AUTHORITY, LEGAL REASONING AND THE PRACTICE OF ISLAMIC FAMILY LAW: *FATWĀ* AS AN EXTENDED LEGAL SOURCE OF INDONESIAN RELIGIOUS COURT

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DISSERTATION

Submitted to
School of Graduate Studies of
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in partial fulfillment of the requirements for the degree
of Doctor in Islamic Studies

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GRADUATION EXERCISE

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HAVING OBSERVED AND CONSIDERED THE ANSWERS THE PROMOVENDUS HAS CONVEYED AND THE OBJECTIONS OF THE EXAMINERS IN THE CLOSED DEFENSE ON **22nd March 2024** AND THE ANSWERS OF THE PROMOVENDUS AND THE OBJECTIONS OF THE EXAMINERS TODAY, WE DECLARE THAT THE PROMOVENDUS,**ABDULLAH JARIR.** STUDENT ID **19300016094** BORN IN **CIBATU** ON **15 NOVEMBER 1973,**

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AUTHORITY, LEGAL REASONING AND THE PRACTICE OF ISLAMIC FAMILY LAW:
Fatwā As An Extended Legal Source Of Indonesian Religious Court

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ABSTRAK

Disertasi ini bertujuan untuk mengkaji fatwa Majelis Ulama Indonesia (MUI) sebagai dasar hukum dalam putusan pengadilan agama untuk beberapa kasus terkait hukum keluarga Islam di Indonesia. Kasus-kasus tersebut berkisar pada status hukum anak di luar nikah dan/atau anak angkat, serta warisan dari pengikut berbeda agama dan pengikut Ahmadiyah. Padahal, kedudukan fatwa dalam sistem hukum Indonesia bersifat tidak mengikat dan bukan merupakan salah satu sumber hukum yang diakui oleh undang-undang di Indonesia.

Berdasarkan hal tersebut, perlu dilakukan penelitian lebih mendalam terhadap tiga aspek penting terkait posisi fatwa di pengadilan agama Indonesia, dengan berpedoman pada beberapa pertanyaan berikut: mengapa hakim merujuk fatwa MUI dalam memutus perkara terkait hukum keluarga Islam di Pengadilan Agama Indonesia?; Hakim merujuk pada fatwa MUI dalam perkara hukum keluarga apa saja?; dan apa argumentasi hukum mereka untuk merujuk pada fatwa MUI, serta sejauh mana pergeseran yang terjadi pada fatwa MUI dari pendapat hukum menjadi sumber hukum?

Mengenai otoritas fatwa, disertasi ini merujuk pada pendapat Profesor Wael B. Hallaq yang menyebutkan tiga elemen penting yang membentuk Hukum Islam modern, yaitu mufti yang mengeluarkan fatwa, hakim pengadilan agama Islam, dan sarjana hukum Islam. Dari ketiga elemen tersebut, fatwa merupakan elemen yang menentukan perkembangan hukum Islam di dunia Islam, karena sifatnya yang terbuka, bebas dari aturan yang mengikat, dan dapat diakses oleh semua pihak untuk melakukan ijtihad sesuai perkembangan dunia modern. Namun menurut Hallaq, sebenarnya fatwa sudah lama dan sering digunakan sebagai dasar pertimbangan hakim, selain menggunakan sumber hukum lainnya. Untuk membahas pentingnya peran fatwa, disertasi ini merujuk pendapat William Walker Atkinson yang membagi penalaran hukum menjadi dua bagian utama, yaitu penalaran hukum induktif dan deduktif. Dalam hal representasi fatwa, disertasi ini mengusung teori J.N.D. Anderson terkait pluralisme hukum dan reformasi hukum.

Secara umum, penelitian ini dapat diklasifikasikan sebagai penelitian kualitatif, dengan fokus pada perangkat praktik interpretatif dan objek material yang menjelaskan bidang hukum tersebut. Penelitian kualitatif ini menggunakan tinjauan pustaka dari sumber primer dan sekunder. Selain itu, untuk mendapatkan perspektif sosiologis, penelitian empiris dilakukan untuk mengevaluasi dampak penggunaan fatwa terhadap pihak-pihak dalam kasus terkait dengan menghadirkan pendapat para cendekiawan Islam tentang anak angkat dan anak di luar nikah, warisan beda agama, dan pengikut Ahmadiyah. Sumber-sumber ini memberikan penjelasan tentang proses hukum yang telah dan sedang diterapkan "secara langsung".

Penelitian disertasi ini mengidentifikasi tiga temuan penting: pertama, otoritas fatwa MUI berhasil menjaga otoritas Islam dan melestarikan nilai-nilai hukum Islam. Hal ini dapat dilihat dalam empat aspek, yaitu fatwa sebagai sumber hukum bagi Pengadilan Agama Indonesia, fatwa sebagai sumber hukum alternatif, fatwa sebagai sumber hukum tambahan secara umum, dan fatwa sebagai asas kepribadian Islam. Kedua, mengenai penalaran hukum yang digunakan hakim dalam memutus perkara di pengadilan agama, dapat dinyatakan bahwa hakim menggunakan penalaran hukum deduktif, yaitu pendekatan yang mengutamakan penalaran logis dalam pencarian fakta. Metode ini dimulai dengan mengambil tiga langkah atau proses, yaitu menentukan aksioma atau premis mayor, menentukan premis minor, dan menarik kesimpulan sebagai langkah atau proses terakhir. Metode interpretasi yang digunakan hakim menggunakan metode campuran. Penelitian menunjukkan bahwa hakim pengadilan agama belum sepenuhnya mempertimbangkan kepentingan sosial dalam putusannya, cenderung mengambil pendekatan konservatif. Ketiga, mengingat semakin pentingnya fatwa MUI dalam putusan pengadilan agama, maka fatwa tersebut harus dikaji secara cermat terkait dengan perubahan dunia dan peran hukum Islam dalam dunia yang terus berubah. Selain itu, disertasi ini juga mengidentifikasi peran hakim sebagai aktor dalam menjalankan ijtihad.

ABSTRACT

This dissertation is motivated by the hope to address the emergence of *fatwās* issued by the MUI as a legal basis for judicial decisions in the Religious Courts for several cases related to Islamic family law in Indonesia. These cases revolve around the legal status of children born out of wedlock and/or adopted, as well as inheritance from different religions and *Ahmadiyah* followers. In fact, the position of *fatwā* in the Indonesian legal system is not binding and it is not, under the Indonesian Constitution, one of the recognized legal sources in the Indonesian legal system.

Based on this, it is necessary to explore more deeply three important aspects of the position of *fatwā* in religious courts in Indonesia, namely: why did judges refer to *fatwā* in rendering decisions relating to the Islamic family law in Indonesian Religious Courts?; in what cases of family law have judges referred to the MUI *fatwā*?; and what are their legal arguments for their referencing the MUI *fatwā*, and to what extent have the status of the MUI *fatwā* shifted from that legal opinion to legal sources?

Regarding the authority of *fatwā*, this dissertation refers to the opinion of Professor Wael B. Hallaq. According to him, there are three important elements forming modern Islamic Law, namely *muftīs* who issue *Fatwās*, Islamic Court Judges, and Islamic Legal Scholars. Of these three elements, a *fatwā* is the decisive element in the development of Islamic law in the Islamic world, because of its open nature, free from binding rules, accessible to all parties for ijtihad in accordance modern developments. According to Hallaq, however, *fatwās* still is and have long been used as bases for consideration by judges, in addition to other sources of law. To address the importance and role of *Fatwās*, this dissertation builds on the opinions of William Walker Atkinson who divides legal reasoning into two major parts, inductive and deductive legal reasoning. While related to the representation of *fatwā*, this dissertation recognizes the

theories of J.N.D Anderson related to legal pluralism and legal reform.

This research can be generally classified as qualitative research, focusing on a set of interpretive, material practices that illuminate this area of law. The qualitative research relies on literature reviews of both primary and secondary sources. In addition, to gain a sociological perspective, empirical research was employed to evaluate the impact on parties to relevant cases and Islamic scholars who have offered their opinions on adopted children and children born out of wedlock, interfaith inheritance, and *Ahmadiyah* followers. These sources provided information on how the law has been and is currently applied "on the ground" so to speak.

Through this research, this dissertation has identified three significant findings: the first, the authority of MUI *Fatwā* has succeeded in preserving Islamic authority and preserving the sense of Islamic law. It can be seen in four aspects, namely *fatwā* as a legal source for Indonesian Religious Courts, *fatwā* as an alternative source of law, *fatwā* as an additional source of law in general, and *fatwā* as the principle of Islamic personality. The second, regarding the legal reasoning used by judges in determining the law in religious courts, it can be conveyed that they use deductive legal reasoning, which is an approach that prioritizes logical reasoning in fact finding. This method begins by taking three steps or processes, namely determining axioms or major premises, determining minor premises, and drawing conclusions as the last step or process. The methods of interpretation used by judges are through a mixed method. It can be seen from the research that religious court judges have not completely considered the social interests in their decisions, taking a conservative approach. The third, recognizing the increasing importance of *Fatwā* from the MUI in religious court decisions, such *Fatwā* must be diligently scrutinized to allow for a changing world and the role of Islamic law in that world. In addition, this dissertation also identified the role of judges as the actor in exercising *ijtihād*.

ملخص

تهدف هذه الأطروحة إلى البحث في فتوى مجلس العلماء الإندونيسي (MUI) كأساس قانوني لقرارات المحكمة الدينية في القضايا المتعلقة بقانون الأسرة الإسلامي بإندونيسيا. وتدور هذه القضايا حول الوضع القانوني للأطفال غير الشرعيين أو الأطفال المتبنين، وكذلك الميراث من أتباع الديانات المختلفة وأتباع الأحمدية. مع أن موقف الفتوى في النظام القانوني الإندونيسي غير ملزم ولا يشكل مصدرًا للقانون المعترف بموجب القانون في إندونيسيا.

