

## Reconstruction of Sharia Economic Procedural Law in Indonesia and Comparison of Sharia Economic Cases in Malaysia and Indonesia

Cik Basir,<sup>1</sup> Joni Emirzon,<sup>2</sup> Muhammad Syaifuddin,<sup>3</sup> Sofyan Hasan<sup>4</sup>

Universitas Sriwijaya Palembang, Indonesia

Email: [cikbasir01@gmail.com](mailto:cikbasir01@gmail.com)

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**Abstract:** *Sharia economy is a subsystem of the national economic system. As an economic system with distinctive Sharia principles, which is an integral part of the national economic system, it should have regulations that can provide appropriate legal certainty for the community. However, this study highlights several weaknesses related to the regulations governing the resolution of Sharia economic procedural law, including the limitations of Supreme Court Regulation (Perma) Number 14 of 2016 concerning Procedures for the Settlement of Sharia Economic Cases and the pluralistic nature of Sharia economic procedural law sources. The aim of this research is to analyze the weaknesses in the resolution of Sharia economic procedural law, leading to disparities in the pursuit of justice by individuals in Religious Courts. This normative problem demands a reconstruction of Sharia economic procedural law to align it with Sharia principles and the values embodied in Pancasila. Furthermore, this study will compare the Sharia economic procedural law in Malaysia, which adheres to the principle of persons professing the religion of Islam, in the resolution of Sharia economic cases. The legal research method used is normative juridical, thus this research analyzes based on three aspects: philosophical, juridical, and sociological, to identify the urgency of legal reform of Perma Number 14 of 2016 concerning Procedures for the Settlement of Sharia Economic Cases. The findings of this research recommend a judicial review of Perma Number 14 of 2016 to build a Sharia economic procedural law derived from Islamic law and capable of providing legal certainty in all aspects of Sharia economic cases.*

## Introduction

The practice of the Islamic economic system is currently expanding widely within the economic life of Indonesian society, growing in a dualistic manner with orientations towards both profit and non-profit activities. Profit-oriented forms include Sharia financial institutions, Sharia pawnshops, and others. Non-profit forms include charitable activities such as zakat, infaq, and shadaqah, as well as waqf institutions (Kusmanto, 2014). The definition of Sharia economy is provided in Article 1, Paragraph (1) of Supreme Court Regulation Number 14 of 2016 concerning Procedures for the Settlement of Sharia Economic Cases, which describes it as business or activities conducted by individuals or legal entities to fulfill needs that have commercial and non-commercial characteristics according to Sharia principles (Bakar, 2020b); simply put, commercial activities based on Sharia principles. In essence,

participants in Islamic economic activities must always adhere to divine principles, which emphasize that individual interests are closely linked with societal interests, promoting harmony and balance rather than opposing the economy, thereby creating a just economic system (Bakar, 2020a).

Sharia economy is regarded as a subsystem of the national economy, deriving its principles from the Qur'an and Sunnah (Djamil, 2015). According to Article 1, Paragraph (2) of Supreme Court Regulation Number 14 of 2016, it is defined as "Islamic legal principles in Sharia economic activities based on fatwas issued by authorized institutions in the field of Sharia." Juridically, Sharia economic principles are intertwined with legislative regulations, encompassing institutional, operational, and all commercial aspects, including law enforcement related to case resolution. The emergence of the Sharia economy represents the realization of guaranteed protection and legal certainty as stipulated in Article 28D, Paragraph (1) of the 1995 Constitution, reflecting the state's commitment to optimizing guarantees of protection and legal certainty (*rechtszekerheid*) through law enforcement, particularly in resolving Sharia economic cases (Afriana & Kusmayanti, 2021). The state has strengthened and expanded the authority of the Religious Courts, designating them as the sole state institution authorized to resolve Sharia economic cases through litigation.

The authority of the Religious Courts is stipulated in Article 49, letter I of Law Number 50 of 2009, concerning the Second Amendment to Law Number 7 of 1989 on Religious Courts, which states that "the Religious Courts are tasked with and authorized to examine, adjudicate, decide, and resolve cases among people professing the religion of Islam, including in the field of Sharia economy." This includes: letter i "Sharia banks, Sharia microfinance institutions, Sharia insurance, Sharia reinsurance, Sharia mutual funds, Sharia bonds, Sharia mid-term securities, Sharia securities, Sharia financing, Sharia pawnshops, Sharia financial institution pension funds, and Sharia business." It also includes the fields of waqf, zakat, infaq, and sadaqah, whether commercial, contentious, or voluntary, as regulated in Article 1, Paragraph (4) of Supreme Court Regulation No. 14 of 2016 on Procedures for the Settlement of Sharia Economic Cases (Hariyanto et al., 2023).

In addition to Article 49, letter i of the Religious Courts Law (UUPA), the authority of the Religious Courts is also addressed in Law Number 21 of 2008 on Sharia Banking (hereinafter referred to as UUPS). Article 55, Paragraph (1) of the UUPS states that "The Religious Courts have the authority to resolve disputes in the field of Sharia banking." From the perspective of Sharia banking practitioners, the goal is to create a system entirely based on Sharia principles, with trust and support from the community. This is particularly relevant given that the majority of Indonesia's population is Muslim, thereby ideally meeting the needs of Indonesian society to practice Islam comprehensively (Tumewang, 2019). Given the significance of Sharia economic law, which influences all aspects of societal life, the provisions related to UUPS were further reinforced by the Constitutional Court Decision Number 93/PUU-X/2012. This judicial review of Article 55, Paragraph (2) of the UUPS, as articulated in the Constitutional Court's decision, clarifies

the competence of the Religious Courts as the sole state institution exercising judicial power authorized to resolve Sharia economic cases in Indonesia.

