

# Application of Mudharabah Agreement Regulation through the Compilation of Sharia Economic Law (KHES) in Islamic Banking in Indonesia

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## ABSTRACT

**Keywords:**  
*Mudharabah Agreement; Compilation of Sharia Economic Law (KHES); Islamic Banking.*

The Compilation of Sharia Economic Law (KHES) is a crucial step in the positivization of Islamic law, adapting it to the context of the Unitary State of the Republic of Indonesia (NKRI). KHES addresses the need for applied legal sources for Religious Courts in Islamic economic cases, particularly after Law Number 3 of 2006. While KHES serves as a standard guideline for resolving sharia economic disputes, some clauses remain ambiguous, risking legal uncertainty. To ensure clarity and consistency, critical review and refinement of its terms and clauses are essential for strengthening the Islamic economic legal framework.

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## INTRODUCTION

Fiqh as a product of Islamic legal thought is one of the most important pillars of Islam. This is because the existence of fiqh itself as a legal guide among Muslims, and

in the course of its long history, fiqh always undergoes adjustments, both to the time, place and conditions of the fiqh (Elhas, 2006).

In relation to social reality, the flexibility of fiqh certainly brings great wisdom for Muslims. But if brought to the realm of legal-institutional codified law, the flexibility of fiqh will actually complicate the process of formation, preparation, and application.

Laws related to sharia economic materials needed by Religious Court judges are still scattered in various fiqh sources, fatwas of scholars and Bank Indonesia Regulations (PBI) (Mughits, 2008). Therefore, to conduct a legal compilation of sharia economic material is very important and awaited by judges in the religious courts.

The Compilation of Sharia Economic Law (KHES) can be used as an answer to the obstacles so far related to problems contained in the economic sphere, especially in the field of sharia economics. The enactment of Law No. 3 of 2006 concerning the amendment of Law No. 7 of 1989 concerning Religious Courts has brought major changes in the existence of religious judicial institutions today. One of the fundamental changes is the addition of the authority of religious judicial institutions, among others, in the field of sharia economics. Based on Article 49 letter (i) of Law No. 3 of 2006 on the Amendment of Law No.7 of 1989 on Religious Courts, it is affirmed that religious courts have the duty and authority to examine, hear and resolve cases including “sharia economics” (Basri, 2017).

Islamic economics is discussed in two disciplines, namely Islamic economics and Islamic economic law. Islamic economics which is the authority of religious judicial institutions regulated in Law No. 3 of 2006 concerning Religious Courts is related to the science of economic law that must be known by judges in religious judicial institutions (Ira, 2022). In various laws and regulations related to Islamic economics, there are no specific rules governing formal law and material law regarding Islamic economics.

The existing regulation of sharia economic law is the provisions contained in the books of fiqh and a small part is contained in the fatwas of the National Sharia Council (DSN) and in Bank Indonesia regulations. Looking at the cases submitted by the parties to the dispute to the religious courts and the national sharia arbitration body (Basyarnas) in connection with the dispute between Islamic banks and their customers, the settlement uses two different laws, namely DSN fatwas and the Civil Code. This is done to fill the legal vacuum in resolving a case.

The need for Islamic economic law in the realm of practice is currently accompanied by the need for dispute settlement, both in the realm of adjudication and non-adjudication. After the enactment of Law No. 5 of 2009 concerning Amendments to Law No. 3 of 2006 concerning Religious Courts, Religious Courts gained expanded authority in resolving sharia economic disputes (Atikah, 2017). This expansion of authority then received legitimacy in the provisions of Islamic economics which

obtained a legal umbrella of laws such as in Law No. 21 of 2008 concerning Islamic Banking.

The position of the compilation of sharia economic law (KHES) with the regulation of the Supreme Court of the Republic of Indonesia (PERMA) Number 2 of 2008 concerning the Compilation of Sharia Economic Law, so that the legal force of KHES is only limited to the Supreme Court Regulation (PERMA) which is not a type of hierarchical legislation, but includes a type of pseudo legislation. Nevertheless, the establishment of KHES is very important for the needs of judges in deciding a case.