وبناءً على ما قد سبق من البيان، من الجدير بالفعل هو إجراء البحث المتعمق نحو ثلاثة جوانب مهمة تتعلق بموقف الفتوى في المحكمة الدينية الإندونيسية معتمدة على الأسئلة التالية: لماذا يرجع القضاة إلى فتاوى مجلس العلماء الإندونيسي في تقرير القضايا المتعلقة بالأسرة الإسلامية في المحكمة الدينية الإندونيسية؟; وأشار القضاة إلى فتوى مجلس العلماء الإندونيسي في أي قضايا الأسرة؟; وما هي حججهم الشرعية للرجوع إلى فتوى مجلس العلماء الإندونيسي ، وإلى أي مدى تحولت فتاوى مجلس العلماء الإندونيسي من الآراء الشرعية إلى المصدر القانوني؟

وفيما يتعلق بسلطة الفتوى، تشير هذه الأطروحة إلى رأي الإستاذ وائل ب. حلاق الذي ذكر ثلاثة عناصر مهمة تشكل الشريعة الإسلامية الحديثة، وهي المفتون الذين يصدرون الفتاوى، وقضاة المحاكم الدينية الإسلامية، وعلماء الشريعة الإسلامية. ومن هذه العناصر الثلاثة، تعتبر الفتوى عنصرا يحدد تطور الشريعة الإسلامية في العالم الإسلامي، إذ أنها مفتوحة، خالية من القواعد الملزمة، ويمكن لجميع الأطراف الوصول إليها للقيام بالاجتهاد وفق تطورات العالم الحديث. رغم

ذلك قال الحلاقإن الفتاوى تُستخدم فعليًا منذ فترة طويلة، وكثيرًا ما تُستخدم كأساس لاعتبارات القضاة، فيما عدا مصدر قانون آخر. ولمناقشة أهمية دور الفتاوى، تشير هذه الأطروحة إلى رأي ويليام ووكر أتكينسون الذي يقسم الاستدلال القانوني إلى قسمين رئيسيين، وهما الاستدلال القانوني الاستقرائي والاستنباطي. ومن حيث تمثيل الفتوى، تحمل هذه الأطروحة نظرية ج.ن.د. أندرسون فيما يتعلق بالتعددية القانونية والإصلاح القانوني.

بشكل عام، يمكن تصنيف هذا البحث على أنه بحث نوعي، مع التركيز على أدوات الممارسة التفسيرية والأشياء المادية التي تشرح المجال القانوني. يستخدم هذا البحث النوعي المراجع من المصادر الرئيسية والثانوية. بالإضافة إلى ذلك، ومن أجل الحصول على منظور اجتماعي، تم إجراء بحث تجريبي لتقييم أثر استخدام الفتاوى على الأطراف في القضايا ذات الصلة من خلال عرض آراء علماء المسلمين فيما يتعلق بالأطفال المتبنين والأطفال لغير الشرعيين، والتراث الديني المختلف، وأتباع الأحمدية. توفر هذه المصادر بيانا عن العمليات القانونية التي تم تنفيذها ويجري تنفيذها "في الوقت الفعلي."

وقد حددت هذه الأطروحة ثلاث نتائج مهمة: أولاً، نجحت هيئة الفتاوى في مجلس العلماء الإندونيسي في الحفاظ على المرجعية الإسلامية والحفاظ على قيم الشريعة الإسلامية. ويمكن ملاحظة ذلك في أربعة جوانب، وهي الفتوى كمصدر للقانون للمحاكم الدينية الإندونيسية، والفتوى كمصدر بديل للقانون، والفتوى كمصدر إضافي للقانون بشكل عام، والفتوى كمبدأ للشخصية الإسلامية. وثانياً، فيما يتعلق بالاستدلال القانوني الذي يستخدمه القضاة في التقرير للقضايا أمام المحاكم الدينية، يمكن القول أن القضاة يستخدمون الاستدلال القانوني الاستنباطي، أي النهج الذي يعطي الأولوية للاستدلال المنطقي في العثور على

الحقائق. تبدأ هذه الطريقة باتخاذ ثلاث خطوات أو عمليات، وهي تحديد البديهية أو الفرضية الكبرى، وتحديد الفرضية الصغرى، والاستنتاج كخطوة أو عملية نهائية. وطريقة التفسير التي يستخدمها القضاة هي طريقة مختلطة. ويظهر هذه البحث أن قضاة المحاكم الدينية لا يأخذون في الاعتبار المصالح الاجتماعية بشكل كامل في قراراتهم، ويميلون إلى اتباع نهج محافظ. وثالثًا، نظرًا للأهمية المتزايدة لفتاوى مجلس العلماء الإندونيسي في قرارات المحاكم الدينية، يجب دراسة هذه الفتاوى بعناية تامة فيما يتعلق بتغيرات العالم ودور الشريعة الإسلامية في عالم متغير. وفيما عدا ذلك، فتحدد هذه الأطروحة أيضًا دور القضاة كفاعلين في القيام بالاجتهاد.

TRANSLITERATION

This work contains many non-English words in languages such as Indonesian, Acehnese, and Arabic. I write non-English words in italics with the exception of certain words. Short explanations of non-English words are written inside square brackets [ ] and footnotes are used for longer and more detailed explanations. To write Arabic words, the transliteration system of the Library of Congress and the *International Journal of Middle Eastern Studies* has been used with slight variations.

ء = ’	ز= z	ف= f
ب= b	س= s	ق= q
ت= t	ش= sh	ك= k
ث= th	ص= ṣ	ل= l
ج= j	ض= d	م= m
ح= h	ط= t	ن= n
خ= kh	ظ= z	و= w
د= d	ع= ‘	ه= h
ذ= dh	غ= gh	ي= y
ر= r		
Short:	= a	= i = u
Long:	ا= a	ي= i و= u
Diphthong:	اي = ay	او= aw

The *ta marbuta* (ة) is omitted unless it occurs within an *idafa*, in which case it is written “t”, such as *wahdat al-wujud.* Arabic words that have been incorporated into Indonesian or Acehnese and indicate certain events, names of institutions and persons, or those words that are now part of the vocabulary of these languages, are written in their Indonesianized form, such as *‘Ahli Hikmah’* instead of *‘Ahl al-Hikmah’, ‘Akhwat-Ikhwan’* instead of *‘Akhwat-Ikhwan’,* and *‘Sultan Ḥasanuddin’* instead of *‘Sultan Hasan al-Din’.*

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Serang, Mei 2024

Abdullah Jarir

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CHAPTER I
INTRODUCTION

A. Background

A *fatwā* is a legal opinion or religious regulation promulgated by Muslim scholars called a *muftī* in relation to Islamic issues. *Fatwā* perpetuates a long-standing tradition in Muslim societies that remain stable throughout the change in different political atmosphere. *Fatwā* does not merely discuss ritual discourses but also involves daily life issues related to the political, social, and economic transactions. There are *fatwas*, for instance, concerning whether a Muslim may watch a *wayang* attraction, or open an account of conventional bank, or it is lawful in Islam if a Muslim participates and becomes a member of non-Islamic party or chooses a woman for presidential election.

The essential function of *fatwā* is to respond to religious question. The person who is giving a *fatwā* is a *muftī*, someone who is trusted as an expert in religious matters. The appointment of a *muftī* is not always through a formal process. A local leader of a mosque could be a *muftī* by default in a small town. There is also self-proclaimed *fatwā* institutions for Muslim populations in a big city. And there are *fatwas* promulgated by Muslim organizations such as Muḥammadiyah, Nahdhatul Ulama, Persatuan Islam (Persis) and others. Even there are transnational *fatwas* promulgated by across wide scope of the Muslim community through social media.

The position of *fatwā* in the Muslim world is quite varied. In Malaysia and Brunei Darussalam, for instance, a *fatwā* is binding on all Muslim citizens. Besides that, the governments of two countries institutionalize it as a council within the structure body of it. Therefore, *fatwās* issued by a council are not independent, because they are a subordination of the government affair. Different from Malaysia and Brunei Darussalam, in Egypt, *fatwā* institution is not under the subordination of the government, but it is in several organizations and institutions formed by communities such as *Dār al-*

Iftā which is under *al-Azhar as-Syarīf*. The *fatwā,* therefore, is more independent and non-binding.

In the Indonesian context, the *fatwā* status is not binding on Muslims, because it is not a part of national legal system. It is just individual perspectives or Islamic organization's perspectives in several Islamic discourses within Muslim society. The status of *fatwā* in the Indonesian legal system is no more than an unwritten legal source that provides freedom for Indonesian Muslim people including judges in Indonesian religious courts to apply it or disregard it. In other word, the position of *fatwā* is not an authoritative one. Therefore, it could be a positive law if it is legalized by state institutions. The most widely used *fatwās* by judges in religious courts are those issued by the Indonesian Council of *'Ulamā.* The *fatwās* in question relate to inheritance between different religions, child adoption, child origins, and cultural *fatwās*. These *fatwās* are explicitly used as a legal basis for the issuance of decisions and stipulations. Therefore, the position of the *fatwā* is not the same as that of jurisprudence.

Recently, however, *fatwā* has become a new source of Islamic law particularly in the legal practice of Indonesian religious courts. This can be seen in the several cases of religious court decisions in relation to the Islamic family law. *Fatwā* explicitly has been cited by judges as one legal consideration in rendering decisions. Therefore, the position of *fatwā* has experienced a shift from just a legal opinion into a legal basis of judiciary institution. In another world, the position of *fatwā* is as level as others legal basis such as the law on marriage 1/1974 and The Compilation of Islamic Law (Kompilasi Hukum Islam).

Therefore, it is interesting to explore why the judges of religious courts in Indonesia have based their decisions on the *fatwā* of Indonesian board of '*Ulamā* (MUI) than the Constitutional Court decision in relation to the legal status of a child out of wedlock for instance. As we know that the Constitution Court of Indonesia issued the decision number 46/PUU/VIII/2010 on the legal status of a child born out of wedlock which he or she is not only relation to his or her

mother but also to his or her father as long as it can be proven through technological advance. Such decisions received a response from MUI by it issuing fatwa number 11/2012 on the legal status of a child out of wedlock and its treatment. Based on its *fatwā*, MUI insisted that a child out of wedlock legally has no relation with his or her father. He or she just relates to his or her mother and his or her mother's family.

Besides that, this dissertation elaborates on the historical trajectory of the involvement of *fatwā* in the Indonesian judiciary. It is also important to express whether *fatwā* ever be a consideration of judges or not, the extent of the influence of *fatwā* in issuing decisions in the contexts of religious courts. Therefore, it will be interesting to further discuss the involvement of *fatwā* in relation to the judiciary world.