The trust in Constitutional Court Decision Number 93/PUU-X/2012 serves as evidence that emphasizes the Religious Courts' role in upholding Sharia economic law and their authority in resolving Sharia economic cases in Indonesia. Studying the implications of the Constitutional Court's decision, it is appropriate for all legal sources used within the Religious Courts to adhere to the principles of substantive Sharia economic law. However, in practice, both simple and regular lawsuits within the scope of Sharia economics must apply Article 54 of the Religious Courts Law, which stipulates that procedural law used in the Religious Courts follows civil procedural law, similar to that in the General Courts. Therefore, in receiving, adjudicating, deciding, and resolving Sharia economic cases, the entire legal process in the Religious Courts adheres to provisions established in legal products from the Dutch East Indies era, such as H.I.R, R.Bg, B.Rv, BW/KUH Perdata (especially Book IV), and the Commercial Code (KUHD), as well as civil procedural law scattered across various Indonesian government regulations applicable in the General Courts. This presents a problem within society where cases falling outside the jurisdiction of the general courts are forced to adhere to pluralistic provisions under general civil law, thereby disregarding the authority of Sharia economic law under the Religious Courts.

The Religious Courts essentially embody the Islamic judiciary system in Indonesia, as reflected in studies on its understanding, which encompass: firstly, judicial power established independently without intervention from state or governmental authorities; secondly, the hierarchical structure of the Religious Courts, including leadership, judges, court clerks, and other elements within the court organization; thirdly, procedural processes related to various types of cases, legal products, and procedural law; fourthly, cases involving matters such as marriage, inheritance, wills, gifts, waqf, infaq, shadaqah, and Sharia economics; fifthly, individuals professing the Islamic faith as litigants or seekers of justice; sixthly, Islamic law as the substantive law referenced; and seventhly, the enforcement of law and justice (Rahmi, 2013). The Religious Courts serve as a venue for resolving disputes related to provisions pertaining to principles of Sharia or Islamic law in economics (Fuadi et al., 2023).

This normative problem manifests as a legal disparity due to the lack of synchronization between the principles outlined in Law Number 50 of 2009, the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts, regarding the authority of the Religious Courts in resolving Sharia economic cases. However, as observed in Malaysia, the resolution of Sharia economic cases is sought to be handled in the General Courts, as Sharia economic actors cannot be restricted solely to individuals professing the Islamic faith or legal entities associated with Islam, commonly referred to as persons professing the religion of Islam (Mohamad & Trakik, 2012). This issue becomes complex concerning the consistency of the function and authority of the Religious Courts in resolving Sharia economic cases, often resulting in disparities within society where individuals seeking justice for their rights must accept legal uncertainty, leading to losses for those who file lawsuits in the Religious Courts regarding Sharia economic cases.

This normative issue arises due to a legal discrepancy resulting from the misalignment between the principles outlined in Law Number 50 of 2009, the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts, regarding the jurisdiction of the Religious Courts in handling Sharia economic cases. However, as observed in Malaysia, Sharia economic cases are typically addressed in the General Courts, as Sharia economic activities are not exclusively limited to individuals or legal entities associated with Islam, commonly referred to as persons professing the religion of Islam (Mohamad & Trakik, 2012). This complexity arises from the inconsistent role and authority of the Religious Courts in resolving Sharia economic cases, often leading to disparities within society. Consequently, individuals seeking justice for their rights must navigate legal uncertainty, resulting in losses for plaintiffs who litigate in the Religious Courts regarding Sharia economic matters.

### **Research Method**

This study analyzes the legislation and principles governing Sharia economic procedural law. It employs a juridical normative research method (Syarafi & Syahbandir, 2024), specifically examining legal systematics to understand the fundamental aspects of issues related to the synchronization of Sharia economic procedural law construction in Indonesia through a comparison with Malaysian law in resolving Sharia economic cases. Data analysis is conducted by approaching legislative regulations related to Sharia economic procedural law and Sharia economic cases to analyze legal aspects concerning the synchronization of Sharia economic procedural law construction (Junius et al., 2023). To analyze the collected legal materials, this research utilizes qualitative data analysis method, namely juridical normative analysis (Nyekwere et al., 2023), presented descriptively by analyzing Supreme Court Regulation Number 14 of 2016 concerning Procedures for the Settlement of Sharia Economic Cases based on three aspects: juridical, normative, and sociological, aiming to provide legal certainty for individuals seeking justice in the Religious Courts. Additionally, this study will illustrate a comparison of Sharia economic procedural law between Indonesia and Malaysia in resolving Sharia economic cases adhering to the principle of “persons professing the religion of Islam”.

### **Results and Discussion**

#### **The Normative Problem of Sharia Economic Procedural Law Construction Based on Analysis of Sociological, Juridical, and Philosophical Aspects.**

Legal construction essentially occurs when several conditions arise (Muwahid, 2017): no statutory provisions can be applied to the case at hand; there are no regulations governing it; there is a legal vacuum or *recht vacuum*; there is a lack of legislation or *wet vacuum*. In Sharia economic cases falling under the jurisdiction of the Religious Courts as stipulated in Article 49, letter I of Law Number 50 of 2009, the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts, only the jurisdiction is addressed. However, in practice, disparities arise in judicial and procedural technicalities, as well as in the execution of judgments, which lack specific rules governing the

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procedural aspects of Sharia economic law to provide legal certainty for every Sharia economic case.

Indonesia has yet to introduce laws regulating Sharia economic procedural law, which sociologically poses a barrier for individuals or entities engaged in Sharia economics seeking justice in asserting or obtaining their rights in the Religious Courts. Thus far, the Religious Courts have primarily focused on normative aspects regarding jurisdiction without considering the sociological dimension. It remains unclear whether Sharia economic actors involved in cases brought before the Religious Courts have truly received justice or if the proceedings merely fulfill formalities in addressing claims brought forth by petitioners or plaintiffs.

