

## **Islamic Law Epistemology Thought of Perspective Wael B. Hallaq and Relevance To Islamic Law in Indonesia**

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**Abstract:** *Studies on the history of Islamic law in Indonesia can also serve as one of the foundations for Muslims in particular to determine the right strategy in the future to bring the nation and Islamic law closer. Although some theories of Islamic law development from the time of the Islamic empire to the time of reform (now) are still optimized. But in addition to the many advances in these developments are also still many obstacles that are difficult to overcome. One of the obstacles to many perceptions is that the implementation of Islamic law today is irrelevant to modern times. In enhancing the development of Islamic law in Indonesia there needs to be comprehensive reviews such as the history and epistemology of Islamic law. This article discusses the development of thought in the field of Islamic jurisprudence emphasizing on the aspect of Islamic legal epistemology which developed in Indonesia. The formulated concept by Wael B. Hallaq, he is a professor of Islamic law at Columbia University who concentrates on research in the field of Islamic law. In this study at least the writer proposes three summaries, first Prof. Hallaq's biography and socio-historical life will be described with a historical and an analytical content approach to explain the epistemological reasoning concept of Islamic law. Second, to know the reasoning of the epistemology of Islamic Law in the Wael. B. Hallaq's perspective. And the third, to know its relevance with developments with Islamic Law in Indonesia.*

**Keywords:** Reasoning, Epistemology, Islamic Law.

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## Preface

Discussing about law, it will come to pass in our minds some rules or norms that regulate all human behavior, whether it is a reality that grows and develops in society or indeed the regulation is deliberately created and enforced by the authorities. The law in Western conception is a law deliberately devised by man to regulate his own human interest in a particular society. In the conception of legislation (the West), which is governed by the law is

only human relations with other human beings and things in society. The law in Western conception is a law deliberately devised by man to regulate his own human interest in a particular society. In the conception of legislation (the west), which is governed by the law is only human relations with other human beings and things in society.<sup>1</sup>

In addition there are other legal conceptions, such as Islamic law. The basis and legal framework is determined by God, which not only regulates human relationships with other human beings and things in society, but also regulates the human relationship with God, man by himself, man with the natural surroundings.<sup>2</sup> So the term Islamic law clearly reflects a far different concept when compared to the concept, nature and function of ordinary law.<sup>3</sup>

There are two views on Islamic law, namely the view of immortality and change.<sup>4</sup> *First*, the view of immortality was as held by a large number of Islamists such as C.S. Hurgronje and Josep Schacht, as well as by most other Muslim jurists which hadith oriented (traditionalist). They argue that in its concept and development and methodology, Islamic law is eternal. They maintain the view that Islamic law seeks its foundation on God's revelation through the Prophet Muhammad as it appears in the Qur'an and hadith. So the law is static, final and not accepting change.

*Second*, the view of alteration that argues that Islamic law has dynamic characteristics, flexible can change and in fact also the law is always changing in accordance with the conditions of space and time. That emphasizes ijtihad activity. In the Qur'an and Sunnah, the term al-Hukm al-Islamy has never been encountered. The term often used is *al-Fiqh al-Islamy* or *al-Shari'at al-Islamiyyah*.<sup>5</sup> For that understanding of the sharia term and fiqh will be very helpful to understand the full understanding of Islamic law.

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<sup>1</sup> Muhammad Daud Ali, *Hukum Islam, Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 4th edition, 9th publishing, 2002), 38.

<sup>2</sup> Ali, *Hukum Islam*..., 38-39.

<sup>3</sup> Musahadi, *Evolusi Konsep Sunnah (Implikasinya Pada Perkembangan Hukum Islam)* (Semarang: Aneka Ilmu, 2000), 45.

<sup>4</sup> Musahadi, *Evolusi*..., 46.

<sup>5</sup> Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2000), 3.

Islamic law is believed to be a law of civilization that will be appropriate at any time. However, some paradigms still argue that Islamic law in implementation in the current era is irrelevant. Especially the secularists deny this belief. Relating to many things, today's modern era has led Islamic law in problematic and dilemma positions.

Some Muslim philosophers are present to prove research studies to prove that Islamic legal principles will be eternal. One of them is a wise man who was born in Palestine and became a professor at one of the universities in Canada. He has created several theories that the world considers to be related to the conception of Islamic legal epistemology.

