

Classical Fiqh in Sharia Economic Disputes: Indonesian Religious Courts and Saudi Arabia

Kitab Fikih dalam Sengketa Ekonomi Syariah: Pengadilan Agama Indonesia dan Arab Saudi

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Abstract

Indonesia and Saudi Arabia settle sharia economic disputes through markedly different institutions. Indonesia channels them to Religious Courts holding exclusive jurisdiction since 2006, where the classical fiqh texts designated in 1958 remain formally available alongside the Compilation of Sharia Economic Law. Saudi Arabia channels them to commercial courts and executive-branch committees that, since the Civil Transactions Law of 2023, apply a code of 721 articles enacted to limit judicial discretion. This study compares the position of classical fiqh texts within the two systems. Employing normative legal research with statutory, case, and comparative approaches, it finds that both have converged upon codification from opposite directions, that fiqh survives in each as a residual source, and that the Indonesian residue is horizontal and indeterminate while the Saudi residue is hierarchical. It recommends an explicit hierarchy of applied sources and sustained judicial training in fiqh literacy.

Abstrak

Indonesia dan Arab Saudi menyelesaikan sengketa ekonomi syariah melalui institusi yang sangat berbeda. Indonesia menyalurkannya ke Pengadilan Agama yang berwenang secara absolut sejak 2006, tempat kitab fikih yang ditetapkan pada 1958 secara formal masih tersedia berdampingan dengan Kompilasi Hukum Ekonomi Syariah. Arab Saudi menyalurkannya ke pengadilan niaga dan komite di bawah kekuasaan eksekutif yang, sejak Nizam al-Mu'amalat al-Madaniyyah 2023, menerapkan kodifikasi 721 pasal yang dibentuk untuk membatasi diskresi hakim. Penelitian ini membandingkan kedudukan kitab fikih dalam kedua sistem tersebut. Dengan penelitian hukum normatif melalui pendekatan perundang-undangan, kasus, dan perbandingan, penelitian ini menemukan bahwa keduanya bergerak menuju kodifikasi dari arah berlawanan, bahwa fikih bertahan sebagai sumber residual, dan bahwa sisa ruang di Indonesia bersifat horizontal dan tidak tertentu sedangkan di Arab Saudi bersifat hierarkis. Penelitian ini merekomendasikan hierarki sumber hukum terapan yang tegas dan pelatihan literasi fikih bagi hakim.



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A. INTRODUCTION

1. Background

Every judgment delivered in a sharia economic dispute must rest upon a source of applied law, and the identity of that source is not a neutral technical matter. It determines who holds interpretive authority, how far a judge may reason independently, and how far litigants may predict the outcome of their case before they bring it. In two Muslim-majority jurisdictions that have recently reorganised this question, Indonesia and Saudi Arabia, the answer has shifted in opposite directions, and the comparison of those shifts is the subject of this article.

In Indonesia, classical fiqh texts entered the courtroom by administrative instrument rather than by statute. The Circular of the Bureau of Religious Justice No. B/1/735 of 18 February 1958, issued in implementation of Government Regulation No. 45 of 1957 concerning the establishment of Religious Courts and Sharʿī Courts outside Java and Madura, designated thirteen works of fiqh, all of them belonging to the Shāfiʿī school, as the substantive law to be applied by religious judges.¹ The instrument was conceived as a measure of unification: because the Islamic law in force among the population was unwritten and scattered across differing works of fiqh, the restriction of the field to a defined list was expected to secure certainty and uniformity of decision.² Among the thirteen, the works most frequently consulted on questions of *muʿāmalah* were Ḥāsyiyat al-Bājūrī, Fath al-Muʿīn, Tuḥfat al-Muḥtāj, Mughnī al-Muḥtāj, and al-Fiqh ʿalā al-Madhāhib al-Arbaʿah.³

The restriction did not achieve its object. Limiting the list did not produce uniformity of outcome, and the works themselves proved incomplete for questions that had arisen in Indonesian social life but were absent from the classical literature. The response was positivisation rather than further restriction, and in the field of Islamic economic law it took the form of the Compilation of Sharia Economic Law promulgated as Supreme Court Regulation No. 2 of 2008.⁴ That instrument followed the expansion of the absolute jurisdiction of the Religious Courts effected by Law No. 3 of 2006, which

¹ Circular of the Bureau of Religious Justice No. B/1/735 of 18 February 1958, issued in implementation of Government Regulation No. 45 of 1957 concerning the Establishment of Religious Courts and Sharʿī Courts outside Java and Madura.

² Ibrāhīm al-Bājūrī, *Ḥāsyiyat al-Bājūrī ʿalā Ibn Qāsim al-Ghazzī* (Beirut: Dār al-Kutub al-ʿIlmiyyah), vol. 1, 337.

³ Zayn al-Dīn al-Malibārī, *Fath al-Muʿīn bi Syarḥ Qurrat al-ʿAin* (Surabaya: al-Hidayah), 66.

⁴ Supreme Court Regulation No. 2 of 2008 concerning the Compilation of Sharia Economic Law.

added sharia economic matters to the fields over which those courts exercise exclusive competence.⁵ Supreme Court Regulation No. 14 of 2016 later supplied procedural rules for the settlement of such cases.⁶

The Compilation was not, however, accompanied by any formal revocation of the 1958 Circular, and classical fiqh texts have accordingly never been displaced from the repertoire available to Indonesian religious judges. Research on the point records that before the promulgation of Supreme Court Regulation No. 2 of 2008 judges in sharia economic cases relied principally upon sources drawn from *kutub al-turāṣ*, including those concerned with *fiqh al-qaḍā'*, and that following its implementation some judges have continued to incorporate the Civil Code into their legal reasoning.⁷ The result is a repertoire in which classical fiqh, a codified compilation, fatwas of the National Sharia Board, and the Civil Code all remain simultaneously available, without any authoritative statement of their relative rank.

Saudi Arabia arrived at a comparable problem from the opposite direction. For decades transactions and contracts in the Kingdom were governed by the principles of Islamic sharia, and specifically by Ḥanbalī jurisprudence, without any unified civil codification; judges relied upon their own interpretations of Islamic jurisprudence in resolving disputes, which at times produced inconsistent judgments and reduced predictability, given the absence of binding precedent.⁸ Scholarship on Saudi judicial training records the same phenomenon from the perspective of the bench, observing that Islamic law leaves room for local practice and for the environmental parameters of the community, that this consideration of context confers flexibility, practicability, and adaptability upon legal interpretation, and that judges operating under the uncoded system took advantage of that flexibility and adjudicated cases through their own interpretation.⁹

⁵ Law No. 3 of 2006 concerning the Amendment of Law No. 7 of 1989 on Religious Courts, in conjunction with Law No. 50 of 2009, art. 49.

⁶ Supreme Court Regulation No. 14 of 2016 concerning the Procedure for the Settlement of Sharia Economic Cases.

⁷ Hasanudin, Kamsi, and Ahmad Yani Anshori, "The Contestation of Legal Foundations in the Resolution of Islamic Economic Disputes in Religious Courts," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 2 (2024): 271, <https://doi.org/10.24090/mnh.v18i2.11934>.

⁸ Mohamad Kassem, "A Comparative Overview of Selected Provisions from the New Saudi Civil Transactions Regulation (Law) (2023)," *BAU Journal – Journal of Legal Studies* 2023, art. 3, <https://doi.org/10.54729/2958-4884.1118>.

⁹ Sümeyra Yakar and Emine Enise Yakar, "Judicial Training in Saudi Arabia: From an Uncodified to Codified System," *Religions* 15, no. 12 (2024): art. 1568, <https://doi.org/10.3390/rel15121568>.

That arrangement was displaced by Nizām al-Mu‘āmalāt al-Madaniyyah, the Civil Transactions Law, enacted by Royal Decree No. M/191 of 29/11/1444 AH, corresponding to 19 June 2023, and brought into force on 16 December 2023. Comprising 721 articles, it constitutes the first comprehensive civil codification in the Kingdom and governs contracts, obligations, and other civil rights.¹⁰ It is the third of four major judicial reform statutes announced in February 2021, alongside the Law of Evidence, the Personal Status Law, and a penal code for discretionary sentences.¹¹ Its stated purpose is to address difficulties of interpretation by codifying sharia principles within a single body of regulation, thereby limiting judicial discretion and securing a higher degree of certainty and predictability.¹² Islamic sharia nonetheless remains the ultimate reference, and the codification does not alter the position regarding judicial precedent, so that scope for divergent decisions persists.¹³

Codification is only half of the Saudi picture, and the other half is institutional. The Kingdom operates a dual judicial system composed of the Sharia courts and an independent administrative judiciary known as the Board of Grievances, alongside a number of administrative committees whose jurisdiction is fixed by the decree constituting each.¹⁴ Commercial disputes were formerly heard by the commercial circuits of the Board of Grievances; in 2017 the Ministry of Justice inaugurated commercial courts in Jeddah, Dammam, and Riyadh as independent courts attached to the Ministry rather than as a branch of the Board, and the jurisdiction of the Board’s commercial circuits passed to them.¹⁵ The Commercial Courts Law was subsequently enacted by Royal Decree No. M/93 of 15 Sha‘bān 1441 AH, corresponding to 8 April

¹⁰ Nizām al-Mu‘āmalāt al-Madaniyyah (Civil Transactions Law), Royal Decree No. M/191 of 29/11/1444 AH, corresponding to 19 June 2023, in force 16 December 2023, 721 articles.

