

## RECONSTRUCTION OF THE ARRANGEMENT OF SHARIA COOPERATIVES IN THE NATIONAL LEGAL SYSTEM

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**Abstract:** *Cooperatives are business entities engaged in financial institutions in addition to running conventionally shaped operations also operating operations in the form of sharia. With the development of sharia-compliant financial institutions, of course, they must be followed by regulations in accordance with Indonesian legislation. This study aims to analyze the form of regulation of sharia cooperatives in Indonesia and the ideal reconstruction model of Islamic cooperative arrangements according to positive law in Indonesia. This type of research is conducted normatively using the Legislation approach method and conceptual approach. The results showed First, the form of regulation of sharia cooperatives in Indonesia is still in the form of a Ministerial Regulation (PERMEN), namely Minister of Cooperatives and Small and Medium Enterprises Republic of Indonesia Regulation Number 16 / Per / M.KUKM / IX / 2015 concerning Implementation of Savings and Loans Business Activities and Financing Sharia by Cooperatives. Secondly, the ideal model for the reconstruction of sharia cooperative arrangements according to positive law in Indonesia is regulated simultaneously in the Cooperative Law or regulated in the form of laws that are specific to sharia cooperatives so that there is no legal vacuum in the form of laws relating to cooperative arrangements sharia.*

**Keywords:** *reconstruction, cooperatives, sharia cooperatives*

### I. INTRODUCTION

“ . . cooperatives, both as a people’s economic movement and as a business entity play a role in realizing an advanced, just and prosperous society based on Pancasila and the 1945 Constitution in the national economic order which is structured as a joint effort based on the principle of family and economic democracy.”<sup>1</sup> In essence the cooperative is an association founded by people who have limited abilities aiming to fight for the improvement of the economic welfare of its members, cooperation is voluntary, each member has the same rights and obligations and is obliged to develop and supervise the operation of cooperative business ) Cooperatives are business entities engaged in the field of financial institutions in

<sup>1</sup> Point a consideration of the Cooperative Law Number 25 of 1992 concerning Cooperatives.

addition to running operations in the form of conventional operations also operating in the form of sharia.

Islamic financial institutions have become the most important instruments and are developing rapidly in the economic system of mankind.<sup>2</sup> In Indonesia, the existence of Islamic financial institutions is a system long awaited by the public, especially Indonesian Muslims who long for financial and banking services that are in accordance with Islamic law.

BMT (Baitul Maal wa Tamwil) is an informal economic institution or non-bank sharia financial institution. It is called informal because this institution was founded by a Self-Help Group (KSM) that is different from banking financial institutions and other formal financial institutions.<sup>3</sup>

Currently developing the small and medium enterprises (SMEs) sector is something that is not negotiable. The growth of sharia microfinance institutions, such as the Baitul Maal wat Tamwil (BMT).<sup>4</sup> Baitul Maal wat Tamwil (BMT) is a people's economic activity with the same characteristics as cooperatives, namely from members by members to members so that based on Republic of Indonesia Law Number 25 of 1992 concerning Cooperatives, Baitul Maal wat Tamwil (BMT) can use cooperative legal entities, but there are differences with non-sharia cooperatives, namely sharia-based operational activities such as non-interest and moral ethics by seeing halal and illicit principles in conducting business activities.

With the development of sharia-compliant financial institutions, of course, they must be followed by regulations in accordance with Indonesian Legislation. The issuance of the Law of the Republic of Indonesia Number 10 of 1998 concerning Amendment to the Law of the Republic of Indonesia Number 7 of 1992 concerning Banking enacted on 10 November 1998 is also a new milestone in the banking sector which began to impose a dual system of dual system banking in Indonesia, namely conventional banking system with interest devices, and the banking system with devices that conform to sharia principles.<sup>5</sup> Islamic banking institutions are regulated in separate legislation, namely Law Number 21 of 2008 concerning Islamic Banking. In Law Number 21 of 2008 concerning Sharia Banking, the principles, objectives and functions, licensing, legal entity forms, articles of association and ownership of Islamic banks, dispute resolution and criminal provisions have been explained.

In 2014 Law Number 17 of 2012 concerning Cooperatives in lieu of Law Number 25 of 1992 concerning Cooperatives was canceled by the Constitutional Court (MK). According to the Constitutional Court (MK) in its ruling that Law Number 17 of 2012 concerning Cooperatives as a substitute for Law Number 25 of 1992 concerning Cooperatives is contrary to the 1945 Constitution of the Republic of Indonesia so that the Act has no binding legal

<sup>2</sup> Amran Suadi dan Mardi Candra, *Politik Hukum Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah*, Prenada Media Group, Jakarta, 2016, p. 605.

<sup>3</sup> Djazuli dan Yadi Djanwari, *Lembaga-Lembaga Perekonomian Umat*, Raja Grafindo, Jakarta, 2002, p. 183.

<sup>4</sup> Abdul Bashith, *Islam dan Manajemen Koperasi, Cetakan I*, UIN-Malang Press, Malang, 2008, p. 36.

