

## Perception and Tendency of a Religious Court Judge in Using the Kitab Kuning (Books of Fiqh) in Indonesia

### Persepsi dan Kecenderungan Hakim Pengadilan Agama dalam Menggunakan Kitab Kuning (Kitab Fikih) di Indonesia

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#### Abstract

In several Circulars of the Supreme Court of the Republic of Indonesia, one of the requirements to be a judge of religious courts in Indonesia is to have the ability to read the Books of Fiqh (Kitab Kuning). One of the competencies of religious courts in Indonesia is the settlement of sharia economic disputes; the judge of religious courts has a role as a decision-maker between the disputing parties. In making a decision, the judges can use KHES, MUI Fatwa through the National Syari'ah Council, and Books of Fiqh (Kitab Kuning). The judges are not required to use Books of Fiqh (Kitab Kuning) in making decisions. The research method used is normative legal and empirical socio-legal research. The perception and tendency of judges toward several sources of legal rules in assessing, weighing, and deciding on a sharia economic case in the Indonesian Religious Courts are not always based on one KHES as a source of material Indonesian law. The judges cannot only use one source, such as the Books of Fiqh (Kitab Kuning), but it is the primary source in resolving sharia economic disputes from several decisions of the Religious Courts in Indonesia. The urgency of the ability to read the Books of Fiqh (Kitab Kuning) from the perspective of sharia economic disputes in the Religious Courts, the primary legal source of sharia economics in Indonesia comes from the Books of Fiqh (Kitab Kuning). It was the source of the birth of KHES and other rules in settlement of Sharia economic disputes in the Religious Courts.

**Keywords:** *Judge's Decision, the Books of Fiqh (Kitab Kuning), Sharia Economic Dispute*

#### Abstrak

Di dalam beberapa Surat Edaran Mahkamah Agung Republik Indonesia terdapat salah satu syarat penting untuk menjadi hakim pengadilan agama di Indonesia diharuskan memiliki kemampuan membaca Kitab Kuning. Salah satu kompetensi pengadilan agama di Indonesia adalah penyelesaian sengketa ekonomi syari'ah, dalam penyelesaian sengketa ekonomi syari'ah hakim memiliki peran penting Hakim sebagai pemutus keadilan antara para pihak yang bersengketa. Dasar pertimbangan yang dapat dirujuk hakim sebagai penemu

hukum di Pengadilan Agama diantaranya: KHES, Fatwa MUI melalui Dewan Syari'ah Nasional, dan Kitab Kuning. Hakim pengadilan agama di Indonesia diwajibkan memiliki kemampuan membaca kitab kuning, sementara dalam membuat putusan hakim tidak wajib menggunakan kitab kuning. Metode penelitian yang penulis gunakan untuk menjawab permasalahan ini adalah kombinasi penelitian hukum normatif (*Normatif legal research*), dan penelitian hukum sosiologis empiris. Dapat dilihat persepsi dan kecenderungan hakim terhadap beberapa sumber aturan hukum dalam menilai menimbang dan memutuskan suatu perkara ekonomi syari'ah ini di Pengadilan Agama Indonesia, tidak selalu berpatokan pada satu KHES saja sebagai sumber hukum materil Indonesia dalam penyelesaian sengketa ekonomi syari'ah, atau hakim tidak dapat hanya memakai satu sumber saja seperti kitab-kitab fikih (kitab kuning) semata tapi kitab kuning sebenarnya merupakan sumber utama dalam penyelesaian sengketa ekononomi syari'ah, ini terlihat dari beberapa putusan Pengadilan Agama di Indonesia. Urgensi kemampuan membaca kitab kuning dalam perspektif sengketa ekonomi Syari'ah di Pengadilan Agama, dari penelitian ditemukan bahwa sumber hukum utama ekonomi Syari'ah di Indonesia itu bersumber dari kitab-kitab fikih (Kitab Kuning). Kitab Kuning kemudian merupakan sumber lahirnya KHES dan aturan lain dalam penyelesaian sengketa ekonomi Syari'ah di Pengadilan Agama.