From a juridical perspective, based on Article 13, Paragraph (1) of Supreme Court Regulation Number 14 of 2016, the Religious Courts are granted authority to execute rights related to collateral and fiduciary agreements based on Sharia contracts. However, the execution authority is not specifically regulated according to Sharia principles. Due to the absence of regulations governing the execution of collateral and fiduciary rights based on Sharia principles, execution matters still rely on provisions outlined in Law Number 4 of 1996 concerning Collateral Rights over Land and Related Objects and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Both provisions regarding execution, namely Law Number 4 of 1996 and Law Number 30 of 1999, derive from principles of legal pluralism rather than Sharia law. Therefore, the legal processes conducted in the Religious Courts can be considered mere formalities, lacking the binding certainty concerning decisions issued by the Religious Courts regarding the execution of case objects. Furthermore, assessing the philosophical aspect poses a hindrance in providing legal certainty for every Sharia economic actor in seeking justice, benefit, and legal certainty in the Religious Courts. The mandate of Pancasila itself in fulfilling the principles of justice is an essential aspect in realizing philosophical values, linking the sociological and juridical aspects.

This analysis is constructed upon several normative obstacles that need to be considered, particularly regarding the imbalance between the enforcement of Sharia substantive law, which is based on Sharia principles and concepts, and the legal construction within Sharia economic procedural law, which relies on primary sources of law with a pluralistic nature, namely HIR, R.Bg, B.Rv, and KUHPerdata, created by the Dutch government. Consequently, the Sharia sources from the Quran and Sunnah are overlooked in the framework of Sharia economic legal sources. Furthermore, from the perspective of procedural law theory, the establishment of procedural law or formal law within Sharia economics should also be accompanied by the development of substantive law to address core issues, thereby providing legal certainty for society. However, in practice, only Sharia economic procedural law is developed, without the simultaneous development of substantive law related to Sharia economics. Additionally, as expressed by A. Rasyid (Rasyid, 1991), procedural law serves the realization of Islamic substantive law, empowering religious courts to establish procedural law that upholds Islamic law and safeguards Islamic substantive law. Both legal theories emphasize

that proper procedural law is built upon a balance between provisions governing procedure and technical justice based on Islamic law.

### **The Function and Purpose of Sharia Economic Procedural Law**

In general, Sharia economic procedural law is a subset of civil procedural law, so its function is not fundamentally different, aiming to resolve civil cases. However, in Sharia economic procedural law, the subject matter pertains to Sharia or Islamic civil matters. The functional essence of Sharia economic procedural law lies in enforcing Sharia substantive economic law through the religious courts while simultaneously protecting the rights and legal interests of the parties involved. Ideally, the function of Sharia economic procedural law is to facilitate the resolution of Sharia economic cases in the religious courts, ensuring justice and adherence to Sharia principles.

The objectives of Sharia economic procedural law can be understood through the lens of legal theory in Islamic perspective, as articulated by scholars such as Muhammad Abu Zahra, Ibn Qoyyim, and Abu Ishaq Asy-syatibi. According to their views, the purpose of Islamic Sharia is to realize the well-being of humans in both this world and the hereafter by preserving the five essential elements outlined in the concept of *maqasid al-shariah*, namely: the preservation of religion (*hifz al-din*), life (*hifz al-nafs*), intellect (*hifz al-aql*), progeny (*hifz al-nasl*), and property (*hifz al-mal*) (Ismail, 2021). Based on these objectives of Sharia, the aim of Sharia economics should also entail providing benefits in both the worldly life and the afterlife, in accordance with Sharia principles derived from the Quran and Sunnah (Djamil, 2015). It should not be based on legal pluralism inherited from colonial-era legal frameworks.

Furthermore, from a Western perspective, the objective of law, as articulated in Gustav Radbruch's theory (Budi & Daud, 2023), is the realization of three elements: legal certainty, justice, and utility. By integrating both perspectives on the objectives of law, the aim of Sharia economic procedural law is to establish legal certainty, justice, and utility, thus promoting human welfare, tranquility, and happiness in both this world and the hereafter across all aspects of life, including matters related to religion (*hifz al-din*), life (*hifz an-nafs*), intellect (*hifz al-aql*), progeny (*hifz an-nasl*), and property (*hifz al-mal*). This objective is what this research aims to achieve in resolving Sharia economic cases in the religious courts.

### **The philosophical aspect in the construction of Sharia economic procedural law**

Pancasila is the philosophical foundation of the Indonesian nation, thus all aspects of Indonesian life are based on Pancasila, which is implemented in the 1945 Constitution (Su'aidi, 2012). Even in the third amendment of the 1945 Constitution, it is explicitly stated in Article 1 Paragraph (3) that Indonesia is a state based on law; therefore, all legal policies must be based on the philosophical values of Pancasila, which serve as the legal foundation of the Indonesian nation. Sharia economic procedural law is the enforcement of Sharia economic law in religious courts to protect the rights and interests of the parties involved in executing Sharia economic substantive law within the national legal system and judiciary. Thus, philosophically, Sharia economic

procedural law should be in harmony, coherence, and consistency with Sharia economic substantive law in terms of principles, principles, norms, and values."