<sup>5</sup> Ahmad Kamil dan M. Fauzan, *Kitab Undang-Undang Hukum Perbankan dan Ekonomi Syariah*, Kencana, Jakarta, 2007 p. 5.

force and states that Law Number 25 of 1992 concerning Cooperatives is valid for a while until the establishment of a new Law.<sup>6</sup>

The consequence of the cancellation of Law Number 17 of 2012 concerning Cooperatives by the Constitutional Court (MK), returning back to Law Number 25 of 1992 concerning Cooperatives has resulted in a vacuum of norms in the form of laws relating to the regulation of sharia cooperatives, because as explained above, that in Law Number 25 of 1992 concerning Cooperatives there is no regulation or explanation at all about sharia cooperatives.

In banking institutions there are two types, namely conventional banking and Islamic banking, as well as cooperatives, namely the existence of conventional cooperatives and sharia cooperatives. The conventional word is a term that is identified with a financial institution that conducts business activities not based on sharia principles.<sup>7</sup>

The very interesting thing to be questioned by the Government as the state organizer and law-making institution is why the Sharia cooperatives have not been regulated in special legislation, this certainly results in a vacuum of norms in the form of a special Law on sharia cooperatives so that legal uncertainty arises towards sharia cooperative legal entity.

On the basis of the explanation above, the author would like to raise the title of the scientific work "Reconstruction Of The Settlement Of Sharia Cooperatives In The National Legal System".

## II. RESULT AND DISCUSSION

### 2.1 *Forms of Sharia Cooperative Arrangements in Indonesia*

Article 33 paragraph (1) of the 1945 Constitution states that the Indonesian economy is structured as a joint effort based on the principle of family, which is then reaffirmed in Article 2 of Law Number 25 of 1992 concerning Cooperatives which states that Cooperatives are based on Pancasila and the Law Basic 1945 and based on the principle of kinship, so that it is clear that Article 33 paragraph (1) of the 1945 Constitution which requires the Indonesian economy to be compiled as a joint venture of its allotment is a cooperative institution based on family. The family principle implies cooperatives in carrying out their business prioritizing the prosperity of members in particular and society in general, not the prosperity of individuals.<sup>8</sup>

The role of cooperatives is very important in growing the economy and developing a people's economy, if you look at the position of the cooperative as explained in the Basic Law and the Cooperative Law above. In the era of globalization and the era of free trade (free trade market) currently needed cooperatives that are truly strong in terms of management or

<sup>6</sup> Decision of the Constitutional Court of the Republic of Indonesia Number 28 / PUU XI / 2013 concerning the testing of Law Number 17 of 2012 concerning Cooperatives against the 1945 Constitution of the Republic of Indonesia on Wednesday 28 May 2014.

<sup>7</sup> Burhanuddin S, *Koperasi Syariah dan Pengaturannya di Indonesia*, Cetakan II, UIN-Maliki Press, Malang, 2013, p. 133.

<sup>8</sup> Kurniawan, *Hukum Perusahaan (Karakteristik Badan Usaha Berbadan Hukum dan Tidak Berbadan Hukum Di Indonesia)*, First edition, Genta Publishing, Yogyakarta, 2014, hlm. 118.

managerial and in terms of organizing in order to provide excellent service for the welfare of members in particular and strengthen the people's economy.<sup>9</sup>

Very fast economic growth is inversely proportional to the development of cooperatives which in fact do not reveal their roles and functions as referred to in the Basic Law and Cooperative Law. The Cooperative Laws and Regulations have not fully regulated the things needed to carry out the role of cooperatives as a business entity or as a populist economic movement. Cooperatives in carrying out their business activities in addition to the conventional form also carry out activities in the form of sharia.

Sharia-managed cooperative practices have grown and developed in the community, as well as taking an important part in empowering the community's economy, especially small and micro businesses so that the government needs to develop a conducive climate to encourage the development of sharia-compliant business activities, especially those that have and will be managed through cooperative so as to be able to provide benefits and legal certainty for the community.

The year 2004 is a milestone for sharia cooperatives, this is due to the issuance of the Decree of the State Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number: 91 / Kep / M.KUKM / IX / 2004 concerning Guidelines for Implementing Islamic Financial Services Cooperative Business Activities<sup>10</sup> which was the first regulation he recognized the existence of sharia cooperatives in Indonesia. The definition of sharia cooperatives in this ministerial decree is found in Article 1 point 2, namely "Sharia Financial Services Cooperative hereinafter referred to as KJKS is a cooperative whose business activities are in financing, investment, and savings according to the profit sharing pattern (Sharia)" The Sharia Cooperative contained in Article 1 number 3, namely "Sharia Financial Services Unit (UJKS), is a cooperative unit engaged in financing, investment, and savings according to the profit sharing pattern (Sharia) as part of the activities of the cooperative concerned".

From the elaboration of Article 1 point 3 above, it can be seen that the Decree of the State Minister for Cooperatives and Small and Medium Enterprises of the Republic of Indonesia (KUKM KEPMEN) Number: 91 / Kep / M.KUKM / IX / 2004 regulates conventional cooperatives which will open sharia units namely Sharia Financial Services Unit (UJKS), while in Law Number 25 of 1992 concerning Cooperatives that regulate conventional cooperatives are not mentioned or explained so.