**Kata Kunci:** *Putusan Hakim, Kitab Kuning, Sengketa Ekonomi Syari'ah*

## **Introduction**

Judge is one of the members of the chess dynasty of law enforcement in Indonesia. In the judicial field, judge has to receive, examine, decide, and settle every case submitted. This is stated in Law no. 48 of 2009 Article 10 paragraph (1) which explains that the Court is prohibited from refusing to examine, try, decide on a case that is submitted unclear legal argument, but it is obliged to examine and try it. It means that the Judge as the main organ of the Court and as the executor of judicial power is obligatory for the judge to find the law in a case even though the legal provisions are absent or unclear.<sup>1</sup>

Law No. 48 of 2009 Article 5 paragraph (1) emphasizes that "Judges and Constitutional Justices are obliged to explore, follow and understand legal values and a sense of justice that live in a society". The word "digging" usually means that the law already exists, in the legislation but is still vague, difficult to apply in concrete cases, so to find the law one must try to find the law by exploring the legal values that live in

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<sup>1</sup> Alfitri Alfitri, "Sharia Judges Role in Indonesia: Between The Common Law and The Civil Law Systems," *Mazahib* 16, no. 2 (August 30, 2017), accessed February 5, 2022, <http://journal.iain-samarinda.ac.id/index.php/mazahib/article/view/825>.

society. If you have met the law in the excavation, then the judge must follow, understand, and decide. So, it follows the sense of justice that lives in society.<sup>2</sup>

Judges apply the law based on statutory regulations which cover two legal aspects. First, the judge must use the written law, but if the written law turns out to be insufficient or inappropriate; both of them will then seek and find the law by him from other legal sources. These other sources of law are jurisprudence, doctrine, treaties, customs, or unwritten as additional sources of law.<sup>3</sup>

Based on law number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning the Religious Courts. Religious courts have the duty and authority to examine, decide, and settle cases at the first level between people who are Muslims in the fields of: Marriage, Inheritance, Will, Grants, Endowments, Zakat, Infaq, Sadaqah, and Sharia Economics.<sup>4</sup> Elucidation of article 49 letter i explains sharia economics are actions or business activities carried out according to sharia principles, including among others: sharia banks, sharia microfinance institutions, sharia insurance, sharia reinsurance Sharia Mutual Funds, Sharia Bonds and Medium Term Sharia Securities, Sharia Securities, Sharia Financing, Sharia Pawnshops, Sharia Financial Institution Pension Funds, Sharia Business.<sup>5</sup>

The next issue is the legal rules that regulate in detail the procedure for resolving the sharia economic dispute is the Supreme Court Regulation Number 14 of 2016 concerning Procedures for the Settlement of Sharia Economic Disputes.<sup>6</sup> The Perma was promulgated on December 29, 2016, hierarchically not stronger than PERMA No. 2 of 2008 concerning the Compilation of Sharia Economic Law (KHES) as material law. Therefore, formal law relating to dispute resolution, especially sharia economics, is relatively new. The Religious Courts as institutions authorized by the state to examine,

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<sup>2</sup> Brian Leiter, "The Roles of Judges in Democracies: A Realistic View" (Springer, Cham, 2021), 7–34, accessed February 5, 2022, [https://link.springer.com/chapter/10.1007/978-3-030-58186-2\\_2](https://link.springer.com/chapter/10.1007/978-3-030-58186-2_2).

<sup>3</sup> Ibid.

<sup>4</sup> Abdul Ghofur Anshori, "Pelaksanaan Good Corporate Governance Dalam Perbankan Syariah," *Perbankan Syariah di Indonesia* (2018): 174.

<sup>5</sup> Titik Suharti, "Proses Penegakan Hukum Di Indonesia Dalam Perspektif Hukum Pidana," *NORMA* 1, no. 1 (July 1, 2004): 37, accessed February 5, 2022, <https://journal.uwks.ac.id/index.php/norma/article/view/1048>.