Harmony, consistency, compatibility, and coherence within the scope of philosophical knowledge necessitate the construction of three corridors of philosophical inquiry in the content of Sharia economic procedural law with Sharia economic substantive law. These corridors include the theory of essence (ontology) in Islam, which involves studying the essence that exists in concrete or abstract forms, thus addressing the aspects of knowledge concerning these forms; the theory of knowledge (epistemology), which, based on terminological views, is depicted as a field of study that examines human knowledge in various types and measures of truth, focusing on how this knowledge is obtained; and Islam and the theory related to Islamic values (axiology), which is a branch of philosophy known for its values and their relationship with the utility of various human-acquired knowledge (Hidayat, 2022). These three corridors of inquiry elucidate philosophically the necessity of constructing Sharia economic procedural law so that every content contained within Sharia economic procedural law is part of the national legal system operating in a harmonious, coherent, consistent, and non-contradictory manner with the principles, foundations, and values of legal doctrines (*idee des recht*) (Setyawan et al., 2021).

The essence of Sharia principles lies in the Quran and Sunnah (Djamil, 2015). Therefore, laws constructed to protect the needs of individuals engaging in Sharia-compliant transactions, such as buying and selling or contractual agreements including arbitration, must be based on Sharia principles without involving pluralistic legal sources. This is because Sharia law entails specific provisions guided by principles and objectives distinct from those found in pluralistic legal frameworks, which may not grasp the Sharia context concretely or abstractly. The existing framework of Sharia economic procedural law, which has been based on the scope of general courts, cannot serve as a basis for Sharia law. This situation renders religious courts ineffective in fulfilling the objectives of Sharia economics, which aim to achieve the well-being of individuals in both the worldly life and the hereafter (Ismail, 2021).

Regulations rooted in pluralism are essentially legal products inherited from the Netherlands, thus they are not aligned with the cultural values of the Indonesian nation but only with the cultural values of the Dutch nation. If the primary source of Sharia economic procedural law continues to rely on pluralistic legal products, it will result in inconsistencies or disorder due to the lack of harmony among the values, principles, and/or legal norms within the Indonesian legal system. Moreover, the substantive law enforced using such procedural law is Sharia economic law, which, in addition to practically possessing dynamic characteristics, ideally embodies specific legal ideals (*rechtsidee*) that not only construct existing values within society based solely on anthropocentric or sociocultural aspects but also accommodate religious, spiritual, and transcendental elements that must be realized in the enforcement of law and justice.

Thus, the current construction of Sharia economic procedural law in Religious Courts, particularly in terms of its legal sources, does not align with

the philosophical foundation of the national legal system, which is Pancasila, the state ideology of Indonesia.

### **Juridical Aspects in the Construction of Sharia Economic Procedural Law**

Juridical basis (*yuridische grondslag*) is part of the considerations or a reason that provides a legal framework formed to provide solutions to legal issues or to fill legal gaps based on existing legal considerations, which will be amended or repealed to ensure legal certainty and a sense of justice for the community (Widiyono & Khan, 2023). Simply put, the juridical aspect is a component of the substance or legal content regulated to demand the formation of new laws for outdated legal issues, inconsistent problems, existing regulations with unclear meanings, or legal gaps requiring new laws or legal reforms to address legal issues as the best solution available to the community.

Regarding the juridical problem of Sharia economic procedural law, it has actually emerged since the delegation of authority to adjudicate Sharia economic cases to the Religious Courts with the issuance of Law Number 3 of 2006, which is an amendment to Law Number 7 of 1989, followed by the issuance of Law Number 21 of 2008. These laws only state that the Religious Courts have the authority to examine, adjudicate, and settle cases or disputes in the field of Sharia economics and Sharia banking (Suadi, 2020). Article 49 of Law Number 3 states that the Religious Courts are tasked and authorized to examine, adjudicate, and settle cases at the first level between Muslims in the field of...i) Sharia economics. As for Article 55 paragraph (1) of Law Number 21, it states that in the resolution stage of Sharia banking disputes, it is conducted by the courts within the Religious Courts' jurisdiction. However, regarding this authority, there is no accompanying policy or regulation on Sharia economic procedural law to be implemented in resolving Sharia economic and banking disputes in the Religious Courts. Consequently, there is a legal vacuum in Law Number 3 of 2006 and Law Number 21 of 2008 regarding the juridical basis of procedural law that can be applied in resolving Sharia economic cases in the Religious Courts.

The issuance of Supreme Court Regulation Number 14 of 2016 concerning the Procedure for Resolving Sharia Economic Cases (State Gazette of the Republic of Indonesia Year 2016 Number 2059) has transformed the landscape of the Religious Courts to fill the legal vacuum in resolving economic cases in the Religious Courts by filing simple lawsuits or lawsuits with regular proceedings. The examination of Sharia economic cases is conducted based on the applicable procedural law, except for those specifically regulated in the said Regulation. Meanwhile, for cases with simplified proceedings, the examination refers to Supreme Court Regulation Number 2 of 2015 concerning the Procedure for Resolving Simple Lawsuits and Supreme Court Regulation Number 4 of 2019 concerning Amendments to Supreme Court Regulation Number 2 of 2015, except for those specifically regulated in the said Regulation (Hidayat, 2022). With the issuance of Supreme Court Regulation Number 14 of 2016, there are at least 7 (seven) Regulations related to Sharia economic procedural law applied in the Religious Courts, namely:



1. Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court. (State Gazette of the Republic of Indonesia Year 2016 Number 175).
2. Supreme Court Regulation Number 5 of 2016 concerning Certification of Sharia Economic Judges (Promulgated on April 20, 2016).
3. Supreme Court Regulation Number 2 of 2015 concerning the Procedure for Resolving Simple Lawsuits (State Gazette of the Republic of Indonesia Year 2015 Number 1172) and Supreme Court Regulation Number 4 of 2019 concerning Amendments to Supreme Court Regulation Number 2 of 2015 (State Gazette of the Republic of Indonesia Year 2019 Number 942).
4. Supreme Court Regulation Number 2 of 2008 concerning the Compilation of Sharia Economic Law (Promulgated on September 10, 2008).
5. Supreme Court Regulation Number 1 of 2019 concerning Case Administration and Trial in Courts Electronically (State Gazette of the Republic of Indonesia Year 2019 Number 894) and Supreme Court Regulation Number 7 of 2022 concerning Amendments to Supreme Court Regulation Number 1 of 2019 (State Gazette of the Republic of Indonesia Year 2022 Number 1039).