The need for a Sharia Financial Services Cooperative (KJKS) to be professionally managed in accordance with the principles of prudence and health, so as to increase trust and provide maximum benefits to its members and surrounding communities, so that in 2007 the Government through the minister issued a Ministerial Regulation (PERMEN) Number: 35 / Per / M.KUKM / X / 2007 concerning Guidelines for Health Assessment of Islamic Financial Services Cooperatives and Cooperative Islamic Financial Services Units whose purpose is to

<sup>9</sup> I Gusti agung Wisudawan, *Hukum Koperasi Indonesia*, Cetakan Pertama, Pustaka Bangsa, Mataram- NTB, 2017, p. 2-3.

<sup>10</sup> The regulation has been replaced by the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by Cooperatives.

ensure standards and procedures that can be used as instruments that can be used to conduct health assessments of Financial Services Cooperatives Sharia (KJKS).

Within 8 years of the regulation of the Decree of the State Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number: 91 / Kep / M.KUKM / IX / 2004 concerning Sharia Cooperative Services Cooperative Business Activity Guidelines, it was only in 2012 that sharia cooperatives were accommodated in the form of The Law, namely Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives. In the Act above, it is affirmed in CHAPTER I General Provisions Article 1 number 16 “The Savings and Loan Unit is one of the non-cooperative Cooperative Savings and Loans business units implemented conventionally or sharia”. Sharia mention in CHAPTER I General Provisions Article 1 number 16 This Act is the only “sharia” phrase contained in Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives.

That with the arrangement of a savings and loan unit in sharia in Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives, it creates fresh air for sharia savings and loan units. The sharia savings and loan unit has been accommodated in the form of a law which has created legal certainty in sharia savings and loan units. Although sharia cooperatives are not regulated in detail in the regulations above, at least there are regulations in the form of laws related to sharia savings and loan units.

The existence of Law Number 17 of 2012 turned out to be not too expected and responded positively by the community, especially the Members of Cooperatives and management cooperatives, even the enactment of this Law became a barrier for some Cooperatives and Cooperatives to carry out cooperative activities, which eventually combined several cooperatives, members of cooperatives and cooperatives submit a test to the Constitutional Court (MK) on several articles contained in Law Number 17 of 2012 concerning Cooperatives because they are considered to be contrary to the 1945 Constitution.

In 2014 Law Number 17 of 2012 concerning Cooperatives in lieu of Law Number 25 of 1992 concerning Cooperatives was canceled by the Constitutional Court (MK). In its ruling, the Constitutional Court (MK) stated that Law Number 17 of 2012 concerning Cooperatives as a substitute for Law Number 25 of 1992 concerning Cooperatives is contrary to the 1945 Constitution of the Republic of Indonesia so that the Law has no legal force bind and declare Act Number 25 of 1992 concerning Cooperatives valid for a while until the establishment of a new Law. The decision of the Constitutional Court Number 28 / PUU XI / 2013 above restores the Sharia Cooperative Regulation to Law Number 25 of 1992 concerning Cooperatives. Not regulated Savings and loans units both conventionally and in sharia in Law Number 25 of 1992 concerning Cooperatives have resulted in a vacuum of norms in the form of Law.

The return of cooperative regulation in Law Number 25 of 1992 concerning cooperatives is a legal setback for the Government because Law number 25 of 1992 concerning Cooperatives is certainly out of date with rapid economic development, so that the government issues Laws. Invite the new one as a substitute for the Cooperative Law, but of course the formation of the Law must be in accordance with the state Constitution, namely the 1945 Constitution which originates from Pancasila (grundnorm), by not changing the original nature of the Indonesian economic goals which have distinctive characteristics and

the character is certainly different from the western economic system which prioritizes personal gain only so that the Law issued by the Government can no longer be canceled by the Constitutional Court (MK) because it is in accordance with the rules of legislation.

The re-enactment of Law 25 of 1992 concerning Cooperatives has resulted in the regulation of the Sharia Savings and Loans Unit being revised in the Decree of the State Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number: 91 / Kep / M.KUKM / IX / 2004 concerning Implementation Guidelines for Cooperative Business Activities Sharia Finance, so that in 2015 regulations related to sharia savings and loan cooperatives and sharia savings and loan units were updated by the Government, namely in the Republic of Indonesia Minister of Cooperatives and Small and Medium Enterprises Regulation Number 16 / Per / M.KUKM / IX / 2015 concerning Implementation of Business Activities Savings and Loans and Sharia Financing by Cooperatives.