<sup>6</sup> Heriyah Heriyah and Faisal Santiago, "Reconciliation as Problem Solution of Sharia Economic Dispute in Religious Court," in *Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education, ICLSSEE 2021, March 6th 2021, Jakarta, Indonesia* (EAI, 2021), accessed February 5, 2022, <http://eudl.eu/doi/10.4108/eai.6-3-2021.2306278>.

adjudicate and resolve disputes which have become their authority should have mobilized all their potential to answer these challenges.<sup>78</sup>

Article 1 of PERMA Number 02 of 2008 concerning the Compilation of Sharia Economic Law which states that "This book is a guideline for sharia principles for judges without reducing the responsibility of judges to explore and find laws to ensure fair and correct decisions" This article opens up opportunities for judges to decide cases outside the provisions of the KHES, one of which is by exploring and finding laws to ensure fair and correct decisions. So that the position of the Kitab Kuning for judges in deciding sharia economic cases in the Religious Courts needs to be investigated further. Relating to the above, the authors are interested in writing and conducting scientific research. The main issues that will be investigated are how the judges' perceptions and tendencies IN referring to the Kitab Kuning, KHES and PERMA Number 14 of 2016 in the Settlement of Sharia Economic Disputes at the Indonesian Religious Courts.<sup>9</sup>

The term "Kitab Kuning" is only known in Indonesia, especially in the world of Islamic boarding schools. It refers to Arabic books by medieval Middle Eastern Sunni scholars, and covers a variety of scientific disciplines, such as theology, morality, fiqh, interpretation and Arabic theory. These books are then referred to as al-kutub al-mu'tabara (books that are worthy of study and guidance). While, "yellow" label in the terminology is because the existing books are mostly printed on yellow paper.

In the Kitab Kuning, there are provisions governing court procedural law. Usually, these provisions are stated in the discussion into court (qadā'), testimony (shahāda) and claims and evidence (da'wa wa bayyina). For example, in the qadā' chapter, it is stated that the position of judge may only be held by people who can perform ijtihad, in the sense of being able to understand the Qur'an, al-Hadth, qiyās and its branches, Arabic linguistics and literature, the opinions of scholars and scientific knowledge. If no one fulfills these requirements, then the sovereign government staff

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<sup>7</sup> Adam Lankford, "A Sexual Frustration Theory of Aggression, Violence, and Crime," *Journal of Criminal Justice* 77 (November 1, 2021): 101865, accessed January 9, 2022, <https://linkinghub.elsevier.com/retrieve/pii/S0047235221000854>.

<sup>8</sup> Ichtijanto Ichtijanto, "PENGADILAN AGAMA DI INDONESIA," *Jurnal Hukum & Pembangunan* 12, no. 2 (June 5, 1982): 111, accessed February 5, 2022, <http://jhp.ui.ac.id/index.php/home/article/view/893>.

<sup>9</sup> Dhaifina Fitriani, "The RELIGIOUS COURT COMPETENCE IN SHARIA ECONOMIC DISPUTE COMPLETION," *Mu'amalat: Jurnal Kajian Hukum Ekonomi Syariah* 12, no. 1 (June 30, 2020): 33–42, accessed February 5, 2022, <https://journal.uinmataram.ac.id/index.php/muamalat/article/view/2107>.

(Sultan Dhu Shawka), even if they cannot practice Islamic practice, as long as they are Muslim and have good morals, they can be judges. When trying two disputants, the judge must treat them fairly. The plaintiff and the defendant must be respected and listened to.<sup>10</sup>

Even in terms of evidence, the judge must treat equally, both through testimony and other evidence. In addition, when dealing with differences of opinion among the scholars, in terms of the decision-making mechanism or *tarjih*, the hierarchy is as follows:<sup>11</sup>

1. Agreed opinion.
2. Expressed or approved opinion.
3. Expressed or approved opinion.
4. Expressed opinion by the majority of scholars, or if not there, by scholars who are more able to take care of themselves.

There is very little research on this matter, we can only see research related to this only discusses in general<sup>1213141516</sup> the settlement of sharia economic disputes, not a single study has focused on judges' considerations from the perspective of the existence of the yellow book as an initial source of sharia economic dispute resolution in Indonesia.

However, the provisions of the procedural law above still seem to leave problems. The *fiqh* literature is very broad and the differences of opinion are complex, so that the decision-making mechanism often requires a long thought process and debate which makes this research very urgent to do.