In addition, from an epistemological perspective, if judges consider a *fatwā* as a center of consideration in making decisions, it shows a new paradigm of the Indonesian legal system. It means that a *fatwā* has become more involved in a new Indonesian Legal system. Besides that, it further confirms the existence of legal pluralism as once identified by Professor Ratno Lukito that in Indonesia there are at least three legal sources that influence the Indonesia legal System, namely customary law, Islamic law, and western law or positive law.[1] In my view, *fatwas* are a manifestation of Islamic law. So, it is something legal if a *fatwā* involved as a source of any others legal source in Indonesia because *fatwā* is living legal source within society.

Furthermore, it is important to express here, that the focus of this dissertation is in the engagement of *fatwā* relating to the issues of Islamic family, because the *fatwā* in Islamic law has not adopted into the any official institutions in Indonesia compared to any MUI *fatwā* associated with the Islamic economic and Islamic banking. As we have known that there is an independent institution of MUI which

[1] Ratno Lukito, *Hukum Sakral Dan Hukum Sekuler, Studi Tentang Konflik Dan Resolusi Dalam Sistem Hukum Indonesia*, trans. Inylak Ridwan Muzir (Tangerang: Pustaka Alvabet, 2008), 28.

organizes and issues the *fatwā* concerning Islamic economic and finance. The official institution in mention is *Dewan Syariah Nasional* (National Syariah Board). The *fatwā* issued by Dewan Syariah Nasional has been adopted by Bank Indonesia as the Indonesian Center Bank. And Indonesian Center Bank is an official institution of the Indonesian Government that has the right to issue financial regulations including the right to adopt *fatwā* regarding Islamic economic and finance. Therefore, the position of such financial fatwas is a part of the Indonesia legal system.

Based on the explanation above, it is interesting to discover any significant question as follows: to what extent is the authority of a *fatwā* used legal authority by judges in rendering decisions related to Islamic family law? what legal reasoning is used by judges in rendering decisions based on fatwas, and what is to be represented by a decision based on a fatwa? In addition, it also important to respond to any issues such as: the historical trajectory of *fatwā* either in the Muslim world or the Indonesian context, the existence of Indonesian Religious Courts, the method of promulgating *fatwā*, and the application in Indonesian Religious Court. Such research questions are expected to answer where the real position of a *fatwā*, which is basically not binding and is not a source of law, in the constellation of the Indonesian legal system which in fact has become a source of law in court practice in Indonesia, especially in the Religious Courts.

B. Research Questions

1. Why did judges consider *fatwā* as a legal basis in rendering decisions related to Islamic family law in Indonesian Religious Court?
2. In what cases of family did the judges refer to the MUI *fatwā* and what are their legal argument of their referencing to the MUI *fatwā*?
3. To what extent have the status of the MUI *fatwā* shifted from that legal opinion to legal sources?

C. Purpose and Benefit of This Research

The primary purpose of this research is to explain why judges of Indonesian Religious Courts prefer a *fatwā* over the decision of the Indonesian Constitution Court as basis of consideration in the case of legal status of a child out of wedlock and why they also base their consideration on *fatwā* in others cases such as children adoption and interfaith inheritance. As for *fatwā* has no legal standing in the Indonesian legal system. This research also identifies the involvement of *fatwā* in relation to judiciary world. Besides that, the research discovers the authority of Indonesian Religious Court whose decisions based on the *fatwā* of MUI.

This research is going to discover the process of rendering judicial decisions who base their decision on *fatwā*. This process provides the method of reasoning of judges in giving the law. In other words, this section expresses the process of rendering judicial decisions and where the position of fatwa is in that process. Besides that, the research also discussed the interpretation of the law used by judges.

This research also confirms the application of legal pluralism in the Indonesian legal system, because, as we know that the *fatwā* is an Islamic legal source that is common in the Indonesian Muslim population. Therefore, the government has to recognize that it as one of Indonesian legal system like other existing legal systems. In other words, this research is going to promote *fatwā* as a new source in the Indonesian legal system that not merely as a spirit of law but also as a basis of consideration by judges.

In a judiciary context, this research expects to contribute to the effort of law reform promulgated by Supreme Court judges. This means that this research perhaps could contribute to providing references in law finding endeavor as ex officio of judge assignments. For Indonesian Constitution Court, this research is going to propose an interpretation of the meaning of Constitution Court decision number 46/PUU/VIII/2010 on the legal status of children born out of wedlock. Because some judges argue that such decisions are still unclear particularly on some issues relating to civil relation as written

in the decision; inheritance relation, guardian relation, or custody right. Therefore, it is ripe for discussion to seek solutions. For Indonesian Muslim people, this research will provide debate and critical perspectives on the position of *fatwā* in Indonesian legal system.

D. Literature Review

In this section, I discuss the literature review that is categorized based on several issues, namely the position of *fatwā* in the contexts of the Indonesian legal system, legal reasoning of judges of Indonesian Religious Courts and the dynamic of *fatwā* in Islam, legal reasoning of the MUI in producing *fatwā*, the authority of MUI *fatwā*, and legal status of a child born out of wedlock.

The first issue is the position of *fatwā* in the Indonesian legal system. There are several scholarly works that discuss this, namely the article proposed by Slamet Suhartono entitled "Eksistensi *Fatwā* Majelis Ulama Indonesia dalam Perspektif Negara Hukum Pancasila (The existence of *fatwā* of Indonesian Council of '*Ulamā* in the Perspective of State Law of Pancasila)". He perceived that the *fatwā* of MUI are not official regulations in Indonesia because the MUI is not an official state institution. However, the position of *fatwā* is one material source of law.[2] Another article that discuss the position of *fatwā* is "Kekuatan Hukum *fatwā* Majelis '*Ulamā* Indonesia (MUI) dalam Perspektif Peraturan Perundang undangan di Indonesia. (The Legal Force of *fatwā* of the Council of Indonesian '*Ulamā* in the Perspective of Indonesian Legal System)." Al Fitra Johar who wrote this article arguing that the *fatwā* of MUI has no power to prescribe behavior it as long as it has not become positive law. Therefore, it includes merely an aspiration of law.[3]

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[2] Slamet Suhartono, "Fatwa Majelis Ulama Indoneia dalam Perspektif Negara Hukum Pancasila." *Journal of Al-Ihkam* Vol. 12 no.2 (December 2017), 457

[3] Al Fitri Johar, "Kekuatan Hukum Fatwa Majelis Ulama Indonesia (Mui) Dari Perspektif Peraturan Perundang-Undangan Di Indonesia. Oleh: Al Fitri Johar, S.Ag., S.H., M.H.I. (11/1) - Direktorat Jenderal Badan Peradilan

In line with the two notions above, Poprizal, Akhmad Mushlih, and Ardilifiza propose an article "Judicial Analysis on The Position of Legal Opinion of Indonesian Council of '*Ulamā*' in Statutory Regulation System in Indonesia." They insisted that *fatwā* of MUI do not form part of positive law and do not have permanent legal authority according to law No. 15 of 2019 on making rules and hierarchy of laws. Therefore, it could not be applied to all Indonesian people. The *fatwā* mentioned could be one of Indonesian positive law when official state institutions recognize it as such. [4] Meanwhile, Ibnu Emil AS Pelu paid attention on the position of *fatwā* in the context of Islamic law. He authored an article titled "Posisi *Fatwā* dalam Konstruksi Hukum Islam (The Position of *Fatwā* in the Construction of Islamic Law)'. He concluded that the *Fatwā* Position in the Configuration of Islamic Law is a legal basis for an act or activity which is good for *Mu'āmalah* nature. However, it is morally associated with those who raise the issue (*mustafti*).[5]

After discussing about the position of *fatwā* in the Indonesian legal system, we can conclude that the position of *fatwā* is out of the Indonesian legal system, so that the position of it is not binding on Indonesian jurisdictions. However, the position of *fatwā* can be changed through the legislative mechanism applied by state institutions such as legislative council or government. Meanwhile, we necessarily look at the position of *fatwā* in the Muslim world. There are several works focusing on the existence of *fatwā* in Malaysia, Singapore, Egypt, and others. Yuki Shiozaki tried to

Agama," accessed June 8, 2022, https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/kekuatan-hukum-fatwa-majelis-ulama- indonesia-mui-dari-perspektif-peraturan-perundang-undangan-di-indonesia-oleh-al-fitri-johar-s-ag-s-h-m-h-i-11-1.

[4] Poporizal, Akhmad Mushlih, and Ardilifiza, "Judicial Analysis on the Position of Legal Opinion of Indonesian Council of '*Ulamā*' in Statutory Regulation System in Indonesia". *Journal of Bengkoelen Justice*, Vol. 11 No. 2 (April 2021), 187

[5] Ibnu Emil AS Pelu, "Posisi *Fatwa* dalam Konstruksi Hukum Islam (The Position of *Fatwā* in the Construction of Islamic Law)'. *Journal of El-Mashlahah*, Vol., 9, No. 2 (2019), 180

explore "the Historical Origins of Control over Deviant Groups in Malaysia: Official *fatwā* and Regulation of Interpretation." He argued that *Fatwā* in Malaysia issued by Majlis Agama Islam which functions to organize Muslim affairs in relation to mosques, *zakāh*, *waqf*, praying, fasting, *Hajj*, marriage, and *fatwā*. There, the Majlis is under the control of Sultan. Historically, the Malaysian government requests *fatwā* makers to issue *fatwās* in relation to religious rituals and practices particularly with reference to government policies and their application. In Malaysian context, a *fatwā* would have legal and binding force if issued by gazette of state. The deviant group would be prohibited from performing its activities and publications by the ministry of home affairs. [6]

In addition, Isa Ansori through his article "Kedudukan *Fatwā* di Beberapa Negara Muslim: (Malaysia, Brunei Darussalam, dan Mesir)." (The Position of *Fatwā* in several Muslim Countries: (Malaysia, Brunei Darussalam, and Egypt)." He found that the position of *fatwā* in Malaysia and Brunei Darussalam are engrained within their own legal system. Therefore, the *fatwā* is binding for all Muslims in their countries. As for Egypt, it seems closer Indonesia. *Fatwās* are separated from Egypt's legal system or governmental system. Therefore, the position of *fatwā* is not binding, meaning that the people are free but not required to follow the *fatwās*.[7]

The second issue is the authority of the *fatwā* of the MUI. There is a number of articles discussing such authority. The first work is from Laa Jamaa entitles "*Fatwās* of Indonesian Council of '*Ulamā* and Its Contribution to the Development of Islamic Law in Indonesia." He argued that for 26 years, the MUI *Fatwā* contributed positively to the transformation of contemporary Islamic law in