In Article 1 number 3 the Republic of Indonesia Minister of Cooperatives and Small and Medium Enterprises Regulation Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Loan Business and Sharia Financing by the Cooperative explained that: “The Cooperative Unit and Sharia Financing are the next Cooperative called USPPS Cooperative is a cooperative unit engaged in the business sector including savings, loans and financing according to sharia principles, including managing zakat, infaq / sedekah and Wakaf as part of the activities of the cooperative concerned “. In CHAPTER I General Provisions Article 1 point 2 of the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by Cooperatives, the term sharia cooperative is called “ Sharia Credit and Financing Cooperatives (KSPPS) are cooperatives whose business activities include savings, loans, and financing according to sharia principles including managing zakat, infaq, and Waqf “.

From the explanation above, it can be seen that there are 2 sharia cooperative regimes, namely the Sharia Financial Services Cooperative regime (KJKS) based on the Decree of the State Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number: 91 / Kep / M.KUKM / IX / 2004 concerning Implementation Guidelines Sharia Financial Services Cooperative Business Activities and the Savings and Loan Cooperative and Financing (KSPPS) regime contained in the Republic of Indonesia Minister of Cooperatives and Small and Medium Enterprises Regulation Number 16 / Per / M.KUKM / IX / 2015 concerning Implementation of Savings and Loans and Financing Activities Sharia by Cooperatives. Comparisons between the two regimes if presented in table form are as follows:

Table 1. Comparison of KJKS and KSPPS Regimes.<sup>11</sup>

DESCRIPTION	REZIM KJKS	REZIM KSPPS
Level	Ministerial decree	Ministerial regulation
Base	Has stood the empowerment of the SME economy, a conducive climate, benefits for society	Expansion of productive activities, people's welfare, Islamic savings and loans, need to be monitored and assessed for their health, inadequate regulations.
Concept	The Sharia Financial Services Cooperative hereinafter referred to as KJKS is a cooperative whose business activities are in the fields of financing, investment, and savings in accordance with the profit sharing pattern (Sharia)	Subsequently the Savings and Loans Cooperative and Financing Cooperative in this Regulation called KSPPS is a cooperative whose business activities include savings, loans and financing in accordance with sharia principles, including managing zakat, infaq / alms and endowments
Sharia Principles	-	Principles of Islamic law in cooperative activities based on fatwas issued by the National Sharia Council of the Indonesian Ulema Council (DSN-MUI)
Sharia business restrictions	-	Only for KSPPS and USPPS
Establishment	Institution Permit	Institutional licenses and business permits, the USPPS business cannot be formed by KSP, cooperatives that form USPPS may not create USP
Guarantee	Collateral	Savings are mandatory, joint responsibility, collateral, fiduciary, insurance, shared information systems

Another interesting thing from the table above is that regarding the establishment of cooperatives in the KJKS regime, only institution permits are needed and in the KSPPS regime institutional permits and business permits are needed, Savings and Loans Business Unit and Sharia Financing (USPPS) cannot be form KSP, and Cooperatives that form USPPS may not make KSP. In Law Number 25 of 1992 concerning Cooperatives there is no term or definition of KSP and the term or understanding of USP is not found. Understanding is a very fundamental issue in the Law because it contains the philosophy of meaning that it regulates.

<sup>11</sup> Sharia Coordination Board (DPS) Training Module for Sharia Cooperatives / BMT, West Nusa Tenggara Province (NTB) Cooperative and UMKM Service.

The adoption of KSP and USP terms or definitions in several articles contained in Article 4 paragraph (2), Article 4 paragraph (3), Article 8 paragraph (1), Article 8 paragraph (3), Article 8 paragraph (4), by Regulation The Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Loans Business Activities and Sharia Financing by Cooperatives, of course, must be based on Regulations in accordance with the Laws and Regulations. Number 25 of 1992 concerning Cooperatives.

Not explained and regulated explicitly related to USP in Law Number 25 of 1992, while for the term KSP the definition closest to Law Number 25 of 1992 concerning Cooperatives is contained in Article 44 paragraph (1) “cooperatives ... activities savings and loan business .... “and paragraph (2)” savings and loan business activities ... “. The terms and understanding of KSP in Article 1 point 2 and USP are contained in Article 1 number 3 Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 15 / Per / M.KUKM / IX / 2015 concerning Savings and Loans Enterprises by Cooperatives, each of which states that in Article 1 point 2 “Savings and Loans Cooperatives hereinafter referred to as KSP are cooperatives that carry out their business activities only savings and loan business” and in Article 1 point 3 “Savings and Loans Unit hereinafter referred to as USP cooperatives are uni cooperatives engaged in the savings and loan business sector as part of the business activities of the cooperative concerned, “which is a Ministerial Regulation (PERMEN) which regulates conventional cooperative savings and loan business activities.

Ministerial Regulations have legal powers that are of a general binding nature and can be used as objects of testing at the Supreme Court (MA). This is stated in Article 24 A paragraph (1) of the 1945 Constitution which states that “The Supreme Court has the authority to adjudicate at the level of appeal, test the Laws and Regulations under the Law against the Law, and have other authorities granted by Law “. So based on the elaboration of Article 24 A paragraph (1) of the 1945 Constitution, the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by Cooperatives can be used as an object of testing at the Supreme Court (MA).

The Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by the Cooperative is a regulation of sharia cooperatives that is valid until now. Of course this corresponds to the theory of the welfare law in which the state is not only a guardian of security or public order, but the main bearer of responsibility is to realize social justice, public welfare and the greatest prosperity of the people.

Because of the influence of the dynamics and changes of society both arising from the development of legal awareness (*rechtsbewustzijn*) and so on, the citizens of the community are increasingly aware of their rights and obligations, and are increasingly trying to protect their interests towards their fellow citizens and the authority of the authorities.<sup>12</sup> This is

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<sup>12</sup> M. Solly Lubis, *Hukum Tatanegara*, Cetakan ketujuh, CV.Mandar Maju, Bandung, 2008, p. 134.

clearly seen by the submission of a test to the Constitutional Court (MK) on several articles contained in Law Number 17 of 2012 concerning Cooperatives because they are considered contrary to the 1945 Constitution by a combination of several cooperatives, members of cooperatives and cooperatives.

Based on the explanation above, it can be seen that the reconstruction of sharia cooperative arrangements in the national legal system in the form of the construction of new regulations in the national legal system which was initially formed in the form of a Sharia cooperative regulation (KEPMEN) namely the Decree of the Minister of Cooperatives and Small and Medium Enterprises : 91 / Kep / M.KUKM / IX / 2004 concerning Guidelines for Implementing Sharia Financial Services Cooperative Business Activities<sup>13</sup>, then regulated in the Law namely Law Number 17 of 2012<sup>14</sup> in lieu of Law Number 25 of 1992 concerning Cooperatives, and now the arrangement lies in the Ministerial Regulation (PERMEN), namely the Minister of Cooperatives and Small and Medium Enterprises Republic of Indonesia Regulation Number 16 / Per / M.KUKM / IX / 2015 concerning Implementation of Save Business Activities Borrow and Sharia Financing by Cooperatives.

In this study it was found that there was a need to make changes to revise the shortcomings of the Republic of Indonesia Minister of Cooperatives and Small and Medium Enterprises Regulation No. 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Loan and Sharia Financing Activities related to matters as explained above, namely the need to include KSP and USP in the general provisions, the need to include the minimum formation limit of primary KSPPS, the need to mention a Notary as the deed of establishment, the need to regulate the Articles of Association (AD), transformation arrangements must be in accordance with the Law The cooperative agreement, the need to be regulated in a separate article related to KSPPS membership, the need to be regulated regarding member meetings, the need to be regulated in articles related to organizational instruments, the need for arrangements for extraordinary meetings, elaborating mechanisms for potential legal issues, regulations regarding sanctions.

Law Number 25 of 1992 concerning Cooperatives regulates conventional cooperatives in general which do not regulate at all regarding sharia cooperatives. In Law Number 17 of 2012 concerning Cooperatives it has regulated sharia cooperatives in the form of a savings and loan business unit, however Law Number 17 of 2012 has been canceled by the Constitutional Court (MK). Now the arrangement of sharia cooperatives has been regulated in a Ministerial Regulation (PERMEN), but the new arrangement in the form of a Savings and Loan Cooperative (KSP) arrangement and sharia financing, has not fully regulated sharia cooperatives.

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<sup>13</sup> The regulation has been replaced by the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by Cooperatives.

<sup>14</sup> The Law was canceled based on the Decision of the Constitutional Court of the Republic of Indonesia Number 28 / PUU XI / 2013 concerning the testing of Law Number 17 of 2012 concerning Cooperatives against the 1945 Constitution of the Republic of Indonesia on Wednesday 28 May 2014.

## **2.2 Reconstruction Model of Ideal Sharia Cooperative Arrangements According to Positive Law in Indonesia**

Legislation as a hierarchical legal norm in which lower legal norms will follow higher legal norms. Not explicitly regulated or referred to in the sharia system in Law Number 25 of 1992 concerning Cooperatives certainly results in a vacuum in the form of laws relating to the regulation of sharia cooperatives. The Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Loans Business Activities and Sharia Financing by Cooperatives is an implementation regulation of Law Number 25 of 1992 concerning Cooperatives.

A family-based cooperative is a mandate from the 1945 Constitution (UUD 1945) like an institution that is not considered too important by the government, the government pays more attention to large-scale economies such as banking institutions. In addition to running conventional banking operations, banking institutions also operate in the form of sharia. the issuance of Law Number 10 of 1998 concerning Banking which applies a dual system of dual banking systems in Indonesia, namely the conventional banking system and the banking system with sharia principles.

The dual system arrangement (conventional and sharia) in the banking institutions above, it seems that what the government wants to adopt towards cooperative institutions is by issuing Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives. In CHAPTER I General Provisions Article 1 point 16 of Law Number 17 of 2012 affirmed "Savings and Loans Unit is one of the business units of Non-Cooperative Savings and Loans Cooperatives that is carried out conventionally or sharia" Sharia mention in CHAPTER I General Provisions Article 1 number 16 This Act is the only "sharia" phrase contained in Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives.

With the arrangement of the Savings and Loans Unit (USP) in Law No. 17 of 2012 concerning Cooperatives carried out in conventional and sharia terms, which means that there has been a regulation in the form of an Act that accommodates the existence of Islamic savings and loan units in cooperative institutions.