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<sup>10</sup> Nita Triana, "URGENCY OF ARBITRATION CLAUSE IN DETERMINING THE RESOLUTION OF SHARIA ECONOMIC DISPUTES," *AHKAM : Jurnal Ilmu Syariah* 18, no. 1 (January 12, 2018), accessed February 5, 2022, <http://journal.uinjkt.ac.id/index.php/ahkam/article/view/8872>.

<sup>11</sup> Alfitri, "Sharia Judges Role in Indonesia: Between The Common Law and The Civil Law Systems."

<sup>12</sup> Heriyah and Santiago, "Reconciliation as Problem Solution of Sharia Economic Dispute in Religious Court."

<sup>13</sup> Fitriani, "The RELIGIOUS COURT COMPETENCE IN SHARIA ECONOMIC DISPUTE COMPLETION."

<sup>14</sup> M Lohot Hasibuan, "Penyelesaian Sangketa Perbankan Syariah Di Pengadilan Agama," *Al-Risalah* 13, no. 01 (December 1, 2018): 111, accessed February 5, 2022, <http://ejournal.lp2m.uinjambi.ac.id/ojs/index.php/al-risalah/article/view/444>.

<sup>15</sup> Yulies Tiena Masriani, "THE POSITION OF NOTARIAL DEED IN THE SHARIA ECONOMIC DISPUTE," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28, no. 1 (February 15, 2016): 162, accessed February 5, 2022, <https://jurnal.ugm.ac.id/jmh/article/view/15861>.

<sup>16</sup> Fiska Silvia, Kukuh Leksono, and Ghansam Anand, "THE CHARACTERISTICS OF SHARIA COMPLIANCE IN THE SETTLEMENT OF SHARIA ECONOMIC DISPUTES IN INDONESIA," in *Proceedings of the International Conference on Law, Governance and Globalization 2017 (ICLGG 2017)* (Paris, France: Atlantis Press, 2018), 113–126, accessed February 5, 2022, <https://www.atlantis-press.com/proceedings/iclgg-17/25902332>.

## **Method**

The type of research that will be used is normative legal research.<sup>17</sup> The types of data used in this research are primary data and secondary data. After data on sharia economic decisions in Indonesian religious courts for 3 consecutive years have been collected, then the data is analyzed and compiled using descriptive analysis and concluded deductively from general matters to specific matters regarding the urgency of using fiqh books. (Kitab Kuning) in considering the judge's decision, by looking at the consideration of the judge's decision originating from the fiqh book, it is seen how urgent the judge's legal study based on these books is in the decision of the religious courts in Indonesia.

## **Findings and Discussions**

Several things are interconnected. First, the existence of KHES cannot be separated from the classical fiqh books. Relating to the history of the formation of KHES in Indonesia, it will not be separated from the existence of classical fiqh books as one of the components in the formation of KHES itself. However, the judges of religious courts are also obliged to explore, follow, and understand legal values and a sense of justice that live in society. Decisions of special religious courts relating to the settlement of shari'ah economic disputes are not enough only refer to one rule of law. It is also necessary to refer to the values contained in the classical fiqh books, which are one of their constituent components. Second, not all of the component principles and values already in the fiqh books are accommodated in the KHES, there may be certain problems that have not been accommodated in the KHES but there are rules in the classical fiqh books. The perception and tendency of judges towards the three sources of law as follows:

### **Perceptions and tendencies of judges in using the Kitab Kuning as the considerations in resolving sharia economic disputes in the religious courts**

Judges should not only be the mouthpiece of the Act, judges must be able to issue decisions in the form of legal discovery (rehtvinding), law creation (rechtscapping), and

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<sup>17</sup> depri liber sonata, "METODE PENELITIAN HUKUM NORMATIF DAN EMPIRIS: KARAKTERISTIK KHAS DARI METODE MENELITI HUKUM," *Fiat Justisia: Jurnal Ilmu Hukum* 8, no. 1 (November 5, 2014), accessed January 8, 2022, <https://jurnal.fh.unila.ac.id/index.php/fiat/article/view/283>.