[6] Yuki Shiozaki, "The Historical Origins of Control over Deviants Group in Malaysia: Official *Fatwā* and Regulation of Interpretation". *Journal of Studia Islamika*, Vol. 22, No. 2 (2015), 209

[7] Isa Ansori, "Kedudukan *Fatwā* di Beberapa Negara Muslim: (Malaysia, Brunei Darussalam, dan Mesir)". (The Position of *Fatwa* in several Muslim Countries: (Malaysia, Brunei Darussalam, and Egypt)". *Journal of Analisis*, Vol. 3, No. 1 (2017), 164

Indonesia. This article also found that during that period, MUI issued 137 *fatwās* and 50 decisions. In addition, he also insisted that the MUI *Fatwā*s have contributed to the development of contemporary Islamic law, either related to the social, cultural, food, medicine, science and technology, or worship.[8] Another work discussing about the authority came from Muhammad Maulana Hamzah. The work mentioned is "Peran dan Pengaruh *Fatwā* MUI dalam Arus Transformasi Budaya di Indonesia. (The Role and Effect of MUI *Fatwā* in the Current of Social Culture Transformation in Indonesia)." This article recognized that although the *fatwā* sometime draws criticism and causes friction in society, it has a significant role in uniting Muslim people when they are faced with several questions as a result of social-cultural transformations. The *fatwā* also has significant effects on Indonesian Muslims particularly the issues relating to family planning, Islamic banking, Islamic economics, and theology.[9]

The works regarding this authority also came from Umarwan Sutopo. He wrote an article entitled "Dialektika *Fatwā* dan Hukum Positif di Indonesia: Meneguhkan Urgensi dan Posisi *Fatwā* di Masyarakat Muslim Nusantara (The Dialectic of *Fatwā* and Positive Law in Indonesia: Strengthening the Urgency and Position of *Fatwā* within Nusantara Muslim Society." Umarwan conceived that although the position of *fatwā* is not binding in the Indonesian legal system, it occupies an important position within Indonesian Muslims. The urgency of *fatwā* for Muslims has become something rational as a form of appreciation and application of Islamic preaching and

[8] Laa Jamaa, "*Fatwas* of Indonesian Council of '*Ulamā* and Its Contribution to the Development of Islamic Law in Indonesia". *International Journal on Islam and Societies (IJIMS)*, Vol. 8, No. 1 (June 2018)

[9] Muhammad Maulana Hamzah, "Peran dan Pengaruh *Fatwā* MUI dalam Arus Transformasi Budaya di Indonesia. (The Role and Effect of MUI *Fatwā* in the Current of Social Culture Transformation in Indonesia)". *Journal of Millah,* Vol. XVII, No. 1 (August 2017), 149

religious life. Therefore, the Umarwan's idea is in line with the notions earlier regarding the authority of MUI *fatwā*. [10]

From the explanation above, we can conclude that although *fatwā* is not a part of the Indonesia legal system, it has impacted the development of Islamic law in Indonesia. *Fatwā* also could unite Muslims in facing any religious issues they have. Besides that, the influence of *fatwā* on Indonesian Muslims has been significant, particularly the issues relating to family planning, Islamic banking, Islamic economic and theology.

The next issue is the legal reasoning of judges in Indonesian Religious Courts. The first notion comes from Muhammad Isna Wahyudi. He authored an article entitled "Judge's Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage." The author found two types of legal reasoning employed by judges of religious courts in dealing with cases of child parentage, doctrinal-deductive legal reasoning, and *maṣlaḥah* based legal reasoning. [11]

Another article comes from Mughniatul Ilma. The title was "Penetapan Hakim tentang Asal Usul Anak Paska Putusan Mahkamah Konstitusi. Studi Kasus di Pengadilan Agama Bantul. (Judges decisions on the filiation of a child at the Religious Court of Bantul after the Constitutional Court ruling). Constitution Court decisions did not impact filiation of children at Religious Court of Bantul, Yogyakarta. It was because the decision was unclear. According to judges, the relationship between a biological father and a child is limited to food, whereas the rights of guardianship,

[10] Umarwan Sutopo, "Dialektika *Fatwā* dan Hukum Positif di Indonesia: Meneguhkan Urgensi dan Posisi *Fatwā* di Masyarakat Muslim Nusantara (The Dialectic of *Fatwā* and Positive Law in Indonesia: Strengthening the Urgency and Position of *Fatwā* within Nusantara Muslim Society". *Journal of Justicia Islamica*, Vol. 15, No 1 (2018), 104

[11] Muhammad Isna Wahyudi, "Judge's Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage". *Journal of Al-Jamiah*, Vol. 55, No. 1 (2017), 143

custody, and inheritance are revered to the *Kompilasi Hukum Islam* and law marriage No.1/1974. [12]

Another notion relating to legal reasoning was illustrated by Ahmad Rofii. He wrote an article entitled "Wither Islamic Legal Reasoning? Law and Judicial Reasoning of Religious Courts." According to him, there are three different ways religious courts apply judicial reasoning, deductive (legislation), Inductive (jurisprudence), and the emphasis of the objectives of Islamic law (*Maqāsyid Syarī'ah*). [13]

The three articles above promoted the legal reasoning of judges in relationship to the legal reasoning of their decisions. Initially, such articles rejected the Indonesian Constitutional Court decisions according to the legal status of children born out of wedlock. The first article focuses on the legal reasoning of judges while the second one pays closer attention to the rationale of judges why they reject the Constitutional Court decision.

The next issue is the legal reasoning of fatwa council of MUI. The first article is related to this is entitled "Metode Ijtihad Majelis *Fatwā* Majelis '*Ulamā* Indonesia dan Aplikasinya dalam *Fatwā*." (The Legal Reasoning of *Fatwā* Council of Indonesian Council of *'Ulamā* and Its Application in the *Fatwā*)." The writers were Heri Fadli Wahyudi and Fajar. They found that the legal reasoning of the *Fatwa* council of Indonesian council of '*Ulamā*: *Naṣ Qaṭ'i* approach, *Qawli* approach, and *Manhaji* approach based on context.[14] In addition,

[12] Mughniatul Ilma, "Penetapan Hakim tentang Asal Usul Anak Paska Putusan Mahkamah Konstitusi. Studi Kasus di Pengadilan Agama Bantul. (Judges decisions on the filiation of a child at the Religious Court of Bantul after the Constitutional Court ruling), *Master Thesis*, Yogyakarta: Sunan Kalijaga State Islamic University (2016), 133

[13] Ahmad Rofii, "Wither Islamic Legal Reasoning? Law and Judicial Reasoning of Religious Courts". *Journal of Indonesian Islam*, Vol. 8, No. 2 (2014), 259

[14] Heri Fadli Wahyudi and Fajar, "Metode Ijtihad Majelis *Fatwā* Majelis '*Ulamā* Indonesia dan Aplikasinya dalam *Fatwā*. (The Legal Reasoning of *Fatwā* Council of Indonesian Council of *'Ulamā* and Its Application in the *Fatwā*)". *Journal of Cakrawala: Jurnal Studi Islam*, Vol. 13, No. 2 (2018), 126-129

Zakaria Syafe'i traced the *Maqāsyīd Syarī'ah* in The *Fatwa* of Indonesian Council of Ulama. MUI only uses an old model of *maqāshid al-syari'ah* which is only focused on Muslims and protecting aspects of *maqasyhid as-syarī'ah*. Contemporary *maqāsḥīd* which are proposed by some Muslim progressive thinkers, are ignored. This in turn creates some hiccups in the context of the modern and religiously plural Indonesia. [15]

The legal reasoning of MUI *fatwā* council has also been examined by Ahmad Sanusi, Ahmad Harisul Miftah, and Ria Agustiana. They authored an article entitled "the application of emergency concept within the MUI *Fatwā* on Measles-Rubella Vaccine Immunization." They found that the use of the vaccine is not allowed in Islam, but it is still allowed. The reason for this ability is an emergency measure because there is no other vaccine until now that can be used to stop the disease, and the use of vaccine is considered very urgent to save the humanity and generation. [16]

Based on the articles above, we could highlight the legal reasoning of MUI *fatwā* council, namely it depends on the *naṣṣ Qur'ān*, *Sunnah,* and legal opinions of classical Muslim scholars. The *fatwā* council also bases its actions on the theory of *maqāṣid syarī'ah* and emergency concepts in their fatwas. Therefore, the council still embraces the text of *naṣṣ Qur'ān* and *Sunnah* through such two Islamic legal sources still order it explicitly. In the context of the legal status of a child born out of wedlock, the council still holds the *Ḥadīṡ* which looks at a child that is not related legally to his father.

The next issue relates to the human rights of a child out of wedlock. The first article is from Felly Annisa Fuji Agustin, Imanuddin Abil Fida, and Tirmidzi. The article discussed "The Status of Children out of Married in *Fiqh* Perspective and Positive Law in Indonesia." In the view of *Fiqh*, A child born outside of marriage is

[15] Zakaria Syafe'i, "*Maqāsyīd Syarī'ah* in The *Fatwā* of Indonesian Council of Ulama". *Journal of Indonesian Islam,* Vol. 11, No.1 (2017), 120

[16] Ahmad Sanusi, Ahmad Harisul Miftah, and Ria Agustiana, "the Application of Emergency Concept within the MUI *Fatwa* on Measles-Rubella Vaccine Immunization". *Journal of al-'adalah*, Vol. 17, No. 2 (2017), 418

not legally related to the father. He or she merely related to his or her mother. However, according to positive law, children born out of wedlock are related legally to their parent if they acknowledge them. Initially, this article focuses on the position of children out of wedlock in the views of both Islamic and positive law of Indonesia.[17]

Meanwhile, Bernadeta Resti Nurhayati contributed an article entitled" Protection of Illegitimate Children (A Case Study at Indonesian Children Protection Commission)." She argued that KPAI received some cases regarded by community groups who did not prevail in the cases. However, the KPI has difficulty in assisting illegitimate children due to marital status. Nurhayati, through this article, explored the role of KPAI in investigating the position and the existence of children born outside of marriage. [18] Muneer Abduroaf has another notion in "An Analysis of The Right of a Muslim Child born out of Wedlock Inherit from His or Her Deceased Parent in term of The Law of Succession: A South African Case Study." Abduroaf have shown that the status of the child in terms of the Islamic law of succession and the South African law of succession is quite different and that Muslims are required in case of Islamic law to ensure that their estates are distributed in terms of the Islamic law of succession upon their demise.[19]

Meanwhile, in Morocco, a child born out of wedlock is not considered related to his or her father. The article is entitled "The Legal Status of Children Born out of Wedlock in Morocco."