## RESEARCH METHOD

The type of method used in this research is library research that uses descriptive analytics (Masduqie et al., 2021). Descriptive analytics is a method that serves to describe or provide an overview of an object under study through data that has been collected as it is without conducting analysis to make conclusions that apply to the public (Sugiyono, 2013). This research design uses the library research method. Library research is research conducted using literature, either in the form of books, notes, or reports on previous research results (Hasan, 2008). This research was conducted by collecting and obtaining data related to the Compilation of Sharia Economic Law from several supporting books and journals.

## RESULT AND DISCUSSION

### Overview of the Compilation of Sharia Economic Law (KHES)

The Compilation of Sharia Economic Law (KHES) is a source of applied law for Religious Courts in the field of sharia economics. KHES consists of four parts (books), namely:

- Book I : Legal Subjects and Amwal
- Book II : Akad
- Book III : Zakat and Grant
- Book IV : Sharia Accounting

The sources of KHES refer to the sources of Islamic law. As is known, that the sources of Islamic law are divided into two groups, namely:

1. The agreed sources of law (mas}âdir al-ahkâm al-muttafaq'alaiha) or often called the main sources, namely the Qur'an, Sunnah, Ijma' and Qiyas.
2. Sources of law that are still in dispute (mas}âdir al-ahkâm al-mukhtalaf fiha), namely Istihsân, Istis}lâh (al-Mas}lahah al-Mursalah), 'Urf, Istis}hâb, Maz}hab S{ahâbi, Syar'u Man Qablanâ, and others.

According to A. Djazuli who is the coordinator of the Compilation of Sharia Economic Law (KHES), according to its nature KHES is a compilation compiled from

various sources, both at the level of sharia, fiqh, and qanun. One of the sources for the preparation of KHES is Majallatu al-Ahkam al-Adliyah, a civil law book compiled in the Ottoman Turkish era, then adapted to modern and Indonesian conditions. This kind of contextualization is indeed appropriate, considering that fiqh can change with changes in time, place, circumstances, intentions and habits (adat-istiadat). This principle of fiqh flexibility is discussed specifically in I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn, which is as follows (Hasneni, 2016):

تغير الفتوى واختلافها بحسب تغير الأزمنة والأمكنة والأحوال والنيات والعوائد

Meaning: Changes and differences in fatwas (legal opinions) are caused by differences in time, place, circumstances, intentions and customs.

Seeing this fact, KHES can be interpreted as a form of positivization of Islamic law that has undergone several adjustments to the current Indonesian context. Because if the positivization effort does not also pay attention to the context that surrounds it, then what happens then is only a legal guideline that becomes a “spectacle”, not a guide.

### **History of the Compilation of Sharia Economic Law in Indonesia**

The birth of KHES originated from the issuance of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. The law expanded the authority of the Religious Courts in accordance with legal developments and the needs of Indonesian Muslims today. With this expansion of authority, now the Religious Courts are not only authorized to resolve disputes in the fields of marriage, inheritance, wills, grants, waqf, and sadaqah, but also to handle adoption applications and resolve zakat, infaq, and other property and civil rights disputes between fellow Muslims, and sharia economics.

The Religious Courts are tasked and authorized to examine, decide and resolve cases at the first level between people of the Muslim religion in the fields of:

1. Marriage;
2. Inheritance;
3. Testament;
4. Grant;
5. Waqf;
6. Zakat;
7. Infaq;
8. Shadaqah; and
9. Sharia economy.

In Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, it is explained that what is meant by sharia economy is an act or business activity carried out according to sharia principles, including:

1. Islamic banks;
2. Islamic microfinance institutions;
3. Sharia insurance;
4. Sharia reinsurance;
5. Sharia mutual funds;
6. Sharia medium-term bonds and securities;
7. Sharia securities;
8. Sharia financing;
9. Sharia pawnshop;
10. Pension funds of sharia financial institutions; and
11. Sharia business.