The issuance of Supreme Court Regulation Number 14 of 2016 to fill the void in Sharia economic procedural law, along with several other related regulations, was indeed appropriate as a proactive and solution-oriented step in line with its authority to facilitate the judicial process. This aligns with the provisions of Article 79 of Supreme Court Law Number 14 of 1985 as amended by Law Number 5 of 2004 and Law Number 3 of 2009, which stipulates that "the Supreme Court may further regulate matters necessary for the smooth operation of the judiciary if there are insufficient regulations in the law."

However, as a consequence of the existence of Supreme Court Regulations (Perma), which are recognized as a type of legislation and possess binding legal force, there are at least three aspects that need to be addressed in their juridical foundation regarding Sharia economic procedural law, as outlined above. Firstly, the application of the principle of publicity to the respective Perma; secondly, the authority of the Supreme Court concerning substantive judicial review of the Perma; and thirdly, the scope and extent of the content regulated in the Perma as the juridical foundation of Sharia economic procedural law in the Religious Courts.

Regarding the principle of publicity, which requires the publication or promulgation of legislation, including Supreme Court Regulations (Perma), this is already regulated in Article 81 of Law Number 12 of 2011 concerning the Formation of Legislation. Furthermore, concerning the publication or promulgation of Perma as regulations falling under the law, it is stipulated in Article 83 of Law Number 12 of 2011 concerning the Formation of Legislation. Additionally, what still needs to be evaluated regarding Perma in its capacity as one type of legislation, especially Perma related to Sharia economic procedural law, is the process of its formation, which has not yet involved broad public participation that could provide critical contributions and suggestions regarding the content of the respective Perma in order to fulfill the purpose of the principle of publicity.

Furthermore, concerning the judicial review (*hak uji materil*) by the Supreme Court (MA) of such Perma, the question about this is intrinsically linked to the principle of natural justice, including the principle of "nemo judex in sua causa," which means that no one can be a judge in their own case. Thus, conducting a material review of Perma by the MA itself is inherently contradictory to this principle. Therefore, based on this principle, the MA fundamentally cannot conduct a material review of Perma made by itself. However, as Perma is one type of legislation, its existence cannot be completely exempt from review, and there must be an institution capable of conducting a material review even if its content contradicts other higher-ranking legislation. In this regard, considering the provision of Article 24 A paragraph (1) of the 1945 Constitution, which mandates that the MA is authorized to review legislation under the law against the constitution, and also Article 9 paragraph (2) of Law Number 12 of 2011 concerning the Formation of Legislation, which determines that "in the case of legislation under the law suspected of conflicting with the law, its review shall be conducted by the MA," judicial review of Perma, which is one type of legislation under the law, should also be eligible for submission and review by the MA.

Regarding the scope and coverage of the content regulated in Perma as the juridical basis for Sharia economic procedural law applicable in the Religious Courts, as stated in the explanation of Article 79 of the Religious Court Law Number 14 of 1985, the issuance of Perma is limited to filling gaps or voids in the administration of justice. Perma is part of the entire procedural law provisions, not regulating matters related to the rights and obligations of citizens in general, nor determining the nature, strength of evidence, its assessment, or the burden of proof. Perma may not contain norms of a general nature, as such matters fall within the legislative jurisdiction and must be regulated by law.

#### **Sociological Aspects in the Consruction of Sharia Economic Procedural Law**

The view of the construction of Sharia economic procedural law in the sociological aspect depicts how law or legal provisions are part of the interests and needs of society in their lives. Thus, this sociological aspect contains elements formed from empirical facts in the form of needs, demands, hopes, and tendencies for the formation of regulations in the form of legislation. This aligns with the idea proposed by Satjipto Raharjo, as cited by Suteki, that the law is for humans, not humans for the law. The task of the law is to provide service to society, not the other way around, so the quality of the law will be measured by its ability to serve by providing welfare to society. Suteki's perspective can serve as a sociological aspect in the construction of Sharia economic procedural law.

The elaboration of obstacles from philosophical and juridical aspects is interconnected with the sociological aspect, wherein society actually requires accurate regulations in the form of legislation to govern Sharia economic procedural law and prevent ambiguity in the execution of decisions, both in arbitration and Sharia economic fiduciary matters. This legal vacuum is indeed a crucial part that urgently needs the establishment of substantive law within

the Sharia economic procedural legal system to embody the cherished values and advance the values upheld in society.

The issue of economics is always closely related to the business world, involving the circulation of money in the form of profit and loss. This also applies to Sharia economics, where the majority of the Muslim community engages in Sharia-compliant economic activities. Therefore, when legal issues arise in the course of business, resulting disputes fall under the jurisdiction of the Religious Courts, as granted by Supreme Court Regulation Number 4 of 2016. In the resolution of Sharia economics disputes, the community demands that the competent courts provide solutions that are simple, fast, cost-effective, effective, efficient, and non-counterproductive. However, these demands have not been fully met due to the incomplete construction of Sharia economic procedural law. This is because of the lengthy process, lack of legal limitations, high costs, and prolonged litigation. Additionally, some court decisions may have legal force (*incraacht*) but cannot be executed.