Moreover, in 2008 Islamic banking institutions have been regulated in a special Law, namely Law Number 21 of 2008 concerning Islamic Banking. Ideally, if the government is sensitive to the existence of sharia financial institutions that continue to develop, it should not only be sharia banking institutions regulated in special laws, but sharia cooperatives must also be regulated in special regulations in the form of laws.

Law Number 25 of 1992 concerning Cooperatives is a Law that regulates cooperatives in general is conventional in nature which does not regulate a bit about sharia cooperatives and of course has become obsolete so that it needs repairs due to rapid economic development, content in Law Number 25 of 1992 about many cooperatives that have not been regulated. The shortcomings of these arrangements are, among others:

- a. Not yet managing the management of cooperatives based on sharia principles

The Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per.M.KUKM / IX / 2015 concerning the

Implementation of Savings and Loans Business Activities and Sharia Financing by Cooperatives is the implementing regulation of Law Number 25 of 1992 concerning Cooperatives, while inside Law Number 25 of 1992 concerning Cooperatives is not regulated and explicitly explained regarding savings and loan business activities and Islamic Financing by cooperatives. This arrangement is different from the Law which has been canceled by the constitutional court, namely in Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives. In CHAPTER I General Provisions Article 1 point 16 of Law Number 17 of 2012 affirmed “Savings and Loans Unit is one of the business units of Non-Cooperative Savings and Loans Cooperatives that is carried out conventionally or sharia”

The closest article to be used as a reference for making the PERMEN above lies in Article 44 paragraph (3) of Law Number 25 of 1992 concerning Cooperatives which says “Savings and loan business activities by Cooperatives are regulated further by government regulations”. If this article which is used as a reference for the making of Islamic Cooperative PERMEN, the Cooperative Law should be revised by the Government or policy makers of the Law and add the phrase “sharia”, this is because it is very clear in the article above that conventional cooperatives are conventional cooperatives who conduct savings and loan business activities.

- b. Notary as the maker of deed of establishment and amendment to the articles of association of the cooperative are not included.  
In addition to being a business entity, a cooperative institution is also a legal entity, a legal entity with its establishment requires a permit from the government. To obtain a permit from the government, first a business entity that has absolute legal status is to make a deed of establishment and articles of association. Notary has the authority to make a deed of establishment and articles of association of cooperatives, so it is very reasonable to include a Notary as the creator of the deed of establishment and articles of association in Law Number 25 of 1992 concerning Cooperatives.
- c. There is no oversight and inspection agency, for example the Financial Services Authority (OJK) which specifically supervises financial institutions that cannot supervise and inspect cooperatives or police institutions, because if the case of cooperatives is reported to the police institution, they tend to be mostly rejected by the police agency and advised to report to the local Cooperative Office.
- d. Sanctions against management / managers of cooperatives that violate the Cooperative Law are not regulated.

Indonesia’s national development goals to achieve the creation of a just and prosperous society based on economic democracy, developed an economic system based on the values of justice, togetherness, equality and benefits in accordance with sharia principles. The needs of the Indonesian people for sharia cooperative services are increasing, because sharia cooperatives have specificity compared to conventional cooperatives. The regulation

of sharia cooperatives is not regulated in Law Number 25 of 1992 concerning Cooperatives so that sharia cooperatives need to be regulated in a special law.

The content in the regulation of the sharia cooperative is still in the form of a Ministerial Regulation (PERMEN), namely the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per.M.KUKM / IX / 2015 concerning the Implementation of Savings and Loan Business and Sharia Financing by Cooperatives used as a reference for the regulation of sharia cooperatives specifically in the form of special laws. Reconstruction of system updates or forms of sharia cooperative arrangements which are still in the form of Ministerial Regulations (PERMEN) into special laws is an absolute requirement for the ideal reconstruction model of sharia cooperative arrangements in Indonesia.

The eligible content to be included in the Sharia cooperative arrangement in the form of a special law includes:

a. General requirements

In the general provisions of the Minister of Cooperatives and Small and Medium Enterprises Regulation of the Republic of Indonesia Number 16 / Per. specifically sharia cooperatives, but there is still something to be added, namely the understanding of sharia cooperatives, the definition of sharia cooperative units, the definition of KSP and USP, the understanding of members of sharia cooperatives.

b. The foundation, principle and purpose of sharia cooperatives

Islamic cooperatives are based on Pancasila and the 1945 Constitution and are based on the principles of sharia principles and economic democracy. The purpose of advancing the welfare of members in particular and society in general as well as supporting the implementation of national development in order to improve justice, togetherness and equitable distribution of people's welfare.

c. Functions, roles and principles of sharia cooperatives

The functions of roles and principles are mostly similar to Law Number 25 of 1992 concerning Cooperatives and the functions of roles and principles in accordance with Islamic Sharia.

d. Sharia cooperative formation

Contains the terms and establishment of sharia cooperatives, the status of sharia cooperative legal entities, forms and types of sharia cooperatives. On the terms and establishment of sharia cooperatives, it includes sharia cooperatives established by at least how many people and in the establishment of sharia cooperatives containing the establishment words which contain the Sharia cooperative Articles of Association (AD), and the Islamic Articles of Association (AD) at least contain anything.

e. Notary as the maker of deed of establishment and amendment to the articles of association of the sharia cooperative must be regulated and mentioned explicitly in the Sharia cooperative law.

f. Membership of sharia cooperatives.