¹¹ Nadia Ahmad, “New Saudi Personal Status Law Codifies Key Women’s Rights,” *Manchester Journal of Transnational Islamic Law & Practice* 19, no. 3 (2023): 285.

¹² Covington & Burling LLP, “Key Features of the New Saudi Civil Transactions Law,” Thomson Reuters Practical Law, December 2023, <https://www.cov.com/-/media/files/corporate/publications/2023/12/key-features-of-the-new-saudi-civil-transactions-law.pdf>.

¹³ Nisreen Mahasneh, “Achieving Legal Certainty in Civil Dealings: An Overview of the Saudi Civil Transactions Regulation,” *Manchester Journal of Transnational Islamic Law & Practice* 19, no. 3 (2023): 253.

¹⁴ Ayoub M. Al-Jarbou, “An Overview of the Saudi Arabian Legal System,” *GlobaLex* (New York University School of Law), accessed 28 September 2026, https://www.nyulawglobal.org/globalex/saudi_arabia1.html.

¹⁵ Sultan Albaheth, “The New Saudi Commercial Courts and Their Jurisdiction over Different Commercial Disputes,” *International Journal of Innovation, Creativity and Change* 8, no. 2 (2019): 220.

2020, and entered into force on 16 June 2020.¹⁶

Financial disputes in the narrow sense follow a different route again. There are no dedicated sharia courts for financial disputes in the Kingdom, although all courts may apply sharia where relevant, and such disputes are generally heard by specialised regulatory tribunals rather than by ordinary civil courts.¹⁷ The Committee of Banking Disputes, established under the Saudi Central Bank, has jurisdiction only over cases in which a bank is plaintiff or defendant and the claim arises from banking business, while a parallel committee was created under the Finance Companies Control Law of 2012 and further committees deal with securities and insurance.¹⁸ Critical scholarship observes that these bodies are not part of the judicial branch, having been created within the central bank and therefore subject to the executive, so that the Committee of Banking Disputes is not an independent court and its members are not independent judges.¹⁹

The institutional contrast with Indonesia could hardly be sharper. Indonesia routes sharia economic disputes to a religious court whose competence over them is exclusive by statute and whose judges are trained in Islamic law; Saudi Arabia routes them to commercial courts created by the Law of the Judiciary of 2007 and to committees situated within the executive branch, neither of which is constituted as a forum of Islamic legal expertise in the Indonesian sense.²⁰ The paradox is immediate: the jurisdiction whose constitutional foundation is the Book and the Sunna adjudicates Islamic financial disputes through regulatory tribunals, while the jurisdiction whose constitution is not religious adjudicates them through a court of religious specialists.

Stated in these terms, the two trajectories are close to mirror images. Indonesia began with a restricted canon of fiqh texts imposed administratively and moved towards codification without ever abolishing the canon; Saudi Arabia began with unrestricted recourse to Ḥanbalī jurisprudence and moved towards codification with the express

¹⁶ Commercial Courts Law, Royal Decree No. M/93 of 15 Sha‘bān 1441 AH, corresponding to 8 April 2020, in force 16 June 2020; Council of Ministers Resolution No. 511 of 7 April 2020.

¹⁷ STAT Law, “Islamic Finance 2025: Saudi Arabia — Trends and Developments,” *Chambers Global Practice Guides*, 2025, accessed 29 September 2026, <https://practiceguides.chambers.com/practice-guides/islamic-finance-2025/saudi-arabia/trends-and-developments>.

¹⁸ Regulation of the Committee of Banking Disputes, Royal Order No. 37441 of 2012; Finance Companies Control Law, Royal Decree No. M/51 of 2012.

¹⁹ Hamza Eid Albaheth, *Towards Having a Specialized Economic and Financial Court in the Kingdom of Saudi Arabia in Lieu of the Extra-Judicial Committees Approach: A Critical Study on the Mechanisms for Dealing with Banking-Related Disputes* (SJD diss., Southern Methodist University, Dedman School of Law, 2018), ch. 3, https://scholar.smu.edu/law_etds/19.

²⁰ Law of the Judiciary of the Kingdom of Saudi Arabia, Royal Decree No. M/78 of 2007.

purpose of narrowing that recourse. Both arrived at a configuration in which a code occupies the foreground while fiqh, in the one case a defined list of works and in the other an entire school, remains available in the background. Whether that residual availability is a source of adaptability or a source of uncertainty is the question this article examines.

The empirical picture in Indonesia is more precise than is often assumed. Muhammad Taufiki, Rokani Darsyah, and Mahmud Ridha analysed 384 decisions classified as sharia economic cases on the website of the Indonesian Supreme Court between 20 April 2016 and 20 April 2020, and found fifteen legal maxims across twenty-eight legal argumentations in fourteen decisions, amounting to 3.65 per cent of the universe of cases; they concluded that the use of those maxims as legal argumentation generally conformed to their conventional usage, subject to certain observations concerning legal finding in sharia economic matters.²¹ A study of the position of Quranic arguments in such decisions reaches a complementary conclusion, namely that the Qur'an operates as a binding legal norm but that there is no obligation to cite it, so that the Quranic argument functions as a complement to the judge's reasoning rather than as its foundation.²²

The picture is complicated further by the competition between the Compilation and the Civil Code. Research on default in sharia economic cases reports inconsistency in the application of the Compilation with consequent effects upon legal certainty, and records that of seven decisions on default delivered between 2018 and 2021, four relied upon the Civil Code, jurisprudence, and doctrine as the legal basis of the ruling.²³ Faqih Zuhdi Rahman and his colleagues map the arguments employed by judges in the regional Religious Courts of Jakarta between 2015 and 2022 and examine how the fatwas of the National Sharia Board and the Compilation are applied in those rulings.²⁴

²¹ Muhammad Taufiki, Rokani Darsyah, and Mahmud Ridha, "The Use of Maxims (*al-Qawā'id al-Uṣūliyyah wa al-Fiqhiyyah*) in Legal Argumentation of Sharia Economic Court Decisions in Indonesia," *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 17, no. 1 (2022): 167, <https://doi.org/10.19105/al-ihkam.v17i1.6070>.

²² Muh. Nur Ridho Chaerul Firdaus, "The Position of Quranic Arguments in Judicial Decisions on Sharia Economic Disputes," *Hukum Islam* 25, no. 1 (2025): 56, <https://doi.org/10.24014/hi.v25i1.37591>.

²³ F. Larassati, "Konsep Wanprestasi dalam KHES dan KUH Perdata: Implementasinya di Pengadilan Agama," *Al-Faruq: Jurnal Hukum Ekonomi Syariah dan Hukum Islam* 4, no. 1 (2025): 15, <https://doi.org/10.58518/al-faruq.v4i1.3380>.

²⁴ Faqih Zuhdi Rahman, Mustolih Siradj, and Asadurrahman, "Judge's Arguments in Decisions Involving Sharia Economic Disputes in the Regional Religious Courts of Jakarta, 2015–2022," *Jurnal Cita Hukum* 12, no. 1 (2024): 149, <https://doi.org/10.15408/jch.v12i1.37929>.

The practical stakes of the question are not confined to doctrine. Indonesian Religious Courts now adjudicate financing disputes arising from a banking sector whose instruments are drafted by institutions operating across jurisdictions, and the Saudi codification was undertaken in express contemplation of the needs of investors and businesses as well as of individuals.²⁵ Where the applicable rule cannot be ascertained in advance, the cost is borne by the parties in the form of litigation risk and by the institution in the form of diminished confidence. Erie Hariyanto's study of public trust in the Religious Courts in sharia economic matters demonstrates that the connection between predictability and institutional standing is not merely theoretical.²⁶ A parallel body of work on the revitalisation of sharia economic law in Indonesia situates the problem within the wider objective of *ummah* welfare.²⁷

The existing scholarship is substantial on each side taken separately but does not join them. Work on Indonesia analyses the sources employed by religious judges without reference to comparable developments in the Arabian Peninsula; work on Saudi Arabia analyses the codification of 2023 without reference to the Indonesian experience of positivising Islamic economic law fifteen years earlier. Comparative studies of Islamic financial adjudication have tended to examine Malaysia and the United Arab Emirates, whose models emerged from different political and economic backgrounds and legal histories,²⁸ or the adjudication of Islamic banking cases in the civil courts of Malaysia, where jurisdiction rests with the civil rather than the sharia courts.²⁹ No study known to the authors compares the position of classical fiqh texts as a basis of judicial reasoning in Indonesia and Saudi Arabia after the codification of 2023. That gap constitutes the novelty of this article.