The difficulties faced by the community in accessing justice hinder the economic circulation of the country, especially in the current opportunity to develop Sharia economics, which urgently requires legal provisions to regulate Sharia economic procedural law. This situation undoubtedly diminishes public trust in the Religious Courts' ability to resolve Sharia economic disputes, as revealed by research conducted by Erie Hariyanto (Hariyanto et al., 2023). The study identified reasons why the religious judiciary is underutilized by economic actors seeking justice in Sharia economic dispute resolution. Economic actors in Sharia finance are less enthusiastic about utilizing the religious judiciary to resolve their disputes. The lack of utilization of the religious judiciary by economic actors in resolving their disputes, according to Erie Hariyanto, is due to two main reasons: firstly, because economic actors still tend to prefer non-litigation avenues over resorting to religious courts, and secondly, due to the low level of public trust in the religious judiciary.

Erie Hariyanto's research is based on data regarding Sharia economic cases adjudicated by religious courts over the past fifteen years, along with interviews with several judges, lawyers, and Sharia economic practitioners. Regarding the persistent low level of public trust in the Religious Courts (PA) revealed in the research, three preconditions underlie the weak public trust in religious courts concerning the resolution of Sharia economic cases (Hariyanto et al., 2023): Firstly, the historical journey of religious judiciary and incomplete regulations to support the process of adjudicating Sharia economic dispute resolutions; Secondly, the business culture demanding quick, effective, and efficient dispute resolutions, coupled with the lack of supportive facilities and infrastructure; Thirdly, the low legal literacy among economic actors concerning the resolution of Sharia economic disputes in the Religious Courts.

The research findings confirm that the persistently low public trust in religious courts for resolving Sharia economic cases is inseparable from the stigma that has long been ingrained in Indonesian society. Religious courts have been widely known as the judiciary for resolving family law disputes. However, their jurisdiction over Sharia economic matters is a relatively new development. Despite being granted the authority to adjudicate Sharia economic matters since the enactment of Law No. 3 of 2006, there was still

controversy due to the lack of clarity regarding the applicable procedural law. It was only after the issuance of Supreme Court Regulation No. 14 of 2016, promulgated on December 29, 2016, that there was clarity on the procedural law applied. This regulation came into effect in 2017. Since then, religious courts have effectively begun handling Sharia economic cases, albeit with various limitations.

However, regardless of the aforementioned, the pertinent aspect from Erie Hariyanto's research, as focused on in this dissertation, is that the low public trust in religious courts regarding handling Sharia economic cases is partly due to the incompleteness of legislation to support the resolution of Sharia economic cases, including the low legal literacy among economic actors regarding the resolution of Sharia economic disputes in Religious Courts. The incompleteness of legislation is nothing but a part of the normative obstacles in the construction of Sharia economic procedural law, which consequently leads to the low public trust in religious courts in handling Sharia economic cases to date. This, in turn, results in a lack of authority of the Religious Courts in resolving Sharia economic cases.

### **Consequences of Normative Issues in the Construction of Sharia Economic Procedural Law from the Analysis of Sociological, Juridical, and Philosophical Perspectives**

The overall legal analysis related to Sharia Economic Procedural Law, both from philosophical, juridical, and sociological perspectives, for the establishment of substantive law in the resolution of Sharia economic cases, becomes a normative problem in the resolution of Sharia Economic Procedural Law cases. This problem gives rise to various empirical impacts that underscore the urgency of building a substantive legal system in the resolution of Sharia Economic Procedural Law cases. The impacts of the problem are as follows:

#### **Disparity in case handling procedures**

The procedures between general courts and religious courts have significant differences, but often the legal sources in the implementation procedures of Sharia economic procedural law use procedures regulated based on pluralistic civil law. This raises seeds of legal uncertainty in handling Sharia economic cases. For example, regarding the handling of immovable property in religious courts, the procedural or handling procedures use provisions regulated in the Supreme Court Regulation Number 4 of 2019 concerning the determination of the jurisdiction of the Religious Court in resolving Sharia economic procedural law cases. However, there is a normative problem related to the provisions regulated. According to the HIR (Herzien Inlandsch Reglement), the lawsuit must be filed in the jurisdiction where the defendant resides. Therefore, if the defendant's residence is unknown, the lawsuit can be filed based on the jurisdiction of the disputed object according to Article 118 paragraph (3) of the HIR and Article 142 paragraph (5) of the RBg (Harsya, 2018).

In contrast, the relationship with Supreme Court Regulation Number 4 of 2019 determines that in filing a lawsuit, whether simple or not, both the defendant and the plaintiff along with their representatives must reside in the

same domicile for case resolution. In practice, this complicates matters for any party filing their cases in the Religious Court, prompting some parties to resort to provisions regulated in civil law such as HIR and RBg. This disparity has empirical implications both in terms of technical justice and procedural technicalities, leading to the absence of legal certainty in resolving Sharia economic cases in the Religious Court.

Furthermore, there is also the provision prohibiting family members from being witnesses and being summoned to testify in court, as stipulated in Article 145 of HIR, Article 172 of RBg, and also regulated in Articles 1909 and 1910 of the Civil Code. However, in the Quran, witnesses in court proceedings due to blood relations or affinity with the parties involved are allowed to testify, as stated in Surah An-Nisa verse 135: *"O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives..."* (QS. An-Nisa' (4): 135).

Furthermore, regarding the provision that the defendant's absence from the hearing does not require any proof and the plaintiff's claim may be fully granted, as stipulated in Article 149 (1) of the R.Bg, equivalent to Article 125 of HIR and Article 78 of Rv, whereas in the Hadith of the Prophet Muhammad (SAW), Islamic law still advocates the requirement of evidence to be applied, as stated: *"If someone's claim is accepted without proof, many people will surely claim rights or property from others, but there is a way to prove it. Those who claim rights (including those who deny others' rights or point to specific events) are burdened with providing evidence, and those who have no other evidence can affirm it with their oath"* (Hadith Bukhari- Muslim).

This constitutes a disparity in both judicial and procedural technicalities, leading to the absence of legal certainty in the resolution of Sharia economic cases in Religious Courts.