### **The History of the Development and Reform Islamic Law**

Broadly speaking, the history of the growth and development of Islamic law can be divided into six periods<sup>6</sup>, namely the period of the Prophet, the period of the Khulafaur Rasyidin, the period of tabi'in, the golden period, the taqlid period and the era of the resurrection. *First, Islamic Law in The Prophet Period* : The development of Islamic law has actually started in the time of the Prophet. This era is the beginning of the emergence of sharia in the real sense, as well as the growth and development of Islamic fiqh. This era took place during the life of the Prophet Muhammad, counted since the inspiration of the Qur'an (610M) until he died (632M).<sup>7</sup>

Islamic jurists usually divide this period into two parts, namely Makkah tasyri and Madinah tasyri.<sup>8</sup> The period of Makkah, lasted for 13 years, since the appointment of the Prophet Mohammad. When the Muslims were still isolated, minority, weak and not yet formed a people who have a strong government. Therefore, the attention of the Prophet was more directed to the da'wah of monotheism, in addition to fortifying themselves and their followers from the distractions and challenges of people who deliberately block the da'wah of Islam. So in this phase there was no chance towards the formation of the laws of amaliah and the preparation of civil law.<sup>9</sup> In short, the period of Mecca is a period of revolution aqidah to change the belief system of ignorant society toward servitude to Allah SWT solely.

<sup>6</sup> See Muhammad Ali Sayis, *Tarikh al-fiqh al-Islamy*, transl. Nurhadi, *Sejarah Fikih Islam* (Jakarta: Pustaka al-Kautsar, 2003), Bandingkan Mun'im A. Sirry, *Sejarah Fiqih Islam, Sebuah Pengantar*, (Surabaya: Risalah Gusti, 1995), p. 19-155. There is also divided to be six periods, that is The Tabi'in and Golden periods into one period, There is a rate as the book keeping period, see Abdul Wahab Khallaf, *Khulasah Tarikh Tasyri' al-Islami*, transl. H. Ahyar Aminuddin, *Perkembangan Sejarah Hukum Islam*, (Bandung: Pustaka Setia, 2000). See also Muhammad Daud Ali.

<sup>7</sup> See Mun'im A. Sirry..., 22.

<sup>8</sup> M. Hudhari Bik, *Tarikh Tasyri' al-Islamy*, transl. Mohammad Zuhri, *Sejarah Pembinaan Hukum Islam*, (Indonesia: Dar al-Ihya, 1980), 27-30.

<sup>9</sup> Abdul Wahab Khallaf, *Khulasah Tarikh Tasyri' al-Islami* (Solo: Ramdhani, 1994), 9-10. Compares Muhammad Khudhari Bik, *see Riyanta*, 73-74.

In contrast to the period of Mecca, which further led to the revolution of faith, in the period of Medina the messages contained in the Qur'an turned out to be specific.<sup>10</sup> At this time Muslims increasingly and able to form a glorious government and media proselytizing even more smoothly. This situation that encouraged the necessity of tasyri and the formation of laws to regulate the relationships between individuals of the nation with other nations or with non-Islamic countries. For that purpose, in Medina legalized law, such as marriage law, divorce, inheritance, agreements, accounts payable, penalties and others.

In other words, the period of Medina can be called the period of social and political revolution.<sup>11</sup> The source of power used in the apostolic period, was the Qur'an and as-Sunnah, so there was no room for dissent. This was because disagreements could be overcome by authoritative revelation tasyri power (the making of laws) was only held by the Messenger of Allah. If there is ijtihad from the Companions, it can also be tasyri but after receiving recognition from the Apostle.

There are three issues related to the development of Islamic law in the period of the Prophet, namely, firstly that the Prophet handled full control in the face of the problems facing society on the basis of the Qur'an and Sunnah. Secondly, the declining legal verses are to answer every event that takes place. Thirdly, Islamic law is decreased gradually, not gradually.<sup>12</sup> *Second*, The Companion Period (11th century caliph H- 41 H) : This period begins after the apostle's death, and called a friend because the period of statutory power held by its prominent companions of the Prophet. In establishing a law, the Companions used the Qur'an and the Sunnah of the Prophet. They return every event to both sources. If both of them do not find a law, then they do ijtihad.<sup>13</sup> In striving-big, they sometimes use the analogy (qiyas), or based on the benefit and refused the damage.<sup>14</sup> It is their Ijtihad that guarantees the development of Islamic law so as to adapt to the diversity of the people. They also have different methods and abilities in understanding the legal texts. Famous companions in their use of *ra'y*.<sup>15</sup> And

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<sup>10</sup> Khallaf, *Khulasah* ...., 76.