This study finds that both jurisdictions have converged upon codification from opposite directions; that in each of them fiqh survives as a residual rather than a primary

²⁵ Middle East Briefing, "Understanding Saudi Arabia's Civil Transactions Law," accessed 29 September 2026, <https://www.middleeastbriefing.com/news/understanding-saudi-arabias-civil-transactions-law-a-cornerstone-of-vision-2030-reforms/>.

²⁶ Erie Hariyanto, "Public Trust in the Religious Court to Handle Dispute of Sharia Economy," *Ahkam: Jurnal Ilmu Syariah* 22, no. 1 (2022): 187, <https://doi.org/10.15408/ajis.v22i1.26216>.

²⁷ Erie Hariyanto et al., "In Search of Ummah Welfare Model: The Revitalisation of Sharia Economic Law in Indonesia," *Sriwijaya Law Review* 7, no. 2 (2023): 244, <https://doi.org/10.28946/slrev.Vol7.Iss2.1080.pp244-261>.

²⁸ Ai Kawamura, "New Dispute Resolution Approach and Models for Islamic Finance," *Arab Law Quarterly* 34, no. 2 (2020): 143, <https://doi.org/10.1163/15730255-14030058>.

²⁹ Ruzian Markom et al., "Adjudication of Islamic Banking and Finance Cases in the Civil Courts of Malaysia," *European Journal of Law and Economics* 36 (2013): 4, <https://doi.org/10.1007/s10657-011-9249-4>.

source of applied law; and that neither has resolved the underlying tension between the doctrinal flexibility that recourse to fiqh confers and the legal certainty that codification is intended to secure.

2. Research Questions

Proceeding from the background set out above, this study addresses three questions. First, what is the normative position of classical fiqh texts as a basis of judicial reasoning in sharia economic cases before the Religious Courts of Indonesia? Second, what position do such texts occupy in the settlement of sharia economic disputes in Saudi Arabia, given the institutional architecture of commercial courts and regulatory committees and the entry into force of the Civil Transactions Law of 2023? Third, what do the two trajectories imply for legal certainty and for the future of fiqh as a source of applied law?

The three questions are sequential. The first establishes the Indonesian position, the second the Saudi position, and the third draws from their juxtaposition a set of conclusions that neither jurisdiction, considered alone, would yield.

3. Research Methods

This study employs normative legal research, which treats law as a system of norms and seeks a prescription concerning what ought to be done in respect of a given legal issue rather than a description of social behaviour.³⁰ Three approaches are combined. The statutory approach is directed at Government Regulation No. 45 of 1957, the Circular of the Bureau of Religious Justice No. B/1/735 of 1958, Law No. 3 of 2006 in conjunction with Law No. 50 of 2009, Supreme Court Regulation No. 2 of 2008, and Supreme Court Regulation No. 14 of 2016 on the Indonesian side, and at Nizām al-Mu‘āmalāt al-Madaniyyah of 2023 together with Article 46 of the Basic Law of Governance on the Saudi side. The case approach is directed at the corpus of sharia economic decisions analysed in the published empirical literature. The conceptual approach draws upon the doctrine of the sources of applied law, upon the classical distinction between *sharī‘ah* and *fiqh*, and upon the theory of codification of Islamic law as expressed in *Majallat al-Aḥkām al-‘Adliyyah*.³¹

The comparative approach is employed in its functional form. The two jurisdictions are not compared institution by institution, since their judicial architectures differ

³⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana Prenada Media, 2014), 133–137.

³¹ *Majallat al-Aḥkām al-‘Adliyyah* (1877), art. 39.

materially, but by reference to the common problem that each has sought to solve, namely how a judge adjudicating a commercial dispute governed by Islamic law is to identify the applicable rule. Primary legal materials comprise the instruments enumerated above and the classical works of fiqh cited; secondary legal materials comprise peer-reviewed articles and scholarly monographs; tertiary materials comprise legal dictionaries and encyclopaedias. The materials were collected through documentary study and analysed qualitatively by means of interpretation, systematisation, and comparison.

B. DISCUSSION/ ANALYSIS

The discussion follows the sequence of the three research questions. The first section establishes the position of classical fiqh texts in Indonesian religious adjudication; the second establishes their position in Saudi adjudication after the codification of 2023; and the third draws out the implications of the comparison.

1. The Position of Classical Fiqh Texts in Indonesian Religious Adjudication

a. From the Circular of 1958 to the Compilation of Sharia Economic Law

The Indonesian arrangement was built in three layers, none of which has been removed. The first layer is the Circular of the Bureau of Religious Justice No. B/1/735 of 18 February 1958, issued in implementation of Government Regulation No. 45 of 1957, which designated thirteen works of fiqh as the substantive law of the Religious Courts.³² The measure was directed at a problem of accessibility as much as of authority: the Islamic law in force was unwritten and dispersed across works that differed among themselves, and a defined list promised uniformity of reference if not of outcome.

Three features of that list bear upon the present analysis. The first is its doctrinal uniformity: all thirteen works belong to the Shāfiʿī school, with the consequence that the interpretive horizon of the Indonesian religious judge was, as a matter of administrative direction, confined to a single madhhab. The second is the treatment of *muʿāmalah*. The list was compiled principally with marriage, inheritance, and endowment in view, those being the fields over which the Religious Courts then exercised jurisdiction, and the works concerned treat commercial transactions in the classical categories of *bayʿ*, *ijārah*, *syirkah*, *rahn*, and *ḍamān* rather than in the forms encountered in contemporary Islamic

³² Circular of the Bureau of Religious Justice No. B/1/735 of 18 February 1958.

finance.³³ The third is linguistic: the works are in Arabic, and the literature has long observed that the practical burden of consulting them fell heavily upon judges whose command of the classical idiom was limited.³⁴

The second layer was constructed by Law No. 3 of 2006, which amended Law No. 7 of 1989 and extended the absolute jurisdiction of the Religious Courts to sharia economic matters.³⁵ The extension created an immediate problem of substantive law, since the material rules required by religious judges remained scattered across sources of fiqh, the fatwas of scholars, and regulations of the central bank. Erie Hariyanto records the expectation prevailing at the time that a compilation of the material rules of Islamic economic law was urgently needed and keenly awaited by judges in the religious jurisdiction.³⁶ The political dimension of that expectation has been analysed by Fauzan Ali Rasyid, who situates the development within the broader configuration of Indonesian legal politics,³⁷ and by scholarship treating legal politics as a catalyst in the formation of the sharia economic legal system across the New Order and Reform eras.³⁸

The third layer is the Compilation of Sharia Economic Law, promulgated as Supreme Court Regulation No. 2 of 2008.³⁹ It is a positivisation of Islamic law adapted to the contemporary context within the framework of the unitary Indonesian state, and it supplies the applied substantive law of the Religious Courts in the field of sharia economics.⁴⁰ Supreme Court Regulation No. 14 of 2016 completed the arrangement on the procedural side.⁴¹ Yet the Compilation was issued as a regulation of the Supreme Court rather than as a statute, and the Circular of 1958 was never revoked. Neither instrument states the rank of the other.

³³ Al-Khaṭīb al-Syirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī Alfāẓ al-Minhāj* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1994), vol. 2, 321.

³⁴ ʿAbd al-Raḥmān al-Jazīrī, *Al-Fiqh ʿalā al-Madhāhib al-Arbaʿah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2003), vol. 2, 147.

³⁵ Law No. 3 of 2006, art. 49.

³⁶ Erie Hariyanto, "Penyelesaian Sengketa Ekonomi Syariah di Indonesia," *Iqtishadia: Jurnal Ekonomi dan Perbankan Syariah* 1, no. 1 (2014): 44, <https://doi.org/10.19105/iqtishadia.v1i1.365>.

³⁷ Fauzan Ali Rasyid, "Konfigurasi Politik Hukum Ekonomi Syariah di Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 16, no. 2 (2017): 299, <https://doi.org/10.18326/ijtihad.v16i2.297-315>.