The presence of KHES is a very urgent need for the availability of sources of applied law for Religious Courts in the field of sharia economics after the birth of Law Number 3 of 2006. So there is no more reason for judges not to handle sharia economic disputes on the pretext that there are no regulations.

KHES that has been finalized, reported to the Chief Justice of the Supreme Court of the Republic of Indonesia. So that KHES can be used as a guideline by judges in the religious courts in examining, deciding and resolving sharia economic cases, the Chief Justice of the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation (PERMA) Number 02 of 2008 concerning the Compilation of Sharia Economic Law. The first launch of PERMA No. 02 of 2008 was held during the RAKERNAS of the Supreme Court with the Chairpersons and Registrars/Secretaries of the Appellate and First Level Courts throughout the Judicial Environment throughout Indonesia in Jakarta in August 2008.

### **Compilation of Sharia Economic Law on Islamic Banking in Indonesia**

The implementation of business activities based on sharia economic principles has achieved a significant development to be observed, at least from the aspect of legislation. In this case, the formation of sharia legislation in the fields of banking, justice, securities and regulations in the field of limited liability companies will be presented.

The pioneering of the implementation of sharia economy (finance) at the national level began with the establishment of Bank Muamalat Indonesia, which explicitly provides operational banking services with a profit-sharing system (mudharabah). The operation of the Islamic banking system obtained a legal basis for Law Number 10 concerning Amendments to Law Number 7 of 1992 concerning

Banking. It was further strengthened by Law No. 23 of 1992 on Bank Indonesia as amended by Law No. 3 of 2004 on Bank Indonesia, which allows the implementation of monetary policy based on sharia principles. Both laws are the legal basis for national banks to implement a dual banking system, namely the use of conventional and sharia banking that runs in parallel (Suryani, 2012).

The development of Islamic banks can increase the resilience of the national banking system, but on the other hand, it can bring consequences of legal conflicts due to the principle differences between the legal provisions applicable to conventional banks and Islamic banks. Given the breadth of the substance of Islamic banking (for example, licensing, ownership, legal form, organizational structure, capital management, types of business activities, coverage of bank secrecy, bank health assessment, sharia supervision, financial markets, money market instruments, liquidation, and criminal sanctions), Dhani Gunawan concluded that the existence of Islamic banking requires a strong legal foundation in the form of legislation (Aprinisia, 2008).

After the enactment of Law No. 3 of 2006, the Chief Justice of the Supreme Court established the KHES Drafting Team based on Decree No. MA/097/SK/X/2006 dated October 20, 2006 chaired by Prof. Dr. H. Abdul Manan, S.H., S.I.P., M.Hum. The task of the Team in general is to collect and process the necessary materials, compile draft texts, organize discussions and seminars that review the draft texts with institutions, scholars and experts, refine the texts, and report the results of the preparation to the Chief Justice of the Supreme Court of Indonesia.

The steps or stages that have been taken by the Team in formulating the Compilation of Sharia Economic Law (KHES) in the world of Islamic banking are as follows:

1. Adjusting the mindset (united legal opinion) in the form of Islamic economics seminars at Sahid Kusuma Hotel Solo on April 21-23, 2006 and at Sahid Hotel Yogyakarta on June 4-6, 2006. Speakers in the two seminars were experts in Islamic economics from universities, DSN/MUI, Basyarnas, and practitioners of Islamic banking (Bank Muamalat) as well as judges from the general and religious courts.
2. Looking for an ideal format (united legal frame work) in the form of a meeting with Bank Indonesia in order to seek input on all matters that apply to BI towards Islamic economics and the extent of guidance that has been carried out by BI towards Islamic banking. The event was held at Bidakara Hotel Jakarta on June 7, 2006. In addition, a workshop on Islamic economics was held at Grand Alia Cikini Hotel Jakarta on November 20, 2006. Speakers at the event were experts in Islamic economics from BI, the Islamic

Economics Communication Center (PKES), MUI, the Association of Islamic Economists and legal practitioners.