<sup>11</sup> Mun'im A. Sirry, *Sejarah Fiqih Islam* (Surabaya: Risalah Gusti, 1995), 23-24.

<sup>12</sup> Sirry, *Sejarah* ... , 65.

<sup>13</sup> Ijtihad which had done in this period were limited to answer some issues. The companion did not want to give opinion about something never happened. M. Hudhari Bik, *Tarikh Tasyri' al-Islamy*, *op. cit.*, p. 257. Compares T.M. Hasbi ash- Sdideqy, *Pengantar Hukum Islam*, re-edited by Fuad Hasbi Ash-Shidieqy, (Semarang: PT.Pustaka Rizki Putra, 2nd publishing, 2001), 54-56, see also T.M. Hasbi, *Dinamika dan Elastisitas Hukum Islam*, 15.

<sup>14</sup> Khallaf, *Khulasah Tarikh*....., 47.

<sup>15</sup> Ahmad Hasan, *The Early Development of Islamic Jurisprudensi* (The University of Michigan: Islamic Reasearch Institut, 2008), 103.

among them there is always a difference of opinion. But nevertheless, they also sometimes adopt (agree and use) the opinions of other companions. From the above it can be concluded that in this period there are four sources are used as a handle by the companions, the Qur'an, the Sunnah, qiyas (ra'yu) and ijma'. *Third*, Tabi'in Period (After the period of Khulafa al-Rasyidin until the beginning of the 2nd century H): After the companions were tabi'in. They continued the tradition of friends in the journey of Islamic law. They set the law based on what they understood from the texts, both in the Qur'an and the Sunnah. In addition they also run ijтиhad, as the friends did. The activity of ijтиhad was done by the tabi'in for two ways. (1) they were not afraid to give priority to the opinion of a friend than any other friend, even the opinion of a tabi'in on the opinion of a friend. (2) they did original thinking, even at this time the actual formation of law began.<sup>16</sup> At this period there was also an attempt to record the hadith<sup>17</sup>, on the initiative of the Caliph Umar bin Abdul Aziz. At this time there was also a division of free legal thought activity ie Iraq, Hijaz and Syria their respective imams. Iraq has two schools of Basrah and Kufa. Hijaz also has two schools of Makkah and Medina, but Madinah's madhhab is more prominent, while in Syria less popular madhhab. This is what ulama then divided into two streams, the Expert Ra'yu and Hadith Expert.

*Fourth*, The Golden Period: This period was also called the period of maturity and the perfection of fiqh or the book-keeping period of the Sunnah and the appearance of the Imams of the Madzhab (Imam Maliki, Imam Hanafi, Imam Syafi'i and Imam Hambali).<sup>18</sup> The schools had produced methodological formulas for a comprehensive and comprehensive study of the law so as to provide opportunities and convenience to the next generation of Muslims to further develop legal studies and better enforce Sharia provisions. The development of these schools, should make Islamic law more flexible, dynamic, because their presence in the community will elicit an alternative legal provision (out of the result of ijтиhad), which in the end will be more adaptive and accommodative to every change taking place in Community.<sup>19</sup>

However, the next development is quite the opposite. Islamic law encountered its anti-climactic point and the activity of berijтиhad ceased. This period is then referred to as the taqlid period or textual imposition.<sup>20</sup>

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<sup>16</sup> Hasan, *The Early Development...*, 18.

<sup>17</sup> Utang Ranuwijaya, *Ilmu Hadits* (Jakarta: Gaya Media Pratama, 1st publishing, 1996), 66.

<sup>18</sup> Abdullah Mustofa al-Maraghi, *Fath al-Mubin fi Tabaqat al-Ushuliyin* (Yogyakarta: LKPSM, 1st publishing, 2001), 72-105.

<sup>19</sup> Musahadi Ham, *Evolusi Sunnah* (Semarang: Aneka Ilmu, 2000), 100.

<sup>20</sup> Sirry, *Sejarah...*, 128.

*Fifth, The Taqlid Period (Beginning of the Fourth Century Until the Fall of Baghdad):* This period of taqlid or an impasse era occurred after the golden age. This era was marked by the emergence of an explanatory climate of problems that had been studied previously without giving new thought, reformulating the methods of the founders of the schools and reaching a

peak in the fanatic defense of the opinion of the imams of the madzhab.<sup>21</sup> Another factor that causes Islamic law to be stagnating was a theological dispute rooted in madzhab fanaticism. This condition is exacerbated by the unstable political situation that makes the scholars busy in the affairs of the state and doing fiqh affairs.<sup>22</sup> It was also due to a crusade under the direction of the Roman Catholic Church, and the barrage of Barbarian troops under the leadership of Holago Khan of Tartar.