³⁸ Andi Fariana, "Legal Politics as a Catalyst in Forming Sharia Economic Legal System in Indonesia's New Order and Reform Era," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, no. 2 (2021): 199, <https://doi.org/10.18326/ijtihad.v21i2.197-212>.

³⁹ Supreme Court Regulation No. 2 of 2008.

⁴⁰ Osman and Kudrat Abdillah, "Hukum Materiil Penyelesaian Sengketa Ekonomi Syariah (Tinjauan Undang-Undang dan Hukum Islam)," *Al-Huquq: Journal of Indonesian Islamic Economic Law* 1, no. 1 (2019): 31, <https://doi.org/10.19105/alhuquq.v1i1.2646>.

⁴¹ Supreme Court Regulation No. 14 of 2016.

b. Empirical Traces of Fiqh in Sharia Economic Decisions

How far classical fiqh actually appears in the reasoning of Indonesian judges is an empirical question, and the answer is more modest than the doctrinal architecture might suggest. The study by Taufiki, Darsyah, and Ridha remains the most systematic: of 384 decisions classified as sharia economic cases on the Supreme Court website between 20 April 2016 and 20 April 2020, only fourteen contained a legal maxim in their legal consideration, amounting to 3.65 per cent of the corpus, and those fourteen decisions yielded fifteen maxims across twenty-eight legal argumentations.⁴² Where maxims were used, their usage generally conformed to conventional understanding, subject to observations concerning specific instances of legal finding.

Two inferences follow. The first is quantitative: express recourse to the classical apparatus is the exception rather than the rule in Indonesian sharia economic adjudication. The second is qualitative: where recourse occurs, it takes the form of maxims rather than of extended citation from the works themselves. The maxim is a compressed formulation, detachable from the treatise in which it appears and capable of being reproduced without engagement with the reasoning that supports it. Its prevalence suggests that fiqh enters these decisions as a repertoire of authoritative formulations rather than as a body of doctrine to be construed. The classical collections of maxims, above all al-Suyūṭī's *al-Asybah wa al-Nazā'ir*, are for this reason more visible in the case law than the substantive treatises on *mu'āmalah*.⁴³

A parallel finding concerns scriptural authority. Research on the position of Quranic arguments in these decisions concludes that the Qur'an operates as a binding legal norm but that no obligation exists to include it, so that the Quranic argument serves as a complement to the judge's reasoning.⁴⁴ The distinction between a norm that binds and a citation that is optional is precisely the distinction that characterises the position of fiqh in these courts. Studies of individual decisions confirm the pattern: the analysis of a decision of the Religious Court of Malang on the application of security rights in a sharia economic matter identifies the legal bases relied upon as consisting of statutes, a

⁴² Taufiki, Darsyah, and Ridha, "The Use of Maxims," 180.

⁴³ Jalāl al-Dīn al-Suyūṭī, *Al-Asybah wa al-Nazā'ir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1990), 83.

⁴⁴ Firdaus, "The Position of Quranic Arguments in Judicial Decisions," 56.

fatwa of the National Sharia Board, and the Compilation.⁴⁵ A study of default in *murābahah* contracts reaches a comparable conclusion.⁴⁶

c. The Competing Authority of the Compilation, Fatwas, and the Civil Code

The most significant complication is not the scarcity of fiqh citation but the presence of a competing source that belongs to an entirely different tradition. Research on default reports inconsistency in the application of the Compilation, with consequent effects upon legal certainty, and records that of seven decisions on default in sharia economic cases delivered between 2018 and 2021, four employed the Civil Code, jurisprudence, and doctrine as the legal basis of the ruling.⁴⁷ The study on the contestation of legal foundations reaches the same conclusion from the opposite direction, observing that after the implementation of Supreme Court Regulation No. 2 of 2008 some judges have continued to incorporate the Civil Code into their legal reasoning.⁴⁸

Four sources are therefore simultaneously available to an Indonesian religious judge deciding a sharia economic dispute: the Compilation, the fatwas of the National Sharia Board, the classical works of fiqh designated in 1958, and the Civil Code. The relations among them are not fully settled. The Compilation is an instrument of the Supreme Court and not a statute; the fatwas are the product of a body that is not an organ of the state, though their harmonisation with the supremacy of sharia economic law has been defended;⁴⁹ the works of fiqh rest upon an administrative circular of 1958; and the Civil Code is a statute of general application inherited from the colonial period. Scholarship has identified the absence of a dedicated body of sharia economic procedural law as a further structural gap,⁵⁰ and the reception of sharia economic legislation within the constitutional order has itself been the subject of sustained

⁴⁵ Erna Dwiyantri, Azizah Zahra Fadlila, and Rohmawati, "Kajian Putusan Hakim Pengadilan Agama Malang tentang Penerapan Hak Tanggungan pada Perkara Ekonomi Syariah," *Jurnal Ilmu Hukum, Humaniora dan Politik* 6, no. 2 (2025): 1455, <https://doi.org/10.38035/jihhp.v6i2.6847>.

⁴⁶ Umihani and Hesti Kamariah, "Resolution of Sharia Economic Disputes: A Case Study on Default in Murabahah Contracts," *International Journal of Islamic Finance* 2, no. 2 (2024): 118, <https://doi.org/10.14421/ijif.v2i2.2322>.

⁴⁷ Larassati, "Konsep Wanprestasi dalam KHES dan KUH Perdata," 22.

⁴⁸ Hasanudin, Kamsi, and Anshori, "The Contestation of Legal Foundations," 271.

⁴⁹ Muhammad Ali Zaidan Ansori et al., "Axiological Harmonization of Sharia Economic Law Supremacy and DSN-MUI Fatwa in Indonesia," *Al-Bayyinah* 4, no. 2 (2023): 129, <https://doi.org/10.35673/al-bayyinah.v4i2.815>.

⁵⁰ Cik Basir et al., "Reconstruction of Sharia Economic Procedural Law in Indonesia and Comparison of Sharia Economic Cases in Malaysia and Indonesia," *Nurani: Jurnal Kajian Syari'ah dan Masyarakat* 24, no. 1 (2024): 19, <https://doi.org/10.19109/nurani.v24i1.22625>.

analysis.⁵¹ Table 1 sets out the resulting configuration.

Table 1. Sources of Applied Law Available to Indonesian Religious Judges in Sharia Economic Cases

Source	Instrument	Formal status	Observed use in decisions
Classical fiqh texts	Circular of the Bureau of Religious Justice No. B/1/735 of 1958	Administrative circular; never revoked	Occasional; predominantly through legal maxims
Compilation of Sharia Economic Law	Supreme Court Regulation No. 2 of 2008	Regulation of the Supreme Court, not a statute	Principal reference, applied inconsistently
Fatwas of the National Sharia Board	Fatwas of DSN-MUI	Issued by a non-state body	Frequently cited alongside the Compilation
Civil Code	Burgerlijk Wetboek	Statute of general application	Employed in a substantial proportion of default cases
Procedural rules	Supreme Court Regulation No. 14 of 2016	Regulation of the Supreme Court	Governs procedure; no substantive hierarchy stated

Source: processed from the Indonesian instruments cited and from the empirical studies discussed in this section.

Table 1 discloses the central feature of the Indonesian position. The repertoire is plural, the instruments establishing its components are of unequal rank, and no instrument states the order of priority among them. Classical fiqh occupies within that repertoire a position that is formally intact and practically residual.

d. Institutional Capacity and the Conditions of Textual Authority

The plurality of sources described above operates within an institutional setting that conditions how far any of them can actually be used. Three constraints deserve notice. The first is linguistic and formative. The works designated in 1958 are written in the classical Arabic of the commentary tradition, and the literature has long recorded that the practical burden of consulting them fell heavily upon judges whose training did not equip them to read such works with facility, and equally upon advocates and litigants seeking to understand the grounds on which their cases were decided.⁵² A source that cannot be read is not, for practical purposes, a source at all.

The second constraint is the absence of a dedicated body of sharia economic procedural law. Cik Basir and his colleagues identify this absence as a structural gap in the Indonesian framework and argue for the reconstruction of such a body by reference,

⁵¹ Bambang Iswanto and Miftah Faried Hadinatha, "Sharia Constitutionalism: Negotiating State Interests and Islamic Aspirations in Legislating Sharia Economic Law," *Al-Ahkam* 23, no. 1 (2023): 5, <https://doi.org/10.15408/ajis.v23i1.32899>.