[17] Felly Annisa Fuji Agustin, Imanuddin Abil Fida, and Tirmidzi, about "The Status of Children out of Married in *Fiqh* Perspective and Positive Law in Indonesia", *Journal of Usrah*, Vol. 1, No. 1 (2020), 56

[18] Bernadeta Resti Nurhayati, "Protection to Illegitimate Children (A Case Study at Indonesian Children Protection Commission)". *1st International Conference on Law, Economic, and Government (ECOLOG)* held by University of Diponegoro Semarang, National University of Malaysia, Semarang, September 4-5 2017, 9

[19] Muneer Abduroaf, "An Analysis of The Right of a Muslim Child born out of Wedlock Inherit from His or Her Deceased Parent in term of The Law of Succession: A South African Case Study", *Journal of Obiter*, Vol. 42, No.1 (March 2021), 135

According to Eva Schlumpf, a child is born out of wedlock is not acknowledged, nor its consanguinity proven; the child is illegitimate. No paternity can be established because there is no lineage-*nasb* – father and child are legally not related. There is no obligation to support such a child and the child therefore has no claims against his biological father because only through a legal relationship to his father.

E. Theoretical Framework

This dissertation is based on the theory put forward by a renowned jurist, namely Nathan Roscou Pound. A legal scholar from Harvard University in America. The theory in question is that "law as a tool of social engineering", meaning that both legislation and judicial decisions must favor the interests of society and comply with the laws that live in the midst of society. Pound wanted to change the law from a theoretical level (law in book) to law in reality (law in action). As a supporter of pragmatic legal realism, Pound also stated that the real law is the law in action. The law is not only what is written in the law, but what is carried out by law enforcement officials or anyone who has the authority to implement the law. [20]

The theory put forward by Roscou Pound above is inseparable from the legal approach he adopts, namely the sociological school of jurisprudence. This school tends to see law as something practical, namely how the law is implemented. Pound himself distinguishes the term sociological jurisprudence from sociology of law. The latter term is interpreted as law at a theoretical level.[21] To more clearly to distinguish the sociological school of jurisprudence from the sociology of law as proposed by Roscou Pound, an example needs to be given, for example whether in giving a verdict, the court has

[20] Roscou Pound, Contemporary Juristic Theory, (Claremont CA: Pamona College, 1940), 66 in Atip Latipul Hayat, Khazanah: Roscou Pound, *Padjadjaran Jurnal Ilmu Hukum*, Vol. 1 No 2 (2014), 414

[21] H. Lloyd, Introduction to Jurisprudence, (New York/Washington:1972), 366 in Atip Latipul Hayat, Khazanah:Roscou Pound, *Padjadjaran Jurnal Ilmu Hukum*, Vol. 1 N0 2 (2014), 413

considered the legal values that live in the midst of society and views on the feasibility or appropriateness that develops in society so that its decisions are in accordance with the principles of law or in the making of laws and regulations must also keep in mind the moral principles adopted by a particular society. The end result to be achieved is whether the legislation or court decisions are in accordance with legal principles that reflect the values of justice in the life of the community.[22]

Based on the theoretical framework above, this dissertation will explain the extent to which the decisions made by judges in the Religious Courts in Indonesia have considered the sense of justice of the litigants. In addition, whether the judges have also considered aspects of the public interest in each of their decisions. That will be the focus of the analysis of this dissertation.

This research also is rooted in the inquiry finding of J.N.D Anderson [23]on the phenomenon of Islamic law recent reform within the Muslim world. He argued that the Muslim world currently adheres to three legal systems, namely the first is a legal system which still recognize *syarī'ah* as the prime legal system and it has been being applied in whole. The second is a legal system that avoids syariah and follows a completely secular system. The third is the legal system that combines both *syarī'ah* and a secular system. Based on those legal systems, Indonesia is included among states that follow the third legal system, that is, trying to mix both *syarī'ah* law and secular law. This means that besides adhering positive law, in practice, especially in the context of Indonesian Religious Court, Indonesia has been implementing *syarī'ah* based legal; namely MUI fatwa. This is in line with what Anderson argued earlier that there is a nation-state that apply either positive law or *syarī'ah* law. Therefore, this research

[22] Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Penerbit Kencana, 2021), 9-10

[23] J.N.D. Anderson, *Islamic Law in the Muslim World*, (New York: New York University Press, 1975), 82-83

examines whether Indonesia is truly consistent in embracing such a legal system in line with Anderson argued about.

Meanwhile, among countries that still maintain *syarī'ah* as a primary legal system and try to implement it in all aspects until now are Saudi Arabia and northern Nigeria. Saudi Arabia is an independent country that still maintains *syarī'ah* as a legal which governs all aspects of its daily life. This state does not want to accept another legal system and it just received a little bit of its legal system originally from the west. In addition, although this country embraces Hanbali's legal school, it is still open to other Sunni's legal school as long as it does not contradict the existing law and king's order.

The nation state that is explicitly declared as a secular nation-state is Turkey. This country has been exposed that *syarī'ah* was no longer applied as far as in the area of judiciary matters, even in the area of family law. In the beginning of revolution, the government of Attaturk ever declared that the government was going to implement a new law based on the legacy of Islamic Turkey. However, after this government ran for several months, a dissenting opinion evolved among legislative member was never ended to formulate the objective of nation. At that time, the government decided to bring the nation to the west rather the east and demanding freedom to leave the past and move forward to progress according to the development of society. Therefore, in 1926 the Swiss law changed to *syarī'ah,* including the law relating to the family law.

The last legal system is addressed to nation-states that try to accommodate two legal systems either *syarī'ah* based legal and secular one. Those countries in mention are Egypt, Sudan, Lebanon, Syria, Jordan, Iraq, Morocco, and Indonesia. The most basic feature of these countries, which choose the moderate way of legal system, is reform in the field of law through observing the patterns and the latest trends. J.N.D. Anderson [24] reminds us of more the basic feature of such reforms, namely the first step took place approximately in 1850. At this first step, the law was colored by a strong dichotomy

[24] J.N.D Anderson, *Islamic Law*…, 90

between law inspired by the west on one hand and Islamic law on the other hand. Actually, this dichotomy has existed for centuries in the Muslim world. However, it never was before recognized so blatantly and equitably. In this dichotomy atmosphere, penal and business law is mostly secularized, and family law remained under the influence of Islam.

Meanwhile, According to N.J Coulson, Islamic law reform can take on four formations. The first is the codification of Islamic law into the positive law which is termed as the political doctrine. The second is where Indonesian Muslims are not bound by one single school of Islamic thought that is termed as (*takhayyur* doctrine), that is, selecting the best opinion. The third is reinterpretation and the fourth is creating the new legal framework in anticipation of developments in society.[25]

This research uses three aspects in analyzing *fatwa* as a new source in Indonesian Religious Court after emerging of MUI *fatwā* on affiliation of children born out of wedlock in 2012, children adoption in 1985, and interfaith inheritance in 2005. It means that this research uses legal authority, legal reasoning, and representation as variables in analyzing the application of *fatwā* within Indonesian religious courts after the emergence of MUI fatwa on legal status of child out of wedlock. In general, scholars who discuss the phenomenon of *fatwā* as an authoritative source of law within society, they approached the subject of their enquiries through three aspects. The first is an aspect of theory which guides and controls the research. The second aspect is the *fatwā* application in Indonesian Muslim organizations, society, and the judiciary. The third aspect is the application of *fatwa* as a new source in Indonesian Religious Courts. Several works associated with this research, to mention some, are by

[25] N.J. Coulson, *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 1994), 149-185

M.B. Hooker,[26] Wael B. Hallaq,[27] and Ratno Lukito.[28] This research incorporates these three aspects to examine the *fatwā* as a new source in Indonesian Religious Court.

The Theory of Authority

'Regarding the authority of fatwa, this dissertation refers to Wael B Hallaq's opinion on the authority of fatwa.[29] According to him, the role of *fatwā* is very central to developing *syarī'ah* in the Islamic world. *Fatwās* are also constantly referenced by judges and the public because the strength of the *fatwā* lies in the quality of the *fatwā* issuer. The higher the quality of a *fatwā*'s scholarship, the higher the public's trust is in the *fatwā*. Therefore, the existence of *fatwās* in the Islamic world has become a living law and reference in the midst of the Muslim community. Therefore, it is natural that its existence continues to live and be implemented by the Muslim community because they need its presence. In the context of the authority of the *fatwā* put forward by Hallaq, this dissertation tries to establish whether the authority has indeed been proven to be implemented consistently.

Besides that, the theory of authority that is elaborated on for this research comes from Nico J.G. Kaptein. He proposed the concept of religious authority in Indonesia through the vehicle of the Islamic institution of *iftā,* the delivering of a *fatwā*. Kaptein classified *fatwā* into three types, namely traditionalist *fatwas,* modernist *fatwās*, and collective ones. Acknowledging authority, according to Kaptein, should be founded on the religious authority in *fatwā*. The foundation of authority itself can be conceived by four concepts, namely the holders of religious authority, the centers of religion, the language of religious authority, and the effectiveness of religious authority.