This period occurred in the middle of the 4th century H, along with the moment of some political, intellectual, moral, and social issues that affected their principles of resurrection and hindered their activity in the state of ijтиhad. In this period the activities of Islamic jurists were, finding laws (research on legal illat), taking and choosing opinions contradicting in madhhab

and support to certain schools of thought (fanatisme madzhab).<sup>23</sup> *Sixth, The Period of Revival* : After suffering a decline, the decline of several centuries, Islamic thought rose again. This happened in the 19th century M / 13H. The revival of Islamic thought arose in response to the aforementioned taqlid attitude which brought about the decline of Islamic law. New movements emerged among the movements of jurists who suggested returning to the Qur'an and Sunnah.<sup>24</sup> This movement was pioneered by Ibn Taymiyyah (1263-1328 AD) along with his disciple Ibn Qayyim al-Jauziyyah (1292-1356 AD). He says that the door of ijтиhad is always open and never closed.

The Taymiyya call to revive the tradition of ijтиhad or to return to the pure teachings of Islam, namely the Qur'an and Hadith greatly influences the development of subsequent Islamic law. It was during this period that Islamic law reform movements emerged in response to events occurring in society.<sup>25</sup> Ibn Taymiyyah's pattern of thought was continued by Muhammad Ibn Abdul Wahab (1707-1787) to the famous Wahabi movement. This effort was then followed by Jamaluddin al-Afghani (1839-1897) along with his disciple Muhammad Rashhid Ridha especially in the political field.<sup>26</sup> He who preaches the Qur'anic verse (13: 11) which states:

<sup>21</sup> Ainurrofiq, *Madzhab Yogyakarta, Menggagas Paradigma Ushul Fiqh Kontemporer* (Yogyakarta: Ar Ruzz, 2002), 82.

<sup>22</sup> Ainurrofiq, *Madzhab*..., 92.

<sup>23</sup> Khallaf, *Khulasah Tarikh*..., 101.

<sup>24</sup> Muhammad Daud Ali, *Hukum Islam* (Jakarta: PT. Raja Grafindo Persad, 1997), 178.

<sup>25</sup> Nurcholis Madjid, *Kaki Langit Peradaban* (Jakarta: Paramadina, 1997), 119-120.

<sup>26</sup> H.M. Rasjidi, *Hendak Dibawa Kemana Umat Ini* (Jakarta: Media Dakwah, 1998), 26-27.

*"God will not change a destiny of a nation if the nation itself does not (at first) seek to change its own destiny".* This verse was used to mobilize the rise of Muslims who generally colonized the West at that time. He considered that the decline of Islam occurred as a result of Western colonization.<sup>27</sup>

The movement by Jamaluddin al-Afghani was continued by Muhammad Abdurrahman (1849-1905M).<sup>28</sup> The movement carried by them was the same that Islam adopted by the ummah was no longer the real Islam, this was what caused Muslims to decline. Therefore, in order to rise again Muslims must return to true Islam, Islam as practiced in classical times.<sup>29</sup>

It was this

period that finally delivered Islamic law in its development (modern times) to be interestingly discussed. Since the 19th century there had been contact between the Islamic world and Western civilization. The contact gave birth to an astounding impact on the changing social structure of the Islamic world. Since then, the development of law in the Islamic world is almost invented and dictated by western influences.

After the Islamic world regained its independence from the West, there was an increasingly intensive effort to revive Islamic law and then to define it in their respective national legal schemes.<sup>30</sup> Formulations of traditional Islamic law are questioned and even sued, especially regarding the extent to which the relevance of the legal needs of modern society.

Inevitably, the reform of Islamic law became an important theme that seized the attention of the Islamic world. It is this effort that determines the appearance of Islamic law in the next period.

However, these efforts are still faced with serious problems, particularly with regard to the reform methodology.<sup>31</sup> The methods developed by reformers in addressing current legal issues have not been satisfactory.<sup>32</sup> In his research on the change of Islamic law, Norman D.

<sup>27</sup> Ali, *Hukum ...*, 179.

<sup>28</sup> For clearer reference about reform movement, Muhammad Abdurrahman, Jamaluddin al-Afghani, Muhammad Rasyid Ridha, see Harun Nasution, *Pembaharuan dalam Islam, Sejarah Pemikiran dan Gerakan* (Jakarta: Bulan Bintang, 5th publishing, 1987)

<sup>29</sup> Harun Nasution, *Islam Ditinjau dari Berbagai Aspeknya* (Jakarta: UI-Press, 2nd publishing, 1978), 99.