⁵² Al-Jazīrī, *Al-Fiqh 'alā al-Madhāhib al-Arba'ah*, vol. 2, 160.

among other things, to the Malaysian experience.⁵³ Supreme Court Regulation No. 14 of 2016 supplies rules of procedure but does not supply a procedural code in the full sense,⁵⁴ and the consequences extend to the substantive question examined here, since the mode of proof and the allocation of the burden shape which sources a judge finds it necessary to consult. Scholarship examining sharia economic disputes through the lens of the small claims procedure demonstrates how far procedural form determines the depth of substantive reasoning that a decision can accommodate.⁵⁵

The third constraint concerns the social location of textual authority. Research on the dynamics of *ijtihad* in *fiqh mu'amalah* among *santri* communities shows that the authority of a text is reproduced through institutions of learning and functions as a marker of identity as well as a source of rules.⁵⁶ Indonesian religious judges are recruited in substantial numbers from those institutions, and their relation to the classical works is accordingly formed before they reach the bench. That formation explains both the persistence of the works in the repertoire and the particular form in which they appear: the legal maxim, which circulates in pesantren teaching as a portable summary of doctrine, travels more readily into a judgment than does an extended passage of commentary.

These three constraints taken together account for the empirical pattern described in the preceding subsection. Express recourse to the classical apparatus is infrequent not because judges regard it as unauthoritative but because the conditions under which it can be deployed — linguistic access, procedural space, and a settled understanding of its rank — are only partially satisfied. Studies of individual decisions bear this out, recording legal bases that consist of statutes, fatwas, and the Compilation, with the classical literature entering, when at all, as a supplementary formulation.⁵⁷

⁵³ Basir et al., "Reconstruction of Sharia Economic Procedural Law," 31.

⁵⁴ Supreme Court Regulation No. 14 of 2016; see also Dadin Solihin et al., "Simplified Lawsuits in Dispute Resolution Within Sharia Economic Law in Indonesia," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 6, no. 1 (2024): 86–100, <https://doi.org/10.30659/jua.v6i1.37265>.

⁵⁵ Anita Afriana and Hazar Kusmayanti, "Review of Sharia Economy Disputes in Religious Courts within the Perspective of Small Claims Court," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 2 (2021): 185, <https://doi.org/10.25041/fiatjustisia.v15no2.2086>.

⁵⁶ Imam Mustofa et al., "The Authority of Texts in the Dynamics of Ijtihad on Fiqh Mu'amalah Among Santri in Indonesia," *El-Mashlahah* 14, no. 2 (2024): 381–408, <https://doi.org/10.23971/el-mashlahah.v14i2.8074>.

⁵⁷ Salfin Abdul Rahman Al'auf et al., "Analisis Putusan Pengadilan pada Peradilan Agama: Hukum, Keadilan, dan Eksekusi dalam Kasus Ekonomi Syariah di Indonesia," *Jurnal Hukum Ekonomi Syariah* 7, no. 1 (2024): 45, <https://doi.org/10.30595/jhes.v7i1.20577>.

2. The Settlement of Sharia Economic Disputes in Saudi Arabia and the Position of Fiqh

a. The Uncodified Era and the Authority of the Ḥanbalī Texts

The Saudi arrangement before 2023 was the inverse of the Indonesian one. Where Indonesia had restricted the field of reference and then positivised it, Saudi Arabia left the field open. Article 46 of the Basic Law of Governance declares the Kingdom an Arab Islamic state whose constitution is the Book of God and the Sunna of His Prophet,⁵⁸ and civil matters were accordingly governed by the classical rules of Islamic sharia according to the teachings of the school prevailing in the Kingdom, namely the Ḥanbalī school, without any codification.⁵⁹ The authoritative works of that school, above all Ibn Qudāmah's *al-Mughnī* and the commentaries of al-Buhūtī, functioned as the operative statement of the law in the same manner in which the works designated in 1958 functioned in Indonesia.⁶⁰

The structural difference is nevertheless decisive. In Indonesia the works were listed by an administrative instrument, which both confined and legitimated recourse to them; in Saudi Arabia no comparable instrument existed, so that the selection of authority within the school rested with the judge. Scholarship on Saudi judicial training describes the consequence in terms that repay close attention: Islamic law leaves room for local practice and for the environmental parameters of the community, and that consideration of context confers flexibility, practicability, and adaptability upon legal interpretation while enabling judges to draw upon contextual factors; judges functioning under the uncodified system took advantage of that flexibility and adjudicated cases through their own interpretation.⁶¹ The same literature notes the classical division of Islamic law into worship, social transactions, and punishment, and the proposition that rules governing the latter two are changeable and adjustable according to time and circumstance, a proposition stipulated as a general principle in Article 39 of the *Majalla*, the first attempt at codifying Islamic law.⁶²

Two costs attached to that flexibility. The first was inconsistency: reliance upon the

⁵⁸ Basic Law of Governance of the Kingdom of Saudi Arabia, Royal Order No. A/90 of 1992, art. 46.

⁵⁹ Shearman & Sterling LLP (now A&O Shearman), "Introducing the New KSA Civil Code," 12 October 2023, <https://www.aoshearman.com/en/insights/introducing-the-new-ksa-civil-code>.

⁶⁰ Ibn Qudāmah al-Maqdisī, *Al-Mughnī* (Riyadh: Dār 'Ālam al-Kutub, 1997), vol. 6, 108.

⁶¹ Yakar and Yakar, "Judicial Training in Saudi Arabia," art. 1568.

⁶² *Majallat al-Aḥkām al-'Adliyyah*, art. 39.

judge's own interpretation at times produced divergent judgments. The second was the absence of binding precedent, which meant that divergence was not corrected over time by the accumulated authority of prior decisions.⁶³ The combination generated uncertainty for practitioners in the application and interpretation of Islamic law, and that uncertainty was the principal impetus for reform.⁶⁴

b. The Institutional Architecture of Dispute Settlement

Before the sources of decision are examined, the forums that apply them must be identified, because in the Saudi case the choice of forum determines a great deal. The Kingdom maintains a dual judicial system consisting of the Sharia courts and the Board of Grievances, the latter being the administrative judiciary, together with a series of administrative committees each of whose jurisdiction is fixed by its constituting decree.⁶⁵ The Law of the Judiciary of 2007 restructured the system to provide for specialised courts in commercial, labour, criminal, general, and personal status matters, each with complete jurisdiction within its field.⁶⁶

Commercial disputes were historically heard by the commercial circuits of the Board of Grievances. In 2017 the Ministry of Justice inaugurated commercial courts in Jeddah, Dammam, and Riyadh as independent courts attached to the Ministry, and the jurisdiction of the Board's commercial circuits was transferred to them, extending to disputes between merchants, disputes arising from commercial contracts, and matters arising under the various commercial statutes.⁶⁷ The Commercial Courts Law enacted by Royal Decree No. M/93 of 2020 completed that reorganisation and abolished the provision of the Law of Procedure before Sharia Courts of 2013 that had previously defined commercial jurisdiction.⁶⁸

Financial disputes proper are routed elsewhere. There are no dedicated sharia courts for financial disputes in the Kingdom; all courts may apply sharia where relevant, but such disputes are generally heard by specialised regulatory tribunals operating with procedural formality and issuing binding decisions.⁶⁹ The Committee of Banking

⁶³ Bremer Law Firm, "Saudi New Civil Transaction Law," accessed 29 September 2026, <https://www.bremerlf.com/resources/saudi-new-civil-transaction-law>.

⁶⁴ Shearman & Sterling, "Introducing the New KSA Civil Code."

⁶⁵ Al-Jarbou, "An Overview of the Saudi Arabian Legal System."

⁶⁶ Law of the Judiciary, Royal Decree No. M/78 of 2007.

⁶⁷ Sultan Albaheth, "The New Saudi Commercial Courts," 226.

⁶⁸ Commercial Courts Law, Royal Decree No. M/93 of 2020.

⁶⁹ STAT Law, "Islamic Finance 2025: Saudi Arabia."