3. Conducting library research that is tailored to the division of the four groups that include experts in Islamic economics, both from universities, DSN / MUI, Basyarnas and Islamic banking practitioners. To complete the references, the KHES Team has conducted a comparative study to the Center for Islamic Economic Studies of the International Islamic University Kuala Lumpur, Takaful Center Malaysia Kuala Lumpur, Islamic Financial Institutions and Banking Dispute Resolution Institutions in Kuala Lumpur on November 16-20, 2006. Comparative studies were also conducted to the Center for Islamic Economic Law Studies of the International Islamic University Islamabad, Shariah Court Pakistan, Mizan Bank Islamabad Pakistan, Islamic Bank Pakistan, and several sharia financial institutions in Pakistan. This visit was conducted on June 25-27, 2007.
4. Processing and analyzing the collected materials and data. The draft KHES which was prepared in the first stage as many as 1015 articles was carried out for four months. Then discussions were held on the content of the KHES draft material.

### **Application of the Compilation of Sharia Economic Law on Mudharabah Agreements in Islamic Banking**

Mudharabah is an investment or funding transaction based on the principle of trust between two parties, namely the fund owner (shahibul maal) and the fund manager (mudharib) (Rosid, 2021). Trust is the most important element in a mudharabah contract, where the fund owner is not allowed to interfere in the management of the business or project that is being funded using funds from the fund owner, except only to provide advice and provide supervision on activities carried out by the fund manager.

Mudharabah in the Compilation of Sharia Economic Law (KHES) contained in book II, chapter I, article 20 is cooperation between fund owners or investors and capital managers to carry out certain businesses with profit sharing based on the ratio.

Mudharabah in the Compilation of Sharia Economic Law (KHES) has many provisions. Which these provisions are used as rules in implementing mudharabah which can be applied to Islamic Banking so that it is carried out in accordance with existing sharia law. The provisions are (Hasneni, 2016):

1. The status of objects in the hands of mudharib received from shahibul maal, is capital.
2. Mudharib acts as a representative of shahibul maal in using the capital he receives.

3. Profits generated in mudharabah, become joint property.
4. Mudharib is entitled to profit in return for his work as agreed in the contract.
5. Mudharib is not entitled to a reward if the business he does is a loss.
6. The owner of the capital is entitled to profit based on his capital as agreed in the contract.
7. Profits from businesses that use mixed capital / shahibul maal and mudharib, divided proportionally or on the basis of agreement of all parties.

In the context of banking or Islamic financial institutions, mudharabah is a fund investment transaction from the owner of shahibul maal funds to mudharabah fund managers to carry out certain sharia-compliant business activities, with the distribution of business results between the two parties based on a predetermined ratio.

## CONCLUSION

From the brief description of KHES above, we can draw several conclusions among others:

1. Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2008 concerning the Compilation of Sharia Economic Law (KHES) is a guideline for judges in the Religious Courts in examining, deciding and resolving sharia economic cases, this is in accordance with Article 49 Letter i of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts.
2. KHES contains four books, namely: Legal Subjects and Amwal (Book I), Akad (Book II), Zakat and Grant (Book III), and Sharia Accounting (Book IV).
3. KHES can be said as a form of positivization of Islamic law with some adjustments to the current context within the scope of the Negara Kesatuan Republik Indonesia (NKRI).
4. Overall, KHES can already be used as a standard guideline in the religious court environment, but there are still many things that need to be addressed and improved, both with regard to terms and clauses in KHES itself which are still multi interpretable, so it is feared that legal uncertainty will arise due to the unclear clauses.
5. Criticism and improvements must also be made to review the terms contained in the Islamic-based economic system.

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