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[26] M.B. Hooker, *Indonesian Islam: Social Change through Contemporary Fatāwā,* (Honolulu: University of Hawaii, 2013)

[27] Wael B. Hallaq, *An Introduction to Islamic Law*, (Cambridge University Press, 2009)

[28] Ratno Lukito, *Hukum Islam dan Hukum sekuler…*

[29] Wael B. Hallaq, *An Introduction to Islamic Law*, …, 9

Kaptein mentioned the holders of authority as individuals and special sections of independent Muslim organizations. He also argued that the involvement of '*ulamā* in state apparatus both during the colonial era and after independence. It means that administrators have always considered the potential political power of the *'ulamā*, therefore have always discover the way to utilize the authority of *'ulamā* to legitimize state policy. This has been seen in various state founded council of '*ulamā*. He further insisted that the old formation of *fatwa*. he has dealt with have been replaced by a newer because of a natural evolution. It may be said that in the present day all types of *fatwā* that he has dealt is still occur. Essentially, the holders of fatwa are addressed by the type of fatwa that is embodied in both individuals and organizations. [30]

The next concept associated with the authority is what the centers of it are. Through a work of Ahmad Dahlan entitled *Muhimmāt al-Nafāis fī bayān al-Asilah al Hadīṡ*, Kaptein regarded that Indonesian Muslim people directed themselves to Mecca in gaining religious advice of particular issues. This occurred before the dissemination of reformist ideas from Egypt. It may be said that Mecca at that time was a center of religious authority for Indonesian people. But, at the beginning of the twentieth century, Cairo raised as the second center of religious authority in Indonesian Muslim communities. Through the journal *Al-Manār* which supervised by Muhammad Abduh and Muhammad Rasyid Ridha, a new methodology termed as *ijtihād* became a trend for several Muslim scholars to proffer a reformational idea on some religious issues. Presently, as we see that in Indonesian Muslims going to indigenous personal *mufti* or independent sections of Muslim organizations.[31]

Another concept of authority is the sources of religious authority. The most important thing of it is institutional *iftā*,

[30] Nico J.G. Kaptein, The Voice of the *'Ulamā*: *Fatwās* and Religious Authority in Indonesia, *Archives de Sciences Sociales des Religions,* (Janvier, Mares 2004), 124-125

[31] Nico J.G. Kaptein, The Voice of the Ulama…, 125-126

particularly the person of the *mufti* itself. Actually, there is no special qualification to be recognized as a *mufti*, but in general it a *mufti* must be a person who has high moral integrity as well as be capable of conceiving the sacred text, namely *Qurān* and *Ḥadīṡ*. The source of authority also could be a collective board which is composed of qualified, respected people. Examining the sources of authority also deals with religious texts. In traditionalist Islam, which in the context of fatwa tents to adhere the way of *taqlīd* as a principle in gaining *fatwas*, usually use the classical authoritative legal handbooks. Meanwhile, in modernist Islam, which in the context of fatwa commonly adheres to the principle of *ijtihād,* the primary sources of authority are the *Qur'an* and *Ḥadīṡ*.[32]

The last concept of authority is the effectiveness of it. It means that sometime both individual authority and institutional authority as expressed in *fatwā* depends on various at circumstance. Another factor that influences to the *fatwā* is charisma. It is like irrational power of an individual that may also play role in the acceptance of the *fatwā*. Moreover, widespread dissemination and acceptance plays a role in the effectiveness of *fatwā*. The fatwa could be promulgated through printed media, radio, television, and the internet. Knowing whether a *fatwā* was effective or not based on the reception of such *fatwā* must be studied separately.[33]

Authority itself can be defined as the right to exact compliance in the name of common values and rules of conduct, shared by those who apply this authority and those who imposed it. Therefore, religious authority means the right to impose rules which are in accordance with God's will. [34] Meanwhile, according to Hannah Arendt as quoted by Ismail Fajri Alatas, authority is a hierarchical relationship that puts in contact a group of people with a past that

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[32] Ibid

[33] G.J. Kaptein, 27

[34] Marc Gaborieau, *The Redefinition of Religious Authority among South Aswan Muslim from 1919 to 1856* in Varieties in Religious Authority: Changes and Challenge in 20th Century Indonesian Islam, (Singapore: ISEAS Publishing, 2010), 1

they recognized to be foundational, therefore, providing those who have authority with the capacity to transmit and transform the past into the examples for the present. Authority relies neither on common reason nor on one who orders, but rather on the recognition of the hierarchy considered by all groups involved to be right and legitimate. [35]

Based on Hannah's explanation above that authority is recognition of a hierarchy deemed by all communities involved to be right and legitimate. In an Indonesian Religious Court context, the authority mentioned is recognition of the decisions of Religious Court judges, which are based on the fatwa of Indonesian Board of *Ulamā*. Therefore, this research challenges the recognition of the authority of such decisions by all parties involved to be right and legitimate.

The Theory of Legal Reasoning

The second theory that is used as a tool in analyzing this research was pronounced by M.B. Hooker. According to him, the authority of *fatwa*¯ be discovered through various methods of reasoning, which is, how the *fatwā* -issuing authorities reach the result. Hooker calls it methodology, because through it we could know an internal logic.[36] The method of Legal reasoning or legal interpretation defined as an effort in seeking reason in law or discovering the foundations of how a judge decides cases of law. Therefore, legal reasoning forms a part of court decisions in providing the judgments. Judges could base their decisions on philosophical, juridical, sociological, and theological aspects that describe justice and benefit for those who litigate. There are many interpretations used by judges in finding the law, namely grammatical interpretation, historical interpretation, systematical interpretation, sociological

[35] Ismail Fajrie Alatas, *what is Religious Authority? Cultivating Islamic Communities in Indonesia*, (Oxford: Princeton University Press, 2021), 4

[36] M.B. Hooker, *Indonesian Islam: Social Change through Contemporary Fatāwā*, (Honolulu: University of Hawaii Press), 47

interpretation, teleological interpretation, and authentic interpretation. [37]

Grammatical interpretation focuses on the meaning of every grammatical phrase that exists in the norms of regulations. Historical interpretation is deciding the law based on the genesis and evolution of such law. The systematical interpretation interprets several laws based on the same cases. Sociological interpretation considers the growing and historical aspect of society as a significant factor in promulgating regulations. Teleological interpretation of the law is based on contemporary growing in society. Finally, authentic interpretation is that interpretation that given by the law itself.

There are three different models and approaches of legal reasoning applied by religious courts. Firstly, several religious courts use The *Kompilasi Hukum Islam (KHI)* as the sole source of their decisions. These judges just find out the legislation and then apply it as a foundation of their judgments. The reasoning process pursues a formal syllogism or deductive logic. Secondly, the court applies Islamic sources by incorporating it with positive legislation. Through these two references could legitimize their decisions. However, the courts still use deductive logic in analyzing such Islamic sources. The final model is the objectives of Islamic law or (*Maqāsyid Syarī'ah*). [38]

Moreover, the substantive legal sources of Religious Courts experienced several phases. Before 1974, the courts relied on the classical *fiqh* literature. Actually, codification of Islamic law appeared after the independence of Indonesia in 1945. however, it could not succeed because the proposal of codification was seen by a majority of Muslims as a fundamental change of religious doctrine. As a result, the courts continued to rely on Islamic classical literature particularly *Syāfi'ite* jurist works. On February 18, 1958, the

[37] Hamzah Halim, *Legal Audit and Legal Opinion*, (Jakarta: Prenada Media, 2015), 176

[38] Ahmad Rofii, "Whither Islamic Legal Reasoning? the Law and Judicial Reasoning of the Religious Courts". *Journal of Indonesian Islam*, Vol. 08, No. 02, (December 2014), 255-257

Ministry of Religious Affair issued Surat Edaran No.B/1/735 which ordered judges of Religious Courts to find guidance from 13 books from *Syāfi'īte* school in deciding cases.

After the enforcement of the law No.1/1974 on marriage law, the state has provided the legal instruments for the court that ensures the application of Islamic law. The position of these classical references, as mentioned before, is as a possible source of consideration for judges as long as it does not contradict those provisions. The presence of The *Kompilasi Hukum Islam* in 1991 has provided the legal basis of the court. Entering the decade of 2010, Indonesian Religious Courts experienced a shift in its recognizing legal sources particularly some cases relating to parentage of a child and legal status of a child born out of wedlock.

The Constitutional Court itself, as mentioned before, held that a child born out of wedlock has a civil relation not only with his mother but also with his father. The decision changed the existing laws, namely law marriage No. 1/1974 article 43 (1) and the Compilation of Islamic Law article 100 that a child merely has a legal relationship with his mother. As a result, the decision has invited many responses and stoked controversies among Indonesian Muslims especially Islamic organizations such as the Majelis ' *Ulamā* Indonesia (Indonesian Council of *'Ulamā*).[39] Through its *fatwā*, MUI argued that, based on *Ḥadīs* and some notions of classical Islamic jurists, a

[39] The Majelis Ulama Indonesia is a biggest *'ulamā* association which is Jakarta as its headquarter. It also has branches in every province and districts in Indonesia. The term of *'ulamā* itself could be identified into several categories. According to Moch. Nur Ichwan, there are two categories of *'ulamā*, namely individual *'ulamā,* and institutional *'ulamā.* The first category of *'ulamā* could be classified in to five characteristics, namely educational *'ulamā* who teach at *Pesantren,* organizational *'ulamā* of *Islamic* organization, political *'ulamā*, activist *'ulamā,* and political *'ulamā*. The second category of *'ulamā* addressed for those who become member of institutionalized *'ulamā* such as the MUI. Moch Nur Ichwan recognized that this two categories are not so clear-cut, however, such terminology perhaps can provide identification about definition of *'ulamā.* For furthermore explanation see Moch Nur Ichwan, "The Local Politic of Orthodoxy: The Majelis *'Ulamā* Indonesia in The Post New Order Banten", *Journal of Indonesian Islam,* Vol. 06, No. 01, (June 2012): 168

child born out of wedlock has a civil relationship only with his or her mother.

In fact, the judges did not follow the Constitutional Court decision, because they argued that the decision has ambiguous, particularly the meaning of the phrase "civil relationship" in Court Constitution decision as follow "Children born outside of marriage has civil relationship with their mother and their mother's family as well as with a male as their father which can be proven based on science and technology and/or other evidence according to law is related by blood, including with his father's family."[40] The phrase "civil relationship" could mean a kinship relationship, inheritance relationship, guardianship, or custody. The Constitutional Court did not offer detail on what exactly was meant by the phrase. If the meaning of the phrase is kinship relationship, inheritance relationship and guardianship, the judges of Religious Court have ignored it, because it fundamentally contrasts the principles of Islamic law. and even they openly and explicitly are mentioned in the *fatwā* of MUI as legal basis of their decisions.