Disputes, constituted within the Saudi Central Bank, has jurisdiction confined to cases in which a bank is a party and the claim arises from banking business; the Committee for Financial Disputes and Violations was created under the Finance Companies Control Law of 2012; and further committees address securities and insurance.⁷⁰ Critical scholarship has questioned the constitutional propriety of this arrangement, observing that these bodies sit outside the judicial branch, having been created within the central bank and therefore subject to the executive, with the consequence that the Committee of Banking Disputes is not an independent court and its members are not independent judges.⁷¹

Three consequences follow for the question examined in this article. The first is that the forum most likely to hear a dispute arising from an Islamic financing contract in the Kingdom is not a court of Islamic legal specialists but a regulatory committee. The second is that such bodies generally uphold contractual terms in line with international market standards, subject to compliance with applicable Saudi law and sharia principles,⁷² which places the sharia dimension in the position of a limiting condition rather than of a constitutive framework. The third is that recourse to the classical literature in these forums is correspondingly attenuated: a committee constituted to apply banking regulation does not read *Kasysyāf al-Qināʿ*, whatever the ultimate constitutional status of that work may be.⁷³

c. The Codification of 2023 and Its Stated Objectives

Nizām al-Muʿāmalāt al-Madaniyyah was enacted by Royal Decree No. M/191 of 29/11/1444 AH, corresponding to 19 June 2023, and entered into force on 16 December 2023. Comprising 721 articles, it is the first comprehensive civil codification in the Kingdom and governs contracts, obligations, and other civil rights.⁷⁴ It is the third of four judicial reform statutes announced in February 2021, the others being the Law of Evidence, the Personal Status Law, and a penal code for discretionary sentences, and it forms part of the broader programme of legal modernisation associated with Vision 2030.⁷⁵

The objectives declared for the instrument are explicitly addressed to the problem

⁷⁰ Regulation of the Committee of Banking Disputes, Royal Order No. 37441 of 2012.

⁷¹ Hamza Albaheth, *Towards Having a Specialized Economic and Financial Court*, ch. 3.

⁷² STAT Law, "Islamic Finance 2025: Saudi Arabia."

⁷³ Manṣūr ibn Yūnus al-Buhūtī, *Kasysyāf al-Qināʿ ʿan Matn al-Iqnāʿ* (Beirut: Dār al-Kutub al-ʿIlmiyyah), vol. 3, 146.

⁷⁴ Nizām al-Muʿāmalāt al-Madaniyyah, Royal Decree No. M/191 of 2023.

⁷⁵ Ahmad, "New Saudi Personal Status Law," 288.

of interpretation. By codifying sharia principles within a structured legal framework applicable across civil and commercial transactions, the law is intended to limit judicial discretion and to provide a more consistent approach to the formation, performance, and termination of contracts.⁷⁶ Nisreen Mahasneh situates the reform within the wider objective of achieving legal certainty in civil dealings, observing that the code seeks both consistency in judicial decisions and an environment conducive to investment.⁷⁷ Mohamad Kassem's comparative survey of selected provisions notes that the codification proceeded with reference to the civil codes of neighbouring Arab jurisdictions.⁷⁸

Two provisions illustrate the character of the exercise. Article 68 confers upon the court a discretion to reduce or increase the extent of contractual obligations, or to invalidate the contract, where one party has exploited an apparent weakness of the other; the provision codifies in statutory form a protective doctrine that would formerly have required recourse to the principles of the school.⁷⁹ Article 94 provides that a valid contract may not be revoked or amended except by agreement or by virtue of a statutory provision, which converts into a rule of code what was previously a proposition of *fiqh al-mu'āmalāt*.⁸⁰ In both instances the substance is continuous with the tradition while the form is that of a modern civil code.

d. The Residual Space Left to Fiqh

The codification did not abolish recourse to fiqh. Islamic sharia remains the ultimate reference, and the legislature ensured that established sharia principles were preserved within the instrument itself.⁸¹ More significantly for present purposes, the codification does not alter the position regarding judicial precedent, with the consequence that scope for divergent decisions persists notwithstanding the unification of the governing rules.⁸² A code without a doctrine of precedent unifies the premises of

⁷⁶ Nabeel Ikram and Giuliano Parlascino, "Saudi Arabia's Civil Transactions Law," *Construction Law International (CLINT)*, International Bar Association, June 2024, <https://www.ibanet.org/clint-june-2024-feature-3>.

⁷⁷ Mahasneh, "Achieving Legal Certainty in Civil Dealings," 260.

⁷⁸ Kassem, "A Comparative Overview of Selected Provisions," art. 3.

⁷⁹ Ikram and Parlascino, "Saudi Arabia's Civil Transactions Law" (art. 68).

⁸⁰ Ikram and Parlascino, "Saudi Arabia's Civil Transactions Law" (art. 94).

⁸¹ Derayah LLC, "The Civil Transactions Regulations," accessed 29 September 2026, <https://www.saudilegal.com/saudi-law-overview/the-civil-transactions-regulations>.

⁸² Nabil A. Issa and Sarah Y. Walker, "Saudi Arabia's New Civil Transactions Regulation," King & Spalding, accessed 29 September 2026, <https://www.kslaw.com/news-and-insights/saudi-arabias-new-civil-transactions-regulation>.

adjudication but not its conclusions.

The Saudi residual space is therefore structurally different from the Indonesian one. In Indonesia, *fiqh* remains available because the instrument designating it was never revoked, and it competes with a compilation, a body of fatwas, and a civil code of general application. In Saudi Arabia, *fiqh* remains available because it is the constitutional foundation of the legal order and because the code itself preserves its principles, but it no longer competes with anything, the code having occupied the field of civil transactions in its entirety. The Indonesian residue is horizontal, that is to say, a matter of competing sources of equal availability; the Saudi residue is vertical, a matter of a superior reference to which recourse is had when the code is silent.

It is important not to overstate the displacement. A code of 721 articles cannot exhaust the field of civil transactions, and the questions it leaves unaddressed fall to be resolved by reference to the principles that the code itself preserves. In practice that means recourse to the authoritative commentaries of the school, above all the works of al-Buhūtī, whose *Kasysyāf al-Qināʿ* and *Syarḥ Muntahā al-Irādāt* have long functioned as the operative statement of Ḥanbalī doctrine on contracts and obligations.⁸³ The relation between code and commentary in the Kingdom after 2023 is therefore one of primary and subsidiary reference rather than of replacement.⁸⁴

A further qualification concerns the uneven reach of codification across the Saudi legal order. The reform programme announced in 2021 addressed civil transactions, evidence, and personal status, and contemplated a penal code for discretionary sentences, but the criminal law has remained minimally codified in the areas of *ḥudūd*, *taʿzīr*, and *qisās*, with the consequence that judges continue to exercise considerable discretion in applying Islamic criminal rules, in continuation of classical sharia judgeship.⁸⁵ The Kingdom has therefore codified selectively rather than comprehensively, and the field of *muʿāmalāt* was selected first precisely because it is the field in which the costs of unpredictability fall most directly upon commerce.

The comparative literature on Islamic financial adjudication supports the significance of that distinction. Ai Kawamura's analysis of the models developed in the

⁸³ Al-Buhūtī, *Kasysyāf al-Qināʿ*, vol. 3, 152.

⁸⁴ Maṣṣūr ibn Yūnus al-Buhūtī, *Syarḥ Muntahā al-Irādāt* (Beirut: ʿĀlam al-Kutub, 1993), vol. 2, 140.

⁸⁵ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "2023 Report on International Religious Freedom: Saudi Arabia," accessed 29 September 2026, <https://www.state.gov/reports/2023-report-on-international-religious-freedom/saudi-arabia/>.

United Arab Emirates and Malaysia shows that they emerged from different political and economic backgrounds and legal histories, and that the institutional route chosen shapes the character of the resulting jurisprudence.⁸⁶ Ruzian Markom and her colleagues demonstrate that where Islamic banking cases are adjudicated in the civil courts of Malaysia, the courts apply the same law and the same principles and procedure as in conventional banking, with the result that the sharia dimension of the dispute is frequently left unaddressed.⁸⁷ Abhik Majumdar's critique of the codification of Islamic law in South Asia cautions against treating codification as a self-evident improvement.⁸⁸ Table 2 sets the two jurisdictions side by side.

Table 2. The Position of Fiqh in Indonesian and Saudi Adjudication Compared

Aspect	Indonesia	Saudi Arabia
Point of departure	Restricted canon of thirteen Shāfiʿī works designated in 1958	Unrestricted recourse to Ḥanbalī jurisprudence
Instrument of designation	Administrative circular	Constitutional foundation in Article 46 of the Basic Law
Codifying instrument	Compilation of Sharia Economic Law, Supreme Court Regulation No. 2 of 2008	Civil Transactions Law, Royal Decree No. M/191 of 2023, 721 articles
Stated objective of codification	Provision of applied substantive law after the extension of jurisdiction in 2006	Limitation of judicial discretion and enhancement of predictability
Status of fiqh after codification	Formally intact, practically residual, competing with three other sources	Preserved as the ultimate reference; the code occupies the field
Doctrine of precedent	No formal doctrine; jurisprudence persuasive	Unchanged by the codification; divergence remains possible
Forum of first instance	Religious Courts, exclusive jurisdiction under Law No. 3 of 2006	Commercial courts since 2017; regulatory committees for banking, finance, securities, and insurance
Composition of the forum	Judges trained in Islamic law within a religious jurisdiction	Commercial judges; committee members situated within the executive branch
Orientation of the applicable standard	Sharia principles as the constitutive framework of the dispute	Contractual terms upheld in line with market standards, subject to sharia principles

Source: processed from the Indonesian and Saudi instruments cited and from the scholarly literature discussed in this section.