law application (recht to pass). The judge's crown is a decision so that a good judge can improvise both in the form of legal discovery, to get a quality decision and contain the spirit of justice. If the existing legal norms cannot answer the case submitted to him, then the judge is obliged to make a legal breakthrough or the term through *ijtihad*. It carried out by judges is not only based on formal and material rules regulated in the law, in religious courts it is also known that the *fiqh* books are a source of consideration for judges in deciding cases.<sup>18</sup>

Until now, the term of *Kitab Kuning* is still popular. The term is commonly used to denote Arabic written works compiled by the *Ulama* several centuries ago. From some opinions, it can be concluded that what is meant by the *Kitab Kuning* are books that contain values and knowledge related to Islamic teachings, written in Arabic, and were originally studied in Islamic boarding schools. It is difficult to separate the *Kitab Kuning* and the world of Islamic boarding schools, because, in that Islamic boarding schools, it is very dominant, not only as a scientific treasure but also as a value system that is held by and colored all aspects of life; it becomes a benchmark of science and piety. It is embodied in religious understanding, worship procedures, relationships, ethics, and perspectives on the lives and their followers, including issues of deciding justice in legal disputes which are very much regulated in the *Kitab Kuning*.

### **Perceptions and tendencies of judges in using KHES as the considerations in resolving sharia economic disputes in the religious courts.**

Judging from the contents of the Compilation of Sharia Economic Law above, of the 796 articles, a total of 653 articles (80%) are related to contracts or agreements, thus the most material of the provisions on sharia economics is related to engagements and agreements. One of the discussions about this contract is the *mudharabah* contract. This discussion of the *mudharabah* contract is the basic discussion in this study.<sup>19</sup>

The compilation of Sharia Economic Law about the concept of a contract or transaction is a *muamalat fiqh*. So that the concepts contained in it cannot be separated

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<sup>18</sup> afdol, "Hukum Komtetensi Peradilan Agama - Google Books," *Rajawali Press*, accessed February 5, 2022, [https://www.google.co.id/books/edition/Hukum\\_Komtetensi\\_Peradilan\\_Agama/gUVIEAAAQBAJ?hl=id&gbpv=1&dq=Afdol,+Kewenangan+Pengadilan+Agama+Berdasarkan+UU+No.+3+Tahun+2006+dan+Legislasi+Hukum+Islam+di+Indonesia,+Surabaya:+Airlangga+University+Press,+2006.&pg=](https://www.google.co.id/books/edition/Hukum_Komtetensi_Peradilan_Agama/gUVIEAAAQBAJ?hl=id&gbpv=1&dq=Afdol,+Kewenangan+Pengadilan+Agama+Berdasarkan+UU+No.+3+Tahun+2006+dan+Legislasi+Hukum+Islam+di+Indonesia,+Surabaya:+Airlangga+University+Press,+2006.&pg=).

<sup>19</sup> Quang Khai Nguyen, "Oversight of Bank Risk-Taking by Audit Committees and Sharia Committees: Conventional vs Islamic Banks," *Heliyon* 7, no. 8 (August 1, 2021): e07798, accessed February 5, 2022, <https://linkinghub.elsevier.com/retrieve/pii/S2405844021019010>.

from the principles contained in the fiqh book, even to get an explanation of an article clause in the KHES of religious court judges cannot be separated from the existence of the fiqh book as its initial source. Religious court judges in Indonesia very often refer to fiqh books if the explanation in the KHES is felt to have not provided judges with a definite basis of consideration in deciding a sharia economic case in religious courts in Indonesia.<sup>20</sup>

**Judges' perceptions and tendencies in using the Kitab Kuning (Books of Fiqh) perspective Supreme Court Regulation no. 14 of 2016 concerning Settlement of Sharia Economic Disputes in Religious Courts.**

This regulatory function is following the mandate of Article 79 of Law Number 14 of 1985 concerning the Supreme Court. This provision states that the Supreme Court can further regulate matters needed for the smooth administration of justice if there are matters that have not been sufficiently regulated in the law as a complement to fill in legal deficiencies or vacancies needed for the smooth administration of justice. It is noted that throughout 2016, the Supreme Court has issued 14 Supreme Court Regulations (PERMA) and 4 Supreme Court Circulars (SEMA). As reported by the MA page, the 14 PERMAs published in 2016 were the most record for the establishment of the institution. As a comparison, from the data released by the Supreme Court, in the last five years, the PERMA published by the Supreme Court each year is still below the achievement in 2016. For example, in 2011, there were two PERMAs, in 2012 there were six PERMAs, in 2013, and there were three PERMAs. In 2014, there were five PERMAs and in 2015 there were seven PERMAs.