### **Disparity in Decisions of Religious Courts**

The disparity in decisions issued by the Supreme Court in the scope of Sharia economic cases is evident in the findings of the MARI Decision No: 528/K/Ag/2015, which stated in its ruling that "breach of contract combined solely with pure tort in one lawsuit may result in the lawsuit being declared inadmissible (Niet Ontvankelijk Verklaard)." This decision contradicts the Supreme Court's decisions in 2007, namely Decision No: 886 K/Pdt/2007 and Decision No: 2157 K/Pdt/2012, which stipulated that "in the practice of justice regarding the combination of breach of contract with tort, it is not automatically deemed inadmissible (Niet Ontvankelijk Verklaard) if the lawsuit is not solely based on tort" (Suadi, 2020). This ruling serves as an example of the disparity in Sharia economic case decisions, highlighting the urgency of establishing substantive provisions in Sharia economic procedural law to serve as guidance and limitations for Religious Courts in rendering decisions.

The disparity in decisions rendered by religious courts in Sharia economic cases is evident in the considerable number of cases appealed to higher courts for review. Between 2015 and 2017, a significant portion of first-instance and appellate decisions were overturned by the Supreme Court upon its own review. For instance, the decision of the Makassar Religious Court in

Case No. 2279/Pdt.G/2015/PA.Mks was annulled by the Makassar High Religious Court in Case No. 101/Pdt.G/2016/PTA.Mks, only to be subsequently overturned at the cassation level by the Supreme Court in Decision No. 179 K/AG/2017. Similarly, the decision of the Medan Religious Court in Case No. 1757/Pdt.G/2014/PA.Mdn was revoked by the Medan High Religious Court in Case No. 127/Pdt.G/2015/PTA.Mdn. Furthermore, the decision of the Perbalingga Religious Court in Case No. 1721/Pdt.G/2013/PA.Pbg was affirmed on appeal by the Semarang High Religious Court in Case No. 160/Pdt.G/2014/PA.Smg, yet both were subsequently annulled at the cassation level by the Supreme Court in Decision No. 569K/AG/2015. These examples collectively illustrate the disparity in decisions issued by religious courts in Sharia economic cases.

### **Disparity in Court Decision Enforcement**

The regulations and jurisprudence in the scope of Sharia economic procedural law lead to disparities in the execution of court decisions, which often occur even though the decisions have obtained final legal force (*inkracht*). The impact that occurs after the execution request is filed by the executed party, but in practice, during the settlement process, the executed parties are called back to explain the purpose of the execution claim and can voluntarily implement the decision (*aanmaning*). Additionally, there is no regulation that allows the Chief Judge of the Religious Court to issue a court decree in the execution process since the *aanmaning* is conducted. Interpretations in execution often vary across the jurisdictions of respective Religious Courts, resulting in disparities in the implementation of Religious Court decisions in Sharia economic cases between one Religious Court and another based on Articles 196-197 of the HIR and Articles 207-208 of the R.Bg.

Disparities also arise from provisions regarding the determination in execution and are related to the timing of execution, which is not regulated in Perma Number 14 of 2016, thus causing prolonged implementation of decisions contrary to the demands of Sharia economics due to the increasing losses resulting from the slow resolution of Sharia economic cases. However, based on the principle adopted in the Judiciary Power in handling and resolving cases, namely the principle of simple, fast, and low-cost trials as stipulated in Article 4 Paragraph (2) of Law Number 49 of 2009 concerning Judiciary Power (Nelson & Santoso, 2021).

### **The Insecurity of Upholding Sharia Principles and Legal Certainty**

In principle, the Sharia economic principles are regulated in Article 1 clause 2 of Supreme Court Regulation Number 14 of 2016, which states that "Sharia principles are Islamic legal principles in Sharia economic activities based on fatwas issued by institutions authorized to issue fatwas in the field of Sharia." However, the insecurity in upholding Sharia principles lies in the neglect of these principles, often leading to the use of conventional provisions in executions, such as executions in mortgage rights and auctions regulated by Law Number 4 of 1996 concerning Mortgage Rights and Minister of Finance

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Regulation Number 27/PMK.06/2016 concerning Auction Implementation Guidelines.

One example of the neglect of Sharia principles is evident in the decision of the West Jakarta Religious Court in Case No: 3551/Pdt.G/2022/PA.JB dated April 6, 2023, which arose from the legal relationship between the plaintiff and the defendant, initiated by a musyarakah mutanaqisah financing agreement and a line facility agreement (Musyarakah) based on provisions regulated in the Fatwa DSN No.08/DSN-MUI/IV/2000 on Musyarakah Financing, Fatwa DSN No.73/DSN-MUI/XI/2008 on Musyarakah Mutanaqisah, and Decision DSN No.01/DSN-MUI/X/2013 on Guidelines for Implementing Musyarakah Mutanaqisah in Financing Products. Musyarakah mutanaqisah (diminishing partnership) is a form of cooperation between two or more parties in the ownership of a property or asset. This cooperation involves reducing the ownership rights of one party while the other party's ownership rights increase through the transfer of ownership rights by paying for the ownership rights of the other party in the form of a partnership, with the transfer of ownership rights to one of the parties (Ainul., 2018).