3. Implications for Legal Certainty and the Future of Fiqh as Applied Law

a. Two Opposite Trajectories Converging upon Codification

The principal finding of the comparison is that two systems proceeding from

⁸⁶ Kawamura, "New Dispute Resolution Approach and Models for Islamic Finance," 158.

⁸⁷ Markom et al., "Adjudication of Islamic Banking and Finance Cases," 21.

⁸⁸ Abhik Majumdar, "Codification of Islamic Law in South Asia, or How Not to Do Comparative Law," *South Asian History and Culture* 10, no. 2 (2019): 198, <https://doi.org/10.1080/19472498.2019.1609262>.

opposite starting points have arrived at substantially the same destination. Indonesia restricted the canon in 1958 in pursuit of certainty, discovered that restriction did not produce uniformity, and codified in 2008. Saudi Arabia left the field open, discovered that openness produced inconsistency, and codified in 2023. In each case the diagnosis was identical, namely that unmediated recourse to the classical literature yields divergent outcomes, and in each case the remedy was identical, namely the reduction of the literature to a body of articulated rules.

The convergence is not accidental, and it is not modern. Article 39 of the *Majalla* had already stipulated as a general principle that rules change with the passage of time,⁸⁹ and the *Majalla* itself, promulgated in 1877, was the first sustained attempt to render the rules of *mu'āmalah* in the form of a code. Abhik Majumdar's analysis of codification in South Asia shows that the same movement occurred there under different political conditions.⁹⁰ Codification of *fiqh al-mu'āmalāt* is best understood not as a departure from the tradition but as a recurrent response within it to the problem of divergence.

What differs between the two jurisdictions is not the direction of travel but the treatment of what is left behind. Saudi Arabia displaced the classical literature from the foreground while retaining it as the ultimate reference, a relation that is hierarchical and therefore determinate. Indonesia superimposed the Compilation upon the Circular of 1958 without revoking the latter and without stating the relation between them, a relation that is therefore indeterminate. The Indonesian arrangement preserves more of the tradition and secures less certainty.

b. Forum and Source: The Institutional Dimension of the Comparison

The comparison undertaken in the two preceding sections yields a finding that neither jurisdiction discloses when examined alone, namely that the position of classical *fiqh* in adjudication depends less upon its formal status as a source than upon the forum in which the dispute is heard. Indonesia has preserved the formal availability of the classical literature while routing sharia economic disputes to a court whose judges are trained to read it; Saudi Arabia has preserved the constitutional supremacy of sharia while routing the same class of disputes to commercial courts and regulatory committees whose composition and procedure are not designed for that purpose.⁹¹ The

⁸⁹ *Majallat al-Aḥkām al-ʿAdliyyah*, art. 39.

⁹⁰ Majumdar, "Codification of Islamic Law in South Asia," 205.

⁹¹ Hamza E. Albaheth, "Establishing Specialized Economic Courts in Saudi Arabia to Boost Investments," *Utopía y Praxis Latinoamericana* 25, no. Esp. 6 (2020): 278–288.

formal and the institutional arrangements point in opposite directions in each country.

The consequence in Indonesia is that a source which judges are competent to use is used sparingly, the empirical evidence recording legal maxims in 3.65 per cent of sharia economic decisions.⁹² The consequence in Saudi Arabia is that a source which enjoys constitutional primacy is applied by bodies that sit outside the judicial branch altogether.⁹³ In neither case is the outcome a deliberate policy choice; in both it is the residue of reforms undertaken for other reasons, the extension of religious jurisdiction in Indonesia in 2006 and the reorganisation of commercial adjudication in the Kingdom from 2017 onwards.⁹⁴

The institutional dimension also explains a divergence in the character of the resulting case law. Because Indonesian sharia economic disputes are heard by a religious court, the reasoning in those decisions engages, however briefly, with Islamic legal categories, and the competing presence of the Civil Code is experienced as a problem requiring justification.⁹⁵ Because Saudi financial disputes are heard by regulatory committees that uphold contractual terms in line with market standards subject to sharia principles,⁹⁶ the Islamic dimension enters as a compliance constraint rather than as a mode of reasoning. The Malaysian experience analysed by Ruzian Markom and her colleagues, in which civil courts applied to Islamic banking facilities the same law and the same principles and procedure as in conventional banking, illustrates the end point of that trajectory.⁹⁷

This finding qualifies the conclusion of the preceding subsection in an important respect. Codification is not the only, and perhaps not the principal, determinant of the place of fiqh in adjudication. A code administered by a religious court may leave more room for the classical literature than an uncoded regime administered by a regulatory committee. Any prescription addressed to the sources of applied law must therefore be accompanied by attention to the forum, a point that Ai Kawamura's comparison of the Emirati and Malaysian models makes from the opposite direction.⁹⁸

c. Legal Certainty against Doctrinal Flexibility

⁹² Taufiki, Darsyah, and Ridha, "The Use of Maxims," 180.

⁹³ Hamza Albaheth, *Towards Having a Specialized Economic and Financial Court*, ch. 3.

⁹⁴ Al-Jarbou, "An Overview of the Saudi Arabian Legal System."

⁹⁵ Larassati, "Konsep Wanprestasi dalam KHES dan KUH Perdata," 22.

⁹⁶ STAT Law, "Islamic Finance 2025: Saudi Arabia."

⁹⁷ Markom et al., "Adjudication of Islamic Banking and Finance Cases," 21.

⁹⁸ Kawamura, "New Dispute Resolution Approach and Models for Islamic Finance," 158.

The tension between certainty and flexibility is the substantive issue that codification raises, and it should not be resolved in one direction by default. The case for flexibility is stated most clearly in the Saudi literature itself: Islamic law leaves room for local practice and for the environmental parameters of the community, and this consideration of context confers flexibility, practicability, and adaptability upon legal interpretation, enabling judges to draw upon the contextual factors that occasion legal alteration.⁹⁹ A code, by fixing the rule, necessarily fixes it at a particular moment and in a particular economic configuration.

The case for certainty is equally strong and rests upon evidence rather than upon assumption. Reliance upon the judge's own interpretation of jurisprudence produced inconsistent judgments and reduced predictability in the Kingdom,¹⁰⁰ and the Indonesian evidence points the same way, inconsistency in the application of the Compilation having been shown to affect legal certainty in cases of default.¹⁰¹ Erie Hariyanto's study of public trust in the Religious Courts in sharia economic matters indicates that the cost of that inconsistency is not confined to the parties but extends to the standing of the institution itself.¹⁰²

The resolution suggested by the comparison is that the tension is misstated when it is posed as a choice between a code and the classical literature. What generates uncertainty is not the availability of fiqh but the absence of a stated relation between fiqh and the code. Saudi Arabia has such a relation and retains a measure of flexibility without paying the full price in certainty, subject to the qualification that the absence of binding precedent leaves room for divergence at the level of application.¹⁰³ Indonesia lacks such a relation and pays the price in both directions, since judges who might draw upon the classical literature to develop the law instead draw upon the Civil Code, whose provisions were framed without reference to Islamic commercial doctrine.¹⁰⁴

d. Limits of the Comparison

Three limits qualify the comparison and should be stated before prescriptions are

⁹⁹ Yakar and Yakar, "Judicial Training in Saudi Arabia," art. 1568.

¹⁰⁰ Middle East Briefing, "Understanding Saudi Arabia's Civil Transactions Law."

¹⁰¹ Deny Guntara, Farhan Asyhadi, and Anggy Giri Prawiyogi, "Analisis Legal Reasoning Hakim dalam Memutus Perkara Ekonomi Syariah tentang Wanprestasi Akad Musyarakah," *Jurnal USM Law Review* 6, no. 2 (2023), <https://doi.org/10.26623/julr.v6i2.6392>.

¹⁰² Hariyanto, "Public Trust in the Religious Court," 199.

¹⁰³ Issa and Walker, "Saudi Arabia's New Civil Transactions Regulation."

¹⁰⁴ Hasanudin, Kamsi, and Anshori, "The Contestation of Legal Foundations," 271.

drawn from it. The first concerns judicial architecture. Indonesia maintains a separate religious jurisdiction whose competence over sharia economic matters is exclusive by virtue of Law No. 3 of 2006,¹⁰⁵ whereas Saudi Arabia does not distinguish between religious and secular courts at all, its entire judiciary applying a law whose constitutional foundation is the Book and the Sunna.¹⁰⁶ A proposition about the place of fiqh in Saudi adjudication is therefore a proposition about the legal system as a whole, while the corresponding Indonesian proposition concerns one jurisdiction within a plural system.