<sup>30</sup> Noel J. Coulson, *Conflict and Tensions in Islamic Jurisprudence*, translation. H. Fuad, *Konflik dalam Yurisprudensi Islam* (Yogyakarta: IKAPI, 2001), 2. <sup>31</sup> The reform methods of Islamic law in question is a method used to overcome every problem that occurs in

society, namely by making a new interpretation of the sources of Islamic law such as the Qur'an, sunnah, ijma' and qiyas. Or by reopening ijihad activity. Ibn Taymiyyah offers his method of renewal by emphasizing the Qur'an and Sunnah and rejecting ra'y (the view of Islamic jurists) as the source of Islamic law. His call was followed by

M. Abdurrahman, Rashid Rida, Jamaluddin al-Afghani. From there then came the experts of Islamic law that offers methods of reform of Islamic law such as Abdul Wahab Khallaf, Abu Zahrah, Wahbah Zuhaili. The source of Islamic law ultimately grows as istihsan, Istishab, maslahah mursalah, 'urf. <sup>32</sup> Ilyas Supena states that the problem facing Islamic law is in the realm of epistemology. According to him

epistemological issues in relation to the discipline of science is a very crucial issue in determining the format of these disciplines, including Islamic law. Therefore according to Ilyas Islamic law should be deconstructed and

Anderson proposed two patterns of legal reform in the Islamic world. Firstly, the sharia will gradually become increasingly neglected in everyday practices such as commercial law, criminal law and many more to finally follow the rules of its largely foreign origin imposed by the secular justice system. Secondly, even in the area of family law that is considered sacred, a number of very significant changes are made by way of interpreting and applying the family law.<sup>33</sup>

What Anderson said has not touched the root of the problem. For that reason we are now challenged to formulate a systematic methodology of Islamic legal reform or an appropriate method of reforming Islamic law, borrowing the term An-Na'im based on the relevant theological framework.<sup>34</sup> Another notable obstacle is the psychological problem born out of a disproportionate theological framework of Islamic law. The reform of Islamic law presupposes the existence of inadequate parts of Islamic law. This is according to most traditional circles is a distortion of the perfection of Islamic law that is divine.

To break through this barrier that must be done is to build awareness, that Islamic law is not actually a law whose whole principles and details of the rules are revealed directly by God to the Prophet. Based on the historical study can be seen that Islamic law is a product of formation by early jurists of Islam based on the interpretation of the source of the foundation of the Qur'ân and sunnah. Such a historical awareness will certainly make contemporary Muslims more receptive to the possibility of substantially reforming Islamic law. The history of Islamic law as has been suggested will further show that Islamic law (fiqh) is not divine, but rather as a product of the logical process of interpretation and translation of the text of the Qur'ân and sunnah. It is for this purpose that the study of the reform of Islamic law becomes extremely urgent.

**The Indonesian Case,** In the preceding section, we discussed in general terms the historical background of the movement for Islamic legal reform. One may conclude from that discussion that two factors emerge as being the most important in driving the movement: an external one, i.e. the impact of Western ideas, and an internal one, i.e. the spread of taqlid among Muslims. These two elements, as we shall see later, can also be found in Indonesia; for one thing, the development of Islamic law in Indonesia cannot, by any means, be separated

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Gama Media, 2002.)

<sup>33</sup> Norman D. Anderson, *law Reform in The Muslim World.*, Quoted in Abdullahi Ahmed An-Na'im, *Toward An Islamic Reformation, Civil Liberties, Human Rights and International Law.* translation. Ahmad Suaedy and miruddin Arrani, *Dekonstruksi Syari'ah, Wacana Kebebasan Sipil, Hak Asasi Manusia dan Hubungan Internasional dalam Islam*, (Yogyakarta: LKiS, 1994), 14

<sup>34</sup> Anderson, *law Reform*, 30.

from what is happening in other Muslim countries. Thus. In Indonesia, we are observing essentially the same aspects, the same struggle, the same future possibilities as in the rest of the Muhammadan world, in spite of the difference of local circumstances and historical development. Before considering the Indonesian case, however, some observations will be made with respect to the general trend of Islamic reform in Indonesia as a backdrop to the more specific movement of Islamic legal reform in the country.

