Law that has not set any compensation over unexpected matters is inextricable from the likelihood of bankruptcy,

¹⁵ Moh. Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: Rajawali Press, 2010) Hal. 2

¹⁶ R. Soeroso, *Perbandingan Hukum Perdata* (Jakarta: Sinar Grafika, 2014) Hlm.5

¹⁷ *ibid*

liquidation, and dismissal of cooperatives. Dismissal, liquidation, and bankruptcy of cooperatives just put the creditors and the members at risk, and this concern urges the government to provide protection and guarantee of returning the deposits paid by the clients in the cooperatives that are insolvent.

Moreover, Article 54 and Article 55 of Cooperative Law do not outline protection and security to creditors and members of cooperatives in case of liquidation and bankruptcy, recalling that these articles highlight the prioritized payments other than debt payments, and they also outline that the dismissal of cooperatives will make the members lose their compulsory deposit and the capital.

On the other hand, in the microfinance organization, a deposit insurance agency is specifically established to provide services supporting business development and community empowerment in the scope of loans or lending at the scale of micro businesses to the members and public, deposit management, or consultation services regarding business development that is not profit-oriented. A microfinance organization can cover business activities including business development services and community empowerment by providing loans or lending services for micro-scale businesses for the members or public, deposit management, or consultation service regarding business development. A micro-finance organization will face problems in the future, and this condition will certainly affect the trust of the clients in micro finances. Therefore, to guarantee the deposit in micro finances, regional governments and/or Micro Finances can establish a deposit insurance agency for micro finances.

With the comparisons made above, some discourses regarding the establishment of insurance organization for cooperatives are under the authority of Deposit insurance agency, while it is commonly known that deposit insurance agency only deals with the funds of clients in conventional, sharia, or rural banks. Thus, if the authority of the insurance program for cooperatives is transferred to a deposit insurance agency, an amendment should be made to law Number 24 of 2004 concerning Deposit insurance agencies. Another option is to amend Law Number 25 of 1992 concerning cooperatives in providing security for creditors or taking part in providing prosperity for the members and the development of the national economy.

C. Conclusion

1. The regulation regarding the existence of a deposit insurance agency for conventional or sharia-based cooperatives is not outlined in Law Number 25 of 1992 concerning Cooperatives, and Chapter X Article 46 to Article 50 do not elaborate on the protection of creditors. Moreover, Law Number 24 of 2004 concerning Deposit insurance agencies does not outline how this deposit insurance agency is intended for the clients of conventional, sharia, and rural banks.
2. A deposit insurance agency for conventional/sharia cooperatives does not exist. To protect creditors in cooperatives, this matter only refers to Article 54 and Article 55 of Law Number 25 of 1992 concerning Cooperatives, explaining that all payments are to be prioritized over other debt payments and this indicates that the dismissal of a cooperative makes the members only responsible to the loss of the compulsory deposit and the capital owned. Thus, a deposit insurance agency must be established to guarantee the security, comfort, and prosperity of the members and to contribute to national economic development through cooperatives.

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