Moreover, in their consideration, judges have perceived that the institution of marriage is sacred that not merely to fulfill biological needs and earn descent, but rather a form of worship. Therefore, the legal status of a child born out of wedlock is not the same as a child born in a legal wedlock. Such a birth has different legal consequences particularly in inheritance rights, marriage and guardianship rights for daughters in line with Law No.1/1974 article 43 (1) on marriage law. However, it is unfair if a child has to bear the burden of losing his or her rights due to the actions of his or her parents. Therefore, the Constitutional Court issued the decision No. 46/PUU-VIII/2010 that changed Law marriage No1/1974 article 43

[40]Rokhmadi, "Status Anak di Luar Perkawinan Paska Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010,' *Jounal of Sawwa,* Vol. 11, No.1, (October 2015): 6

(1), so it runs into "has civil relationship with his or her biological father." [41]

Instead of following the decision of Constitutional Court, however, the judges of Religious Courts prefer to apply the MUI *fatwā* No 11/2010 on the right of a child born out of wedlock and its treatment thereof. Even they openly and explicitly mentioned the *fatwā* of MUI as legal basis of their decision. To conclude, judges have decided that a child born out of wedlock has full civil relationship with his or her mother, but he has limitation civil relationship with his or her biological father merely in meeting the needs of the child's life until adulthood and providing *wāṣiyat wājibah* not more one third of inheritance.

The Theory of Representation

The third theory is representation of *fatwā*. According to Hooker, it is crucial to how one looks and knows and understands religion. The prohibition on image and image making is doctrinally sensitive instance in representation.[42] Representation also is legitimacy. Legitimacy has two meanings, namely normative and sociological. An institution can be legitimate in normative sense if it has right to organize and apply the rules. In addition, it must ensure compliance with them by giving the cost for non-compliance and providing benefits for compliance. Meanwhile, from a sociological perspective an institution is legitimate when it is widely accepted to have the right to rule.[43] Legitimacy requires not merely that institutional agents are lawful in implementing the rules, but also the institutional rules have content-independent reasons for compliance, and that those who have domain to operate the rules also has content-independent reasons to endorse institution or not to interfere its

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[41] Religious Court judgment of South Jakarta No.0156/Pdt.P/2013/PAJS, 7

[42] M.B. Hooker, Indonesian Islam, … 47

[43] Robert O. Keohane, *The Legitimacy of Global Governance Institutions,* in Allen Buchanan, Human Rights, Legitimacy and The Uses of Force, (New York: Oxford University Press, 2010), 105

function. Someone is judged as having content-independent reason to comply of the rule if he does not care about any positive assessment of the contents of the rule. [44]

In the context of this research, legitimacy in the sense of normative law could be conceived as to what extent the *fatwā*-based decisions are accepted societally. It means that whether Indonesian Muslims follow and implement the decisions. The legitimacy in this understanding was relating to the level of compliance in society. Additionally, it is important to know the legal standing of such decisions towards perspectives of Islamic jurists. Meanwhile, the legitimacy in the sense of a sociological perspective aims to understand how the Muslim intellectual gesture including Muslims organizations such as the Indonesian Board of *Ulamā* for instance towards judicial decisions. The legitimacy in this context associated with the response of Indonesian scholars to such jurisprudence. Based on the elucidation above, it is important to discover the normative and the sociological sense of legitimacy towards *fatwās*-based decisions. In the sense of normative legitimacy, there have been some ideas of classical and contemporary Islamic jurists that they initially prohibited non-Muslims to gain inheritance from Muslim heirs.

Meanwhile, from a sociological perspective, this research explores the responses and comments of Indonesian intellectuals particularly Islamic scholars and judges towards such Supreme jurisprudence. It further identifies to what extent their responses and what are the main arguments they have. It is important because it will bring clarity about the legitimacy of jurisprudence in view of society.

F. Research Method

1. Type of Research

This research is classified as qualitative research, that is, a situated action that put the research in the academic community. It contains a set of interpretations, materials, and practices that make

[44] Ibid., 109

the world visible. These practices change the world. They transform the world into a series of illustrations, including notes of field interviews, dialogues, photographs, recordings, and memoranda. In this context, qualitative research entangles an interpretive naturalistic approach to the world. It means, the researchers of qualitative learn things in their natural settings, trying to make sense of or interpret phenomena in case of the meaning people attributes to them. [45]

In addition, this research is also identified as empirical research, that is, an inquiry that approaches the law as a legal phenomenon. The goal of this study is to examine the law as a product of dialogue between state and society. In other words, this study elucidates, analyzes, and generates new provisions, and constructs theory. Empirical legal research sees the significance of considering social phenomenon in learning the law. [46] Meanwhile, according to Unger, empirical or sociological research is a study of religion's influence on society and society's effect on religion. This means that there is interdependence between religion and society. [47] According to Joachim Wach, the sociology of religion is a study of the interrelation between religion and society, and the interaction between them. It means that how encouragement, ideas, and religious institutions influence to the society and how social power, social stratification, and effect to such religion.

Because this research is classified as empirical research, the method used for this research is sociological. Furthermore, Islamic studies with sociological research are closer to the study of classical sociology than modern. Classical sociology analyzes how religion

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[45] Norman K. Denzin and Yvonna S. Lincoln, *Handbook of Qualitative Research*, (California: Sage Publication, 2005), 3

[46] Theresia Anita Christiani, "Normative and Empirical Research Methods: Their Usefulness and Relevance in Its Study of Law as an Object". *3rd International Conference on Business and Social Science*, GCBSS-2015, 16-17 December 2015 Kuala Lumpur Malaysia, 203-206

[47] Inger Furseth and Pal Repstad, *An Introduction to The Sociology of Religion*: *Classical and Contemporary Perspectives*, (Hants: Ashgate Publishing Limited, 2006), 5

effects to the social understanding and vice versa. Meanwhile, the modern studies merely identify the influence of religion in social understanding. One theme which is proposed by Atho Mudzhar was the influence of social change and its growth into the thought of Islamic law.[48] Research using a sociological method describes and even explains the phenomenon of religious courts from anthropological and sociological perspectives.[49]

Moreover, according to M. Amin Abdullah, Islamic studies cannot be studied and approached only by using a single discipline, but it must be approached by in a multi-disciplinary manner. It means that Islamic studies are not enough just be approached by one discipline of knowledge separately as we could saw it from some works in the past which we usually mentioned it with *at-turās̄* or classical Islamic works. We can mention here some works related to exegeses (*tafsīr*), Islamic jurisprudences (*fiqh*), theology (*kalam*), Islamic mysticism (*tasawwuf*) and others. Therefore, we can classify the first paradigm of Islamic studies as *al-ulūm ad-dīniyah*, because approaches which are used by scholars at that time were merely mono-disciplinary. Perhaps it was fine at that time. Yet, for this time, such a paradigm is not enough anymore to handle many problems that emerge within society. Therefore, we need a new paradigm to solve any challenges that we are facing today with multi-disciplinary approaches that involve social, anthropological, and historical theories in Islamic studies that using social experiences to understand Islam. The last paradigm we can classify with *ad-dirāsah al-islāmiyah*. *Al-dirāsah al-islāmiyah* is an Islamic studies model that uses a multi-disciplinary approach to Islamic studies. Therefore, it is a combination between mono-disciplinary and multi-disciplinary

[48] M. Atho Mudzhar, "Pendekatan Sosiologi dalam Studi Hukum Islam", in *Mencari Islam: dalam Berbagai Pendekatan*, ed., M. Amin Abdullah, (Yogyakarta: Tiara Wacana, 2000), 34-35

[49] Cik Hasan Bisri, *Peradilan Agama di Indonesia,* (Jakarta: Rajagrafindo Perkasa, 1998), 35

approaches in Islamic studies. In other words, we can term it with inter and multi-disciplinary Islamic studies. [50]

In line with the accounts above, Prof Noorhaidi Hasan argued that multi- disciplinary is a research model that uses different disciplines of knowledge, without interfering with their respective disciplines. Inter-disciplinary is an approach which attempts to integrate many disciplines of knowledge. Additionally, trans discipline is how to combine many disciplines of knowledge to be one discipline or how to interconnect any disciplines of knowledge in order to reach unity of knowledge. Even, he criticized of how implemented it into reality. [51]

2. Research Approach

Legal research uses various approaches, with the aim of obtaining information from various aspects of the issue under study. To solve the problem that is the subject matter of legal research, an approach in legal research is needed. [52]

The approach is defined as an attempt to establish a relationship with people or methods to achieve an understanding of the research problem. The approach is also interpreted as a means to understand and direct the problem under study. In legal research there are several approaches. With this approach, researchers will get information from various aspects regarding the issues to be answered.[53]

This dissertation itself uses the sociological approach. The sociological approach is an approach that analyzes how reactions and interactions occur when the norm system works in society.[54] This

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[50] M. Amin Abdullah, *Multidisiplin, Interdisiplin, dan Transdisiplin, Metode Studi Islam di Era Kontemporer*, (Sleman: IB Pustaka, 2021), 24-27

[51] Noorhaidi Hasan, "Meretas Involusi Kajian Islam: Pendekatan Multidisipliner, Interdisipliner, dan Transdisipliner", in M. Amin Abdullah, *Multidisiplin, Interdisiplin, dan Transdisiplin* …, xxxi

[52] Muhaimin, *Metode Penelitian Hukum*, (Mataram, Mataram University Press, 2020), 55

[53] *Ibid.*

[54] *Ibid.,* 87

approach is used to discover understanding of the problems in this dissertation as well as finding answers to the formulation of the problem in question, especially looking for answers related to whether the Religious Court's decision for several cases that are the object of the research has guided social interests or not.

3. Research Strategy

a. Sources of Data

This research involves both library and empirical resources. The library resources were compiled by investigating some relevant literatures such as books, articles, academic works, journals, research reports, and the compilation of laws. Such resources primarily relate to the main topic as written in the title of dissertation.

In additional bibliographical sources, it is important to convey here that this research also uses empirical data source collected by interviewing and observing a number of relevant sources such as judges, Islamic scholars, Islamic organizations, litigants, and any other component of society those who related to the topic. Such emprical sources are needed to make confirmation about some problematic issues related to the topic of dissertation, such as the issues about the legal reasoning of judges on Religious Courts.

b. Technic of Collecting Data

This research uses date collection technics in gaining data sources from subject of research including a number of audiences, particularly in gathering empirical data sources. Such technics in mention are literature review and interview. The literature review referred here seeks and discovers library data sources relating to the research topic, particularly to seek the foundations of theory used for supporting the process of analyzing and interpreting the data.

The interview is a dialogue-the way of asking questions and observing. It is not a neutral instrument, for at least two people generate the reality of interviewing the circumstances.