If we look at the description of the content and substance of PERMA Number 2 of 2008 concerning the Compilation of Sharia Economic Law (KHES) as the material law of the settlement of sharia economic disputes in Indonesia:

**Table 1: Description of the content and substance of Law Number 21 of 2008 concerning the Compilation of Sharia Economic Law (KHES)**

No	Muatan	Pasal-Pasal yang Mengatur
1.	Ketentuan Umum	Pasal1
2.	Asas, Tujuan dan Fungsi	Pasal 2, Pasal 3, dan Pasal 4.
3.	Perizinan, Bentuk Badan Hukum, Anggaran Dasar, Kepemilikan	Pasal 5, sampai dengan Pasal 17

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<sup>20</sup> Abdul. Manan, "Reformasi Hukum Islam Di Indonesia" (2006): 370.



4.	Jenis Kegiatan Usaha, Kelayakan Penyaluran dana, larangan bagi bank syari'ah dan UUS	Pasal 18 sampai 26
5.	Pemegang Saham Pengendali, Dewan Komisaris dan Dewan pengawas syari'ah, Direksi dan Tenaga Kerja Asing	Pasal 27 sampai dengan Pasal 33
6.	Tata Kelola, prinsip Kehati-hatian, dan Pengelolaan Resiko Perbankan syari'ah	Pasal 34 sampai dengan Pasal 40
7.	Rahasia Bank	Pasal 41 sampai dengan Pasal 49
8.	Pembinaan dan Pengawasan	Pasal 50 sampai dengan Pasal 54
9.	Penyelesaian Sengketa	Pasal 55
10.	Sanksi Administrasi	Pasal 56 Sampai dengan Pasal 58
11.	Ketentuan Pidana	Pasal 59 sampai dengan Pasal 66
12.	Ketentuan Peralihan	Pasal 67 sampai dengan Pasal 68
13.	Ketentuan Penutup	Pasal 69 sampai dengan Pasal 70

Source : Religious Court Magazine, December 8 2015 Edition, pages 11-12.

Although the KHES is substantially based on the Qur'an and Hadith, the rules of fiqh proposals, the rules of fiqh and the rules of qanuniah, and the opinions of scholars, thus KHES is compiled with these legal sources following local values. From the research results, not all the rules of fiqh are used as article formulations in the KHES, even Book I and Book IV do not have fiqh rules, either explicitly or implicitly, so that it is common for judges to decide on sharia economic cases in religious courts, still referring to the fiqh rules contained in the Kitab Kuning, in addition to also referring to the KHES and Perma Number 14 of 2016 as the formal law. So, if it can be counted in Book II, there are only those from Majallah found 7 articles that are explicitly adopted from the 99 Muamalah Fiqh Rules. Implicitly, there are fiqh rules that are applied to 125 articles, meanwhile, in Book III there are fiqh rules that are absorbed indirectly in the form of 11 fiqh rules and there are 24 articles on the application of deductive reasoning.

From the research results, there are only 27 fiqh rules out of 99 fiqh rules, the 27 fiqh rules are applied to 149 articles in KHES. 20 of the 27 fiqh rules are mentioned implicitly, while the other 7 fiqh rules are mentioned explicitly as follows:

**Table 2: Seven other fiqh rules are mentioned explicitly in KHES**

No.	Kaidah Fiqih	Penyerapan dalam KHES
1.	<i>al-ibrah fi al-uqûd li al-al-maqâshid wa al-ma'ânî lâ li al-alfâdh wa al-mabânî</i>	Pasal 48
2.	<i>al-ashl fi al-kalâm al-haqîqah</i>	Pasal 49 Ayat (1)
3.	<i>i'mâl al-kalâm aulâ min ihmâlih</i>	Pasal 50
4.	<i>al-muthlaq yajrî „alâ ithlâqih, idzâ lam yaqum dalîl al-taqyîd nashshan aw dalâlatan</i>	Pasal 54
5.	<i>idzâ ta„adzdzarat al-haqîqah yushâr ilâ al-majâz</i>	Pasal 51
6.	<i>idzâ ta„adzdzara i„mâl al-kalâm yuhmal</i>	Pasal 52
7.	<i>dzikr ba„dl mâ lâ yatajazza kadzikr kullih</i>	Pasal 53

Source: Religious Court Magazine,<sup>21</sup> 8 December 2015 Edition, page 15

Then the absorption of the DSN Fatwa that the Indonesian Ulema Council is a forum for deliberation of scholars born since July 26, 1975, one of the roles of MUI is to issue fatwas and advice to the government and Muslims in matters relating to religion and religion. In 1999 the MUI took the initiative to issues a Decree Number: Kep-754/MUI/II/1999 dated February 10, 1999, which confirmed the National Sharia Council as part of the MUI fatwa commission with the specific task of giving birth to fatwas relating to Islamic economics.

From 1999 to 2015, DSN has issued 96 fatwas covering MudharabahI, wadiyah, Murabahah, Bai al salam, Musyarakah, Ijarah, Wakalah kafalah, Hawalah, Save deposit box, Ran gold, Letter of credit, Shari'ah credit card, Leasing shari'ah and so on. More than 50% relates to sharia banking, the rest relates to the sharia capital market, sharia insurance, sharia bonds, sharia mortgages and sharia financing.

According to Juhaya S Praja, that the absorption of the DSN-MUI fatwa which was adopted as Indonesian material (texts) for KHES is illustrated in the following:

**Table 3: Absorption of DSN-MUI Fatwa Adopted as Indonesian Material (texts) KHES**

No. Fatwa DSN- MUI	Material Indonesia Fatwa	Absorption KHES	Chapter
8/2000	Musharaka Financing	Kontrak Kerjasama (Syirkan)	129-140
9/2000	Ijarah Financing	Bab X: Sewa Menyewa	247-287
10/2000	Wakalah	Bab XVII: Wakalah (Pemberi kuasa)	483-557
11/2000	Kafalah	Bab IX: Penjaminan (Wakalah)	293-330
12/2000	Hawalah	Bab XII: Pemindahan Hutang (Hawalah)	331-342
21/2001	General Guidelines for Sharia Insurance	Bab XX: Asuransi	558-608
39/2002	Hajj insurance	Bab XX: Asuransi	607-608

Source: Religious Court Magazine, December 8 2015 Edition, page 16

**Table 4: Decisions of the First Level Religious Courts after 2008**

Case Number and Parties	Decision	Type of Dispute	Source of law						
			*1	*2	*3	*4	*5	*6	*7
419/ Pdt.G/2008/PA.SE (PA Selong) PT BPR Syari'ah Tulen Amanah dengan Nasabah	2-3-2009	Wanprestasi Akad murabahah	v	v	v			v	
1221/Pdt.G/2009/PA.JS (PA Jakarta Selatan) BMI dengan Asuransi Takaful Umum	4-8-2010	Wanprestasi Akad Asuransi	v		v		v	v	

<sup>21</sup> Mohammad Mahfud MD M, "Majalah Peradilan Agama Edisi 8.Pdf - Google Drive," accessed February 5, 2022, <https://drive.google.com/file/d/0B5UQVcJ8Df8WYVNHvZmZWTgxaWs/view?resourcekey=0-pQt9ajXZh7ErOiVbr5Naw>.