Colonization has been seen as one of the main avenues of the penetration of Western ideas into Muslim countries, and Indonesia was by no means an exception, particularly during the nineteenth century when, it has been said, "Indonesia experienced the effects of Western influence on a rapidly increasing scale.<sup>35</sup> Although the primary interests of Westerners (particularly the Dutch) in colonizing the Indonesian archipelago were economic in nature, it has been pointed out that "a paragraph on religion is often contained in treaties" made between the colonial power and the local peoples.<sup>36</sup> Through Portuguese, British, and especially Dutch intervention, Western ideas easily penetrated into Indonesia, making known the latest developments in Western countries, or even in Muslim countries which had been influenced by Western ideas. These Western ideas, in the long run, profoundly influenced many young Indonesians, among them most notably Sukarno, the leading figure of the Nationalist group, who in his early life, attacked Islam as a backward religion. What is more, severe criticisms were directed at Muslim society by some members of the Nationalist and Communist parties, who argued that Islam is incompatible with the modern world, particularly with regard to the position of women. This situation was exacerbated in many instances by Dutch colonial policy which as a rule always suppressed the identity of the local population.

No less important for the development of Islamic reform in Indonesia is the internal factor spoken of earlier. Azyumardi Azra reminds us that the reform movement in Indonesia was first motivated by the debate amongst the Muslims themselves. Western ideas, says Azra, did have a serious impact upon the local population, but this factor contributed to the acceleration of the reform movement only, rather than served as its first cause.<sup>37</sup> In order to understand the internal factors that motivated the reform movement, one must first realize the uniqueness of Indonesian Islam, a religious and cultural phenomenon whose origins extend far

<sup>35</sup> Benda, *Riskg Sun*, 32. For some examples of such influences, see generally B.J.O. Schrieke, ed., *The Effect of Western Influence on Native Civilizations in the Malay Archipelago* (Batavia: G. Kolf & Co, 1929).

<sup>36</sup> Karel Steenbrink, *Dutch Colonialism and Indonesian Islam: Contacts und Conflicts 1596-1950*, trans. Jan Steenbrink and Henry Jansen (Amsterdam: Rodopi, 1993), 66-7; Clifford Geertz, *Islam Observed: Religious Development in Morocco and Indonesia* (Chicago: The University of Chicago Press, 1968), 63-5.

<sup>37</sup> Azyumardi Azra, *The Transmission of Islamic Reformism to Indonesia: Networks of Middle Eastern and Malay-Indonesia 'Ulama' in the Seventeenth and Eighteenth Centuries* (Ph.D. diss., Columbia University, 1992), 488.

into the past, as far back as the arrival of the first Muslim merchants in the archipelago. Certainly, there is much controversy concerning the origins of Indonesian Islam, and a number of theories have been advanced in an attempt to resolve it. In the end, however, one may agree with Azra that these theories are not final in themselves; the subject is still open to discussion and new methods of investigation can lead to additional theories being advanced.<sup>38</sup> In fact, Ahmad Hassan's ancestors, as we shall see in the next chapter, may serve partly to explain the roots of Indonesian Islam: following the Southeast Asian trade route, Islam originally came from Arab countries (first Yemen, then later on Egypt), then from India, and finally from Malay-speaking countries such as Singapore. In fact, Singapore, the birth-place of Ahmad Hassan, has long been "an important centre on the Indonesia-Arabia route."<sup>39</sup>

In any case, it is generally admitted that by the time Islam was brought to Indonesia. It had been colored by the notion of legal school (madhab), characteristic of an era when Islamic civilization is commonly considered to have been in decline. It was the Gujeratis. Malabarese, Kalings, Bengalis, Arabs, Persians and Turks who were most responsible for the spread of Islam to Indonesia, even though their role was for the most part limited merely to introducing the new religion. The actual conversion of the local populace to Islam was "due to the untiring efforts of Indian, particularly Bengali, Sufi (mystic) preachers who accompanied the merchants on their visits to the local rulers. This being the case, it is understandable that the early Islamic leaders and preachers should have been mostly Sufis, and early Indonesian Islam highly infused with Sufi's doctrine, which is generally understood to be tolerant of traditional usages and habits whether these be compatible with orthodox Islam or not. In fact, the mystical nature of early Indonesian Islam constituted the most important factor in the rapid conversion of the local people. Its mystical character made Islam easier for the local people<sup>40</sup> "to understand it, appreciate it, and use it." Nor is it surprising that the local populace who converted to Islam in these circumstances still preserved the old traditions common to the followers of the earlier beliefs and religions, simply giving these traditions new meaning and significance new wine in a very old bottle.