The second limit concerns doctrinal orientation. The Indonesian canon is exclusively Shāfiʿī by administrative designation, whereas Saudi practice is Ḥanbalī by long establishment rather than by formal instrument. The two schools differ on questions that matter in commercial adjudication, and the difference is not merely one of result. Ḥanbalī doctrine is conventionally characterised by a broader presumption of permissibility in contractual stipulation, a feature of some significance for the design of financial instruments.¹⁰⁷ A comparison that treated the two canons as interchangeable repositories of Islamic commercial law would miss the point of both.

The third limit concerns the range of institutional options that neither jurisdiction has adopted. Ai Kawamura's account of the Emirati and Malaysian models shows that the resolution of Islamic financial disputes may be organised through dedicated tribunals and advisory councils rather than through ordinary courts applying a code,¹⁰⁸ and the Malaysian arrangement demonstrates the opposite risk, namely that adjudication by civil courts applying the same law and the same principles and procedure as in conventional banking leaves the sharia dimension of the dispute unexamined.¹⁰⁹ Arbitration and mediation supply a further route that operates outside the judicial hierarchy altogether.¹¹⁰ Abhik Majumdar's critique of codification in South Asia is a useful corrective to the assumption that the movement traced in this article is necessarily progressive.¹¹¹ The prescriptions that follow are accordingly framed as measures to

¹⁰⁵ Law No. 3 of 2006, art. 49; see also Andi Mardiana and Rizal Darwis, "The Gorontalo Religious Court Judges Response toward Their Absolute Competence in Resolving Shariah Economy Disputes," *Al-Ulum* 15, no. 1 (2015): 201–218.

¹⁰⁶ Basic Law of Governance, art. 46.

¹⁰⁷ Ibn Qudāmah, *Al-Mughnī*, vol. 6, 121.

¹⁰⁸ Kawamura, "New Dispute Resolution Approach and Models for Islamic Finance," 158.

¹⁰⁹ Basir et al., "Reconstruction of Sharia Economic Procedural Law," 19.

¹¹⁰ Nur Khalidah Dahlan et al., "Arbitration and Mediation Method Applied to Islamic Finance Conflicts in Malaysia," *Journal of Social Sciences Research* 6, no. 3 (2015): 1151, <https://doi.org/10.24297/jssr.v6i3.4329>.

¹¹¹ Majumdar, "Codification of Islamic Law in South Asia," 205.

render the existing Indonesian arrangement determinate, not as an argument that codification is the only defensible response to doctrinal plurality.

e. **Prescriptive Implications**

Three measures follow from the analysis, all of them directed at the Indonesian arrangement, which the comparison shows to be the less determinate of the two. The first is the promulgation of an express hierarchy of applied sources for sharia economic cases, stating the order in which the Compilation, the fatwas of the National Sharia Board, the classical works of fiqh, and the Civil Code are to be consulted, and stating in particular the conditions under which recourse to the Civil Code is permissible. The absence of such a statement is the proximate cause of the inconsistency documented in the empirical literature.¹¹² The Saudi model, in which the code occupies the field and sharia operates as the ultimate reference, supplies one available template.¹¹³

The second is the formal revision or revocation of the Circular of 1958 in respect of sharia economic matters. That instrument was designed for marriage, inheritance, and endowment, and the works it designates address commercial transactions in categories that do not map onto contemporary Islamic financial products.¹¹⁴ Leaving it nominally in force while the Compilation governs in practice produces an appearance of continuity without its substance. If the classical literature is to retain a role in this field, that role should be stated positively rather than inferred from the survival of an unrevoked circular.

The third is sustained investment in the fiqh literacy of the bench. The empirical finding that legal maxims appear in 3.65 per cent of sharia economic decisions, and that where they appear they are generally used in conformity with conventional understanding, indicates a capacity that exists but is exercised sparingly.¹¹⁵ The Saudi experience is instructive here, the transition from an uncoded to a codified system having been accompanied by a corresponding reorientation of judicial training.¹¹⁶ A judge who understands the reasoning that supports a rule is better placed to apply a code intelligently than one who knows only its text; and where the code is silent, such a judge

¹¹² Rahman, Siradj, and Asadurrahman, "Judge's Arguments in Decisions Involving Sharia Economic Disputes," 149.

¹¹³ Covington & Burling, "Key Features of the New Saudi Civil Transactions Law."

¹¹⁴ Al-Syirbīnī, *Mughnī al-Muhtāj*, vol. 2, 335.

¹¹⁵ Taufiki, Darsyah, and Ridha, "The Use of Maxims," 180.

¹¹⁶ U.S. Department of State, "2023 Report on International Religious Freedom: Saudi Arabia."

is the only resource the system has. Ibn Farḥūn's treatment of the principles of adjudication remains the classical statement of that proposition.¹¹⁷

Taken together, the three measures would give the Indonesian arrangement the determinacy that the Saudi arrangement acquired in 2023 without requiring Indonesia to abandon the plurality of sources that distinguishes it. The object is not to reduce the repertoire but to order it. The classical works of the Shāfi'ī school designated in 1958, the commentaries of the Ḥanbalī school relied upon in the Kingdom, and the codes that have displaced both from the foreground are not competing claims to authority so much as successive attempts to answer a single question, namely how the law of *mu'āmalah* is to be known with sufficient precision to be applied.¹¹⁸ Ordering them explicitly is the unfinished part of that answer.

Table 3. Prescriptive Framework for the Indonesian Arrangement

Issue	Present position	Saudi comparator	Prescription
Hierarchy of applied sources	Not stated; four sources simultaneously available	Code occupies the field; sharia as ultimate reference	Express hierarchy promulgated for sharia economic cases
Status of the 1958 Circular	Never revoked; nominally in force	No equivalent instrument	Formal revision or revocation for sharia economic matters
Recourse to the Civil Code	Employed without stated conditions	Displaced by the code within its field	Conditions of permissible recourse stated
Judicial capacity in fiqh	Exercised sparingly; maxims in 3.65 per cent of decisions	Judicial training reoriented alongside codification	Sustained investment in fiqh literacy of the bench
Consistency of application	Inconsistent application of the Compilation documented	Divergence persists owing to the absence of binding precedent	Strengthened role for jurisprudence as a unifying instrument

Source: processed from the analysis undertaken in this study.

C. CONCLUSIONS

Classical fiqh texts entered Indonesian religious adjudication through the Circular of the Bureau of Religious Justice No. B/1/735 of 1958, which designated thirteen works of the Shāfi'ī school as substantive law, and although that instrument has never been revoked and the Religious Courts have exercised exclusive jurisdiction over sharia economic disputes since 2006, the empirical evidence shows that express recourse to the classical apparatus occurs in a small minority of decisions and takes the compressed form of legal maxims, while the Compilation of Sharia Economic Law, the fatwas of the

¹¹⁷ Ibn Farḥūn, *Taṣbirat al-Ḥukkām fī Uṣūl al-Aqdiyyah wa Manāhij al-Aḥkām* (Cairo: Maktabat al-Kulliyāt al-Azhariyyah, 1986), vol. 1, 22.

¹¹⁸ Ibn Ḥajar al-Haytamī, *Tuḥfat al-Muḥtāj bi Syarḥ al-Minhāj* (Cairo: al-Maktabah al-Tijāriyyah al-Kubrā), vol. 4, 216.

National Sharia Board, and the Civil Code compete for the same adjudicative space without any stated order of priority. Saudi Arabia settles the same class of disputes through a different architecture altogether, routing them to commercial courts established from 2017 and to regulatory committees constituted within the executive branch rather than to any dedicated sharia forum, and governing them since December 2023 by the Civil Transactions Law, a code of 721 articles enacted to limit judicial discretion, so that fiqh survives there as the ultimate constitutional reference rather than as an operative source. The comparison therefore discloses two opposite trajectories converging upon codification, a residual space for fiqh that is hierarchical and determinate in the Saudi case but horizontal and indeterminate in the Indonesian one, and a further finding that neither system yields alone, namely that the place of the classical literature depends less upon its formal rank than upon the forum before which the dispute is brought, Indonesia preserving a source its judges can read but seldom do, and Saudi Arabia preserving a source of constitutional primacy applied by bodies outside the judiciary. It is accordingly recommended that Indonesia promulgate an express hierarchy of applied sources for sharia economic cases, formally revise or revoke the Circular of 1958 in respect of those cases, and invest in the fiqh literacy of the bench, so that the plurality of its sources may be ordered rather than reduced, and that any reform of sources be accompanied by attention to the forum in which they are to be applied.

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