The membership of the sharia cooperative contains the requirements to become a member of the sharia cooperative, the rights and obligations of the members of the sharia

cooperative which are also stipulated based on the Sharia Cooperative Articles of Association, extraordinary members whose requirements are stipulated in the sharia cooperative's Articles of Association.

g. Sharia cooperative organization tools

The organizational instruments, which are mostly almost the same as Law Number 25 of 1992 concerning Cooperatives, which consist of meetings of members, administrators and supervisors. The highest power lies in the meeting of members, in the meeting the members specify at least anything, but there are differences, namely in the sharia cooperative there is a Sharia Supervisory Board (DPS), so it should be regulated what the authority and duties of the sharia supervisory board.

h. Islamic cooperative capital

Provisions regarding the regulation of sharia cooperative capital can be said to be the same as Law Number 25 of 1992 concerning Cooperatives, which consists of compulsory savings, reserve fund principal savings, grants and added with "halal" phrases or in accordance with sharia principles.

i. Business activities of sharia cooperatives

The Islamic Cooperative conducts business activities and plays a major role in all fields of economic life of the people who have sharia principles. Examples are profit sharing transactions (mudharabah and musyarakah), lease transactions (ijarah), lease purchase transactions (ijarah muntahiya bittamlik), buying and selling transactions in the form of accounts receivable (murabahah, salam, istishna), loans and loans (qard)

j. Dissolution of sharia cooperatives

Regulatory provisions regarding the dissolution of sharia cooperatives can be said to be the same as Law No. 25 of 1992 concerning Cooperatives, which regulates how the mechanism of sharia cooperatives can be dissolved, namely by the decision of a member meeting or a government decision.

k. Sharia cooperative dispute resolution

Of course it needs to be regulated regarding the settlement of sharia cooperative disputes in the contents of the Sharia cooperative law.

l. Provisions regarding sanctions both administrative and / or criminal sanctions.

Provisions regarding sanctions on sharia cooperatives, in order to better ensure legal certainty in addition to administrative sanctions, must also contain criminal provisions, namely if sharia cooperative managers misuse their authority or management that violate sharia cooperative law provisions, so that they can be ensnared by the Sharia cooperative law.

Sharia cooperative arrangements in a special law other than having to include the above content should also regulate the contents of the National Sharia Council (DSN) and Sharia Supervisory Board (DPS), so that the National Sharia Council can issue a special fatwa regarding sharia cooperative institutions, not fatwas separate fatwas which are then matched to be included in the regulation of sharia cooperatives, because most of the fatwas

issued by the National Sharia Council (DSN) are the same as governments pay more attention to large-scale economies such as sharia banking and sharia insurance institutions.

In order to overcome the challenges that will be faced by cooperatives in the future, there needs to be a strong legal framework in the form of Legislation, only serious problems arise, namely Law Number 25 of 1992 concerning Cooperatives still in force today should have been done revision because the law is always developing and not static.<sup>15</sup> When in 2012 the government through the House of Representatives ratified Law No. 17 of 2012 concerning Cooperatives but it was very unfortunate the Constitutional Court (MK) had revoked it because it was deemed contrary to the 1945 Constitution and the old Law was declared still valid.<sup>16</sup> Of course this is a legal setback, because it turned out that the DPR made and ratified the Laws and Regulations that were in contradiction with the 1945 Constitution, if this matter was left unchecked and the solution would not be sought it would have a negative impact on the existence of cooperatives in the future.<sup>17</sup>

The arrangement of sharia cooperatives which are still in the form of Ministerial Regulations (PERMEN) needs to be studied further regarding the existence of the Ministerial Regulation (PERMEN) regarding sharia cooperatives. Ministerial Regulation (PERMEN) which regulates sharia cooperatives such as mushrooms that suddenly grow no man's land when viewed in the context of the Legislation Regulations hierarchy, because it is clear the Sharia cooperative Minister Regulation (PERMEN), namely Minister of Cooperatives and Small and Medium Enterprises Regulation Number 16 /Per/M.KUKM/IX/2015 concerning the Implementation of Savings and Loans Business Activities and Sharia Financing by Cooperatives, is an implementing regulation in Law 25 of 1992 concerning Cooperatives, while in Law Number 25 of 1992 concerning Cooperatives none The phrase "sharia" as compared to banking institutions in Law Number 10 of 1998 concerning Banking is regulated by dual system banking. Of course this raises the question of why the Government has not set up a sharia cooperative in a special law that has caused uncertainty (recertification) or uncertainty over legislation. Of course, with the regulation of Islamic cooperatives in a special law, it will guarantee legal certainty regarding the existence of sharia cooperative institutions.