887/Pdt.G/2011/PA.Sit (PA Situbondo) PT. BPR syari'ah dengan Nasabah	28-4-2011	Wanprestasi Akad	v	v			
483/Pdt.G/2011/PA.Btl (PA Bantul) Nasabah dengan Ksu BMT	17-10- 2011	Musyarakah Wanprestasi Akad Mudharabah	v				
318/Pdt.G/2011/ PA.Bt (PA Bantul) Ksu BMT Bima sejahtera Mandiri dengan Nasabah	27-12- 2011	Wanprestasi Akad Mudharabah	v	v	v	v	v
1740/Pdt.G/2011/PA.Pbl (PA Purbolinggo) BPRS Bunna Mitra Perwira vs Nasabah	19-1-2012	Wanprestasi Akad Mudharabah	v				
700/Pdt.G/2011/PA.Btl (PA Bantul) Nasabah vs Ksu BMT islam Sejahtera	23-7-2012	Wanprestasi Akad Mudharabah		v		v	v
967/Pdt.G/2012/PA.Mdn (PA Medan) Nasabah vs Bank Sumut Syari'ah Cabang padang Sidempuan	18-6-2013	Akad Mudharabah	v	v			v
0945/Pdt.G/2014/PA.ME (PA Muara Enim) PT. Bank BNI Syari'ah Kecapem Mikro Prabumulih vs Nasabah	28-2-2015	Wanprestasi Akad murabahah	v	v	v	v	

**Source: Religious Court Magazine, December 9 2016 Edition, page 16**

Note:

\*1: KHES

\*2: KUHper

\*3: Fatwa DSN

\*4: PBI

\*5: UU

\*6: Kitab Kuning

\*7: Yurisprudens

From the data, saw that decisions are using KHES as a judge's legal consideration in deciding cases of sharia economic disputes. In addition to KHES, the judges still use sources of legal considerations outside of KHES including still using the books of Fiqh as one of the judge's legal considerations, meaning the existence of KHES as a source of formal and material Indonesian law for resolving sharia economic disputes in the Religious Courts. However, the judges have to use other sources including the books of Fiqh which is also known as the Kitab Kuning.

The decisions above taken in general can illustrate that KHES has been used as a reference in resolving sharia economic disputes, most of which saw refer to KHES which regulates contracts and broken promises. This is because most of the sharia economic disputes that occur are caused by default or broken promises. Decisions that use KHES as a reference in resolving sharia economic disputes mostly refer to the provisions of

KHES which regulate contracts and breaking promises. This is because most of the sharia economic disputes that occur are caused by default or broken promises.

This method and practice, the perceptions and tendencies of judges towards several sources of the rule of law in assessing, weighing, and deciding on a sharia economic case in the Religious Courts. Judges in deciding sharia economic case disputes cannot tend or rely on only one KHES as a source of material Indonesian law in the settlement of sharia economic disputes, or judges cannot use only one source such as the books of Fiqh alone or for formal rules. The settlement of sharia economic disputes is only in Perma No. 14 of 2016 alone as a source of Indonesian material law, how about when a case does not have clear rules about it, then the judge needs to make legal discoveries.

In the legal discovery made by the judges of the Religious Courts, there is the role of the classical fiqh books, that courts or judges are prohibited from refusing to examine, try, and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. The Religious Courts as special courts in Indonesia require certain conditions in the recruitment of Religious Court judges related to the existence of the Kitab Kuning in supporting judges in making a court decision. In the Circular Letter of the Supreme Court Number: 001/Bua.2/F.001/IX/2010 concerning the Admission of Candidates for Judges, Secretariat of the Supreme Court, Jakarta, September 24, 2010, it is explained that each candidate for a Religious Court judge must be selected first in relation to his or her control over Fiqh books.

With the issuance of Perma Number 14 of 2016 concerning procedures for resolving sharia economic disputes in religious courts as a formal rule of KHES which in terms of its composition there are also several articles that are absorptions from the Books of Fiqh. Judges of religious courts can explore the values and principles contained in the Fiqh books so that they can create decisions that are fair, have legal certainty, and have benefits, in addition to the existing rules governing the settlement of existing sharia economic cases in the KHES and Perma Number 14 of 2016.

## **Conclusion**

Classically, there has been collaboration in the implementation of both KHES, MUI Fatwas including the use of the Kitab Kuning as one of the basic considerations for judges in Religious Courts in Indonesia. The judges of the Religious Courts should not

only rely on the law, but they also pay attention to legal values that live and thrive in society, including the existence of the Kitab Kuning (the books of Fiqh). Especially in casuistic cases, every decision made should fulfill the legal objectives for the parties.

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