Both agreements, which are instruments in Sharia banking to provide financing for land and building ownership based on the principle of Musyarakah Mutanaqisah (Ainul., 2018), establish the position of the financing object in the deed of mortgage with the guarantee of debt repayment by the debtor as the plaintiff to the creditor as the defendant amounting to Rp.15.000.000.000,- (fifteen billion Indonesian Rupiah). The initial implementation of this agreement is based on Sharia principles, but in handling and resolving cases related to mortgage rights, it is not done based on Sharia principles. Instead, the execution of the decision is based on provisions regulated in Law No. 4 of 1996 concerning Mortgage Rights over Land and Related Objects and Minister of Finance Regulation No. 27/PMK.06/2016 concerning Guidelines for Auction Implementation. Therefore, if the debtor defaults, the holder of the mortgage right has the right to sell the mortgaged object at their own discretion based on Article 6 of Law No. 4 of 1996 concerning Mortgage Rights over Land and Related Objects. Consequently, the sale of the object is carried out by the holder of the mortgage right without regard for the principles of partnership, equality of rights, and balance between the giver and the holder of the mortgage right, which are the principles of musyarakah mutanaqisah (Asyiqin & Alfurqon, 2024). In this context, despite being within the framework of Sharia economics, the collateral object is still executed based on conventional economic provisions, resulting in the lack of enforcement of Sharia law and the absence of legal certainty for parties engaging in Sharia economics.

**Comparison of Sharia Economic Case Resolution in Malaysia and Indonesia.**

When discussing the judicial system in a country, it cannot be separated from the legal system adopted in that country, as there is always a correlation between the legal system adopted and the judicial system applied. Therefore, to facilitate the identification of the similarities and differences in the judicial systems applied in the resolution of Sharia economic cases in Malaysia and Indonesia, it is necessary to first understand the legal system adopted. In the

past, legal experts identified the legal system adopted by a country by grouping it into two major branches of legal systems in the world, each with its own characteristic features: the Anglo-Saxon legal system, known as the Common Law System, and the Continental European system, also known as The Civil Law System or civil law system. Indonesia itself adheres to the civil law system, while Malaysia's legal system uses the common law system.

Malaysia is a federal monarchy consisting of 13 states covering the Malacca Peninsula area, namely: Johor, Malacca, Pahang, Negeri Sembilan, Selangor, Perak, Terengganu, Kelantan, Penang, Kedah, and Perlis in West Malaysia, and East Malaysia consisting of Sabah and Sarawak. As a country with a federal system, the governing power in Malaysia is divided into two parts: federal government and state government. However, the significant power remains with the central government. Regarding the law, Malaysian legislation recognizes Islam as the official religion of the state. Article 3(1) of the Malaysian Law states that: Islam is the religion of the Federation, but other religions may be practiced peacefully throughout the Federation. Although much of the legislation and jurisprudence still follows English law, in Malaysia, the resolution of Sharia economic cases falls under the jurisdiction of the civil courts or commonly referred to as the general courts or civil courts. This settlement is a result of Malaysia's legal system, which is inherited from British colonial rule.

The authority to adjudicate cases in the field of Sharia economics in Malaysia is vested in the High Court, which is part of the Superior Courts under the Federal Courts. The High Court has several divisions, including the Commercial, Criminal, Family, and Muamalah Divisions. It is within the Muamalah Division that all Sharia finance cases are handled. The reason for not including Sharia economic cases within the jurisdiction of the Sharia Courts or Sharia Courts in Malaysia is because, in their view, the legal subjects in these cases are not considered Muslims, meaning they are not regarded as persons professing the religion of Islam.

This is based on the regulations of the Federal Constitution, which empower the Civil Courts as the institution authorized to settle all cases in general, including cases in the field of Sharia banking. Regarding Sharia economic cases, particularly in Islamic banking, as stated by Sutan Remy Sjahdeini, Malaysia has at least three dispute resolution institutions in accordance with applicable law (Sjahdeini & Sutan Remy, 2007):

1. Commercial Courts, specially designed to settle cases in the field of Islamic banking.
2. Arbitration Centers, designated to handle and resolve disputes in the field of Islamic banking at the international level.
3. Mediation institutions, particularly focused on handling and resolving domestic cases in the field of Islamic banking.

These three institutions cover the resolution of Sharia economic cases through both litigation and non-litigation methods. Specifically concerning the litigation of Sharia economic cases, there are significant differences between Indonesia and Malaysia. The main difference lies in the judicial institutions authorized to handle Sharia economic cases through litigation. In Indonesia, the judicial institution authorized to handle cases in the field of Sharia



economics through litigation is the Religious Court (PA). In this regard, the Religious Court in Indonesia holds a position as one of the state institutions implementing judicial power, with its main function being to uphold the law and justice based on Islamic law within the framework of the unitary state of the Republic of Indonesia, which is based on Pancasila and the 1945 Constitution.

Meanwhile, non-litigation resolution of Sharia economic cases surprisingly exhibits similarities in mechanism between Indonesia and Malaysia. Dispute resolution can be pursued through Alternative Dispute Resolution (ADR) mechanisms (Helim et al., 2022), which involve settling disputes outside of the courtroom through a system of consultation, including mediation, consultation, negotiation, conciliation, and expert assessment. Alternatively, resolution can be sought through Sharia arbitration.

### **Conclusion**

The normative problem in resolving Sharia economic cases in religious courts involves three aspects: philosophical, juridical, and sociological. Firstly, the philosophical aspect pertains to regulations regarding Sharia economic procedural law derived from pluralistic laws not based on Islamic law. Secondly, the juridical aspect involves the limited role of Supreme Court Regulation Number 14 of 2016 concerning the Procedure for Resolving Sharia Economic Cases in filling legal gaps. Thirdly, the sociological aspect concerns the emergence of disparities in various aspects of society, leading to a decline in public trust in religious courts in resolving Sharia economic cases.

Addressing normative problems in resolving economic cases requires the reconstruction of the Sharia economic procedural law to avoid disparities in society through legal reform. This involves conducting a judicial review of Supreme Court Regulation Number 14 of 2016 concerning the Procedure for Resolving Sharia Economic Cases to establish Sharia economic procedural law based on Islamic law and provide legal certainty in all aspects of Sharia economic cases to realize the principles of Sharia economics and legal certainty.

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