### **At a glance About Wael B. Hallaq: socio-historical and socio-political**

Prof. Hallaq was born on November 26, 1955, and married to a countryman, Palestine, named Ghada Bathish-Hallaq; They are blessed with two daughters, Lena and Cherina. When

<sup>38</sup> Azyumardi Azra, *Perspektif Islam di Asia Tenggara* (Jakarta: Yayasan Obor Indonesia, 1989), xiii.

<sup>39</sup> Jacob Vredenbregt, *The Haddj: Some of Its Indonesia*. Bijdragen Tot de Taal 1 18 (1962), 126.

<sup>40</sup> Mudzhar Fatwas; 15; *Benda, Rising Sun*, 12; *Mi, Islam and Modernism*, 83: Federspiel, Persatuan Islam, 1-2.

he has become Professor at the Institute of Islamic Studies-McGill University, Montreal-Canada, Prof. Hallaq and his family live in Quebec, a predominantly Canadian province of French descent who is always trying to break away from the predominantly Canadian Canadians. After that, Prof. Hallaq moved in accordance with his career, and lastly, they were in New York for being Professor at Columbia University, USA.<sup>41</sup>

From the beginning, his academic career was indeed brilliant. After graduating from Nazareth Municipal High School, he took a B.A. At Haifa University in Middle Eastern Political and Historical Sciences, graduated in June 1978. After that, he took the Magister Program in Islamic law at the University of Washington (graduated in 1979) and Doctoral Program in the same College with the same field, Islamic law, graduated in 1983. Provision of good education led to life and academic career that is quite good as well. This is among others seen in many scientific works that can be classified as a very prolific writer (prolific). His works are books, papers, book reviews, and academic careers such as guest lectures, readers and papers (referee) and also as a member of the Editorial Board of International Journals are proof of his good academic charisma. Other things that are also important are the tasks associated with academic positions in a number of universities. He is, for example, a member of the Institute of Comparative Law, Faculty of Law, McGill University, as one of the referee of the International Journal of Meddle East Studies, The Journal of the American Oriental Society, The Journal of Islamic Social Sciences, Journal of Islamic Studies, McGill Law Journal, Islamic Law and Society, and as exsternal evaluator (assessor) for hiring and promotions University of Malaya, Kuala Lumpur (1996-1999). He is also believed to write important aspects of Islamic law as well as Islam for the Encyclopedia of Islam (new edition), the Encyclopedia of the Qur'an, the Encyclopedia of the Modern Middle East, and the Oxford Encyclopedia of the Modern Islamic World.

Career as a lecturer also reinforces his important position in the academic world. Since 1985, Prof. Hallaq was appointed Assistant Professor of Islamic Law at the Institute of Islamic Studies, McGill University, Canada. In addition to the subject matter of Islamic Law, he also teaches Arabic for the second year (intermediate) and third year (advance). Thanks to his success in teaching Islamic Law at the Institute and his diligence in research and writing, since 1994 he has established himself as a full Professor; who at that time was the youngest and most prolific professor at the Institute, not to compare it with Prof. Islamic law elsewhere.

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Prof. academic works Hallaq cannot be missed not only by those who study Islamic law but also the study of Islam in general. Some of his works have been published into a number of languages, including: Arabic, Chinese, Japanese, Indonesian, Persian, Urdu, Russian, and Italian. Even the translated work of this time attracts not only Islamic scholars but also religious and socio-cultural scholars in general. It may not be an exaggeration to say that, of all the published works, the work translated this time is the work of magnum opus Prof. Hallaq. For those who know close Prof. Hallaq may not be denied that success in his career sometimes bring Prof. Hallaq shows an elusive attitude, at least I've been with at least seven years. For example, it is not uncommon for some modern works on Islamic law written by Arabs or Muslims, although in reality they are an important part of the Islamic law curriculum in today's Muslim country. Spicy condemnation is often addressed, for example, to Abu Zahrah (Egypt), Khudlari Baek (Egypt), Abd Wahhab Khallaf (Egypt), Ahmad Hasan (Pakistan), and Mohammad Hasyim Kamali (Afghanistan, Malaysia)<sup>42</sup>. He also often advised his students not to use books written, for example, by Samir Aliyah, Abd Aziz al-Bukhari, and Abu al-Ainain Badran. According to Hallaq, their works were written not supported by sufficient historical knowledge that is difficult to account for historically.