Based on the above explanation, it is felt that it is very adequate based on the Islamic cooperative institutions having broad space and business opportunities related to the people's economic interests. Therefore, to harmonize with the dynamic development of the environment there needs to be a legal foundation that is able to encourage cooperatives to grow and develop into stronger and more independent business entities.<sup>18</sup> The implementation of cooperatives in addition to having to adhere to family principles can also be directed at the development of business orientation (business oriented) which can actually play a role in economic empowerment.<sup>19</sup>

Legislation that does not regulate comprehensively the things needed to support the implementation of the role of conventional cooperatives and sharia cooperatives both as

<sup>15</sup> I Gusti Agung Wisudawan, *Op.Cit.*, p. 3.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, p. 4.

<sup>18</sup> Burhanuddin, *Op.Cit.*, p. 3.

<sup>19</sup> *Ibid.*

business entities and as a people's economic movement, which makes cooperatives a national economy while fulfilling cooperative principles as desired by the Law Basic 1945. Therefore, to harmonize with the rapid economic development it is necessary to have a new legal foundation that is able to encourage sharia cooperatives to grow and develop to become stronger and independent.

Law Number 25 of 1992 concerning Cooperatives which regulates cooperatives in general should be revised by the government as a banking institution that adheres to a dual system (conventional and sharia) so that it does not only regulate conventional cooperatives, but includes the contents of Islamic cooperatives or sharia cooperatives are regulated in special laws. So the reconstruction model is the need to be regulated simultaneously in the Act on Cooperatives related to conventional cooperatives and sharia cooperatives or sharia cooperatives regulated in special laws.

The content that must be contained in the special law of sharia cooperatives is a general provision that contains the definition of sharia cooperatives, foundation, principles and objectives of sharia cooperatives, the functions and principles of sharia cooperatives, the formation of sharia cooperatives, notaries as deed of establishment and changes to the sharia cooperative must be regulated and mentioned explicitly in the Sharia cooperative law, sharia cooperative membership, sharia cooperative organization instruments, sharia cooperative capital, sharia cooperative business activities, sharia cooperative dissolution, sharia cooperative dispute settlement, provisions regarding sanctions in both administrative and / or criminal sanctions .

### **III. CONCLUSION**

That based on the results of research on the form of regulation of sharia cooperatives in Indonesia and the ideal form of reconstruction of sharia cooperative arrangements according to positive law in Indonesia can be concluded as follows:

- a. The form of regulation of sharia cooperatives in Indonesia in the form of reconstruction arrangements in the national legal system is the initial formation of sharia cooperative arrangements in the form of Ministerial Decrees (KEPMEN) namely Decree of the Minister of Cooperatives and Small and Medium Enterprises of the Republic of Indonesia Number: 91 / Kep / M.KUKM / IX / 2004 concerning the Guidelines for Implementing Sharia Financial Services Cooperative Business Activities, then regulated in Law namely Law Number 17 of 2012 as a substitute for Law Number 25 of 1992 concerning Cooperatives, and now the arrangement lies in the Ministerial Regulation (PERMEN) namely Ministerial Regulation The Republic of Indonesia Cooperative and Small and Medium Enterprises Number 16 / Per / M.KUKM / IX / 2015 concerning the Implementation of Savings and Credit Business Activities and Sharia Financing by Cooperatives. Law Number 25 of 1992 concerning Cooperatives regulates conventional cooperatives in general which do not regulate at all regarding sharia cooperatives. In Law Number 17 of 2012 concerning Cooperatives it has regulated sharia cooperatives in the form of a savings and loan business unit, however Law Number 17 of 2012 has been canceled by the Constitutional Court (MK). Now the arrangement of sharia cooperatives has been regulated in a Ministerial Regulation

(PERMEN), but the new arrangement in the form of a Savings and Loan Cooperative (KSP) arrangement and sharia financing, has not fully regulated sharia cooperatives.

- b. The ideal model for the reconstruction of sharia cooperative arrangements for positive law in Indonesia is that Law Number 25 of 1992 concerning Cooperatives that regulates cooperatives in general should be revised by the government as a banking institution that adheres to a dual system (conventional and sharia) so that it does not only regulate conventional cooperatives, but entering the contents of the Islamic cooperative in it or the sharia cooperative is regulated in a special law. So the reconstruction model is the need to be regulated simultaneously in the Act on Cooperatives related to conventional cooperatives and sharia cooperatives or sharia cooperatives regulated in special laws. The content that must be contained in the special law of sharia cooperatives is a general provision that contains the definition of sharia cooperatives, foundations, principles and objectives of sharia cooperatives, functions, roles and principles of sharia cooperatives, sharia cooperative formation, Notary as deed of establishment and changes in cooperative statutes sharia must be regulated and stated explicitly in the Sharia cooperative law, sharia cooperative membership, sharia cooperative organization instruments, sharia cooperative capital, sharia cooperative business activities, sharia cooperative dissolution, sharia cooperative dispute settlement, provisions regarding sanctions both administrative and / or sanctions criminal.

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