In this situation, responses are given. The interview also results in understanding based on certain interactions. This method is affected by personal characteristics of the interviewer. This interview identified certain empirical data sources relating to the main topic, particularly the data which are sourced from judges and other various components. Moreover, the type interviewing used for this research is unstructured interviews. This type of interview gives more latitude for respondents to provide answers rather than any other types. This type of interviewing is more suitable for qualitative research purposes because the respondents will feel free to respond at long as they desired to. [55]

c. Technic for Analyzing Data

Data analysis is a step of study or review of the results of data processing assisted by using theories that have been obtained previously in the theoretical framework. In other words, data analysis is describing data in the form of numbers so that it is easy to read and give meaning if the data is quantitative; and describing data in the form of good and correct sentences so that it is easy to read and understand and give meaning if the data is qualitative. [56]

According to Mukti Fajar and Yulianto Ahmad as quoted by Muhaimin, data analysis is an activity of giving an opinion which can mean opposing, criticizing, supporting, adding, or commenting and then making a conclusion on the research results with one's own mind with the help of theories that have been mastered. [57]

Data analysis in legal research has properties such as descriptive, evaluative, and prescriptive. Descriptive is an analysis that aims to provide exposure and description of the

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[55] Andrea Fontana and James H. Frey, *The Interview from Neutral Stance to Political Involvement*, in Norman K. Denzin and Yvonna S. Lincoln, Handbook of Qualitative Research …, 105

[56] Muhaimin, *Metode Penelitian Hukum*… 104

[57] *Ibid*., 104-105

object and subject of research as a result of the research conducted. Researchers do not justify the results of research. While what is meant by evaluative is an analysis technique that aims to provide justification and assessment of the research results. While prescriptive analysis techniques are analysis techniques that aim to provide arguments for the results of research. Argumentation is carried out to provide an assessment of the rightness and wrongness of a research finding.[58]

According to the explanation above, this dissertation uses descriptive and prescriptive data analysis technic. It is because this dissertation aims to provide the description of data and giving argumentation whether or not the legal source and the methods used by judges in providing decisions related to some of cases they handle are in according with procedures and laws.

d. Drawing the Conclusion

Because this research is categorized as empirical research and grounded theory based, it uses inductive approach to draw conclusion. Charmaz suggested that grounded theory, in its essential shape, it contains systematic inductive guidelines for gathering and analyzing empirical data sources. [59] She perceives that grounded theory is a method of applying qualitative inquiries that focus on generating a conceptual framework or theories through developing inductive analysis from the data.[60]

G. Structure of Research

This dissertation presents seven chapters. The first chapter is an introduction that consists of discussions, namely the background of research, the formulation of problem, the purpose of research, the

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[58] *Ibid.*

[59] Norman K. Denzin and Yvonna S. Lincoln, *Handbook Qualitative Research*, …382

[60] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis*, (London: Sage Publishing, 1996), 187

usefulness and benefit of research, literature surveys, conceptual framework, research methodology, research structure, literatures, and research schedule.

The second chapter focuses on the development of *fatwā* namely the history of *fatwā*, typology of *fatwā*, the fatwa issuer, Indonesian institutions that issue the fatwa, the legal reasoning of *fatwā* and *fatwā* within Indonesian Muslims. This chapter will also explore the center, the source, the language, and the representation, and the effectiveness of *fatwā* within society. And of course, it is going to regard the theoretical perspective of fatwa on a theoretical basis.

The third chapter elucidates historical trajectory of Indonesian Religious Courts, substantive law in Indonesian Religious Courts, administrative law in Indonesian Religious Courts, the competency of Indonesian Religious Courts, the legal reasoning of judges on Indonesian Religious Courts. This chapter explores the center, the source, the language, and the representation, and the effectiveness of fatwa within society. And of course, it regards the theoretical perspective of fatwa on a theoretical basis.

The fourth chapter concerns the content and legal reasoning of *fatwā* in Indonesian Religious Courts. It consists of representation of *fatwā* within Muslim society. It will discuss the rate of legitimacy of *fatwā* among Indonesian Muslims particularly relating to the legal status of children born out of wedlock. This chapter also discuss about the decisions of several Religious Court accommodating *fatwās*.

The fifth chapter discovers the authority of *fatwā* as a new source and a new formation of legal reasoning of Indonesian Religious Courts. It consists of *fatwā* as a new epistemology of Indonesian Religious Court, *fatwā as* an additional source of Indonesian Religious Court, *fatwā* as an explanatory toward legal source of Indonesian Religious Court. This chapter also expresses deductive legal reasoning and conservative legal reasoning.

The sixth chapter analyzes the shifting of *fatwā* from legal opinion to the legal source. This chapter discusses about the

deviation of state law from Qur'an and Sunnah, the equal study of KHI and *Fatwā*, the legitimacy of *Fatwā*, the indigenous of *fatwā*.

The last chapter contains conclusions and findings of the research. This chapter argues the conclusion of research formulation. This chapter also highlights research findings and answering of theoretical claims. Besides that, it discusses the suggestions for institutions such as the Indonesian religious Courts, Indonesian Constitutional Court, and others.

H. Literature

This dissertation required a number of references relating to some variables of the topic. Some of them are data sources which based on library and others are empirical data sources. The library data sources generally relating to the theoretical framework of the variables, namely the variable of *fatwā*, position of *fatwā* in the Indonesian legal system, the authority of judges, legal reasoning of judges, and human rights consideration. The library data sources are needed to put foundational argument and theoretical claims that will be challenged by empirical data finding gained during the research.

As for the empirical data sources gained from interviews resulted from several judges who are facing the cases. Some judges who were facing the cases which are relating to the topic of research. The data are needed to answer the formulation of research. Generally, the empirical data are associated with the legal reasoning of judges in making decisions and the reasons for why judges disregard Indonesian Constitutional Court decisions and prefer to follow the *fatwā*.

CHAPTER VII
CONCLUSION

The research for this dissertation has identified three significant findings.

Finding 1

First, the authority of MUI *Fatwā* has succeeded in preserving Islamic authority and preserving the sense of Islamic law. It can be seen through *fatwā* as a legal source for Indonesian Religious Courts, *fatwā* as an alternative source of law, *fatwā* as an additional source of law in general, and *fatwā* as the principle of Islamic personality.

The position of *fatwā* as a legal source can be seen through the decision relating to *Ahmadiyah*. The judges on the Tanjungpinang Religious Court referred to the MUI *fatwā* on Ahmadiyah as legal basis in rendering their decision. The position of *fatwa* as alternative source in making decision is a fatwa concerning the legal status of children out of wedlock. It because the judges of Kediri Religious Court preferred to refer to MUI *fatwā* on children born out of wedlock than the prevailing Indonesian Constitution Court decision. Meanwhile, the *fatwā* as an additional source is the *fatwā* relating to the interfaith inheritance and adoption. The case of *Ahmadiyah* followers also has clarified the position of *fatwā* as the principle of Islamic personality.

The position of *fatwā* as an epistemological source can be understood as *fatwā* is the main source of law and the basis of consideration by judges, especially judges on the religious courts, in rendering decisions or other rulings. It could be seen in the case of interfaith inheritance in the West Jakarta Religious Court in 2016. *Fatwās* in the view of judges on religious courts fall into the category of doctrine. Also, it is considered a positive source of law in addition to official state laws such as the Marriage Law, the Compilation of

Islamic Law, and jurisprudence. This clarifies the position of judges as the actors in exercising *ijtihād*.

Some judges consider that although the *fatwā* is not binding and is not part of the pantheon of recognized sources of law in Indonesia, due to its position as a source of normative law that is alive and believed to be true by the community, the existence of a *fatwā* has become very important and of course binding when it becomes part of a decision or determination of a panel of judges. Therefore, the existence of *fatwā* as a source of law is in accordance with the opinion expressed by Weil B. Hallaq that the position of *fatwā* in the Islamic world is very decisive in the formation of Islamic law. According to Hallaq, there are three important elements that make of the origins of Islamic law, namely judicial decisions, opinions of legal consultants, and *fatwās*. Currently, *fatwā* is the most important element in the formation of Islamic law.

Based on the above explanation, it seems that the existence of *fatwā* in the religious court environment in Indonesia is very strong. Because *fatwā* is not positioned as an additional rule, it occupies a strong place as a source of law for judges in rendering decisions or determinations. Therefore, this strong position is in line with the thesis offered by Weil B. Hallaq.

Finding 2

The second conclusion, regarding the legal reasoning used by judges in determining the law in religious courts, is that they use deductive legal reasoning, which is an approach that prioritizes logical reasoning in determining the truth. this method includes three steps or processes, namely determining axioms or major premises, determining minor premises, and drawing conclusions as the last step of the process. In the case of the origin of children born from an invalid marriage as happened before the religious court of Kediri in 2015. We can convey the axiom "every child born outside a legal marriage is only civilly connected to his mother and his mother's family." Then the minor premise is "the child in the case at the Kediri religious court is a child born outside a legal marriage." The

conclusion is "a child born outside of a valid marriage as happened in the Kediri religious court is only civilly connected to his mother and his mother's family."

Meanwhile, this type of legal interpretation tends to identify legal sources from a legal positivistic point of view. In other word, when interpreting legal sources, they primarily focus on the literal aspects and ignore the common values and norms such as equality as they are invisible to the five senses. The judges rely heavily on overt legal sources which often urge them become textual judges. Generally, conservative judges are influenced by *legism*, that is, a legal school that does not consider the outside influences other than accepted legal sources. Therefore, *legism* represents the majority of legal positivism. When they render a decision, the judges who embrace this kind of mindset strictly adhere the existing legal sources. Accordingly, they will not consider any other source except existing legal sources. In other words, they merely decide the cases through concrete rational references.

Finding 3

The third finding, related to the shifting of *fatwā*, is that *fatwā* has experienced shifting from legal opinion to the legal source. It can be seen in at least two things, namely presenting the legitimacy of decisions based on *fatwā* and illustrating the existence of legal pluralism. From the results of interviews with several academic figures and Islamic organizations, it was found that decisions based on fatwas have strong recognition among Indonesian Muslims. They consider that when a *fatwā* is used as a legal basis for a judicial decision, it automatically becomes binding because it has become part of a judicial decision or determination.

While related to legal pluralism, the interviewed figures firmly argued that the emergence of *fatwā* as a legal basis of a decision in religious courts is evidence of the emergence of legal forces outside of the existing positive legal sources. This strengthens the thesis put forward by Anderson that there are several countries in the Islamic world that make Islamic law one of the sources of law in addition to

other sources of law. In this context, the *fatwā* as a representation of Islamic law is an important part of the legislative system in Indonesia. Although the application of Islamic law is not comprehensive, it is an important source in the development and formation of legislation.

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