### **The Wael B. Hallaq's Epistemological View of Islamic Law**

In general it can be known that, Prof. Hallaq known as a scholar who is very famous in the field of Islamic law with a number of positive contributions in the field he has dominated. Among its main concerns is the epistemology institutional shock caused by modernity as well as the accompanying socio-political historical forces, as well as the intellectual and developmental history of Orientalism. Prof. Hallaq also paid serious attention to the development of Islamic traditions in hallogics, legal theory, and substantive law in line with independent systems within the traditions. Almost all works of Prof. Hallaq describes the structural dynamics of pre-modern law change, and more recent works have focused on emphasizing the central position of moral theory in the context of the understanding of Islamic law both past and present. His works have been translated into several languages, including: Arabic, Indonesian, Hebrew, Japanese, Persian, Turkish, and Russian.

By looking at the thoughts of Prof. Hallaq, there are at least five theses submitted as well as remodel, minimally suing the established theses since the beginning of Islamic studies and

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<sup>42</sup> Criticism can be read, for example, in Wael B. Hallaq, *Review of the Principles of Islamic Jurisprudence*, by Mohammad Hashim Kamali, *Islamic Law and Society* 2 (1995), 209-10.

Islamic law in the West. First, the thesis on *insidat al-ijtihad chapter, close the gate of ijihad closed the door of ijihad*. Driven in question by Joseph Schacht, the thesis developed among Western scholars is: after applying the four schools that Malik, Shafi'i, Abu Hanifa and Ahmad ibn Hanbal, after experiencing the 4th century Hijri / 10th, all Problem The principle of Islamic law is over The next studies of Islamic law are always based on and are the development of ideas that have fundamentally closed the scholars of the above sect, which in an attempt to bring to the close of the door of ijihad. Actually logical, the effort to study law in the next period sebgai activity is not merely a matter of trivia.

The above facts encourage Prof. Hallaq to study more about the door of ijihad. According to him, Schacht's statements relating to ijihad are at odds with one another. One time Schacht said that the door of ijihad has been closed at another time he says that after the 4th / 10th century, many scholars are doing ijihad in daily living conditions. Hallaq then decided to make this issue his main topic of dissertation under the title *The Gate of Ijtihad: A Study of Islamic Law Theory (1983)*. The dissertation is then published in the form of two papers, first: *Was the Ijtihad Gate Closed?* "And *On the Origins of the Controversy About the Existence of Mujtahids and the Gate of Ijtihad.*" These first two papers have succeeded in attracting the scholars' attention and awakening them to the thesis image that the closed door of ijihad that has not been in accordance with history, at least this thesis needs to be questioned again. Since the executive of Prof. Hallaq, the debate about the door of ijihad is lifted again and for the young into controversy among the next writers; consequently, subsequent studies of ijihad always involve the names of Schacht and Hallaq.

To support the above thesis, Prof. Hallaq proposes the second thesis, namely: the existence of a dialectic between theory and practice in Islamic law. As in his earlier thesis, he corrected a thesis already established among earlier scholars, a thesis that Schacht also built. According to Schacht, there is a distance between the theories of Islamic law and the practices that exist in the midst of Islamic society. For example, the discussion of Islamic legal theories develops in the form of jurisprudence as reflected in the jurisprudence books; while in the practice of everyday life, many things are not in accordance with the provisions of the theory formulated by the fuqaha. The emergence of the legal fiction doctrine (*hilah-hiyal*) is a clear example in this regard.<sup>43</sup> Based on the doctrine of *hilah*, one legal action can be seen formally correct in that it is contrary to the text of the Qur'an or Hadith of the Prophet. An example in

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<sup>43</sup> Joseph Schacht, *Classicisme, Traditionalisme et Ankylose Dans L'âme Religieuse de l'Islam* (Paris: Chantemerle, 1957), 148.

this case is known as the marriage of muhallil and hutangrente by way of *bai'atan fi bai'ah* that occurred in the midst of Islamic society including in Indonesia.<sup>44</sup>

Converted to the above belief, Prof. Hallaq argues that the dialectic process between the theories contained in the Jurisprudence books and the practice of law in the midst of halal Islamic society continues. There are many examples put forward by Hallaq to prove this thesis. First, for example, the existence of works of commentary (*syarh*), commentary on comment (*hasyiyah*), and summary (*mukhtashar*) in the jurisprudence books. This, according to Hallaq, is an intellectual activity not only in the existing texts which is also the result of the dialogue of its authors with the concrete books developing by Muslims. For example, there is one book written by an Islamic jurist (*faqih*); then there is another author who writes the summary (*mukhtashar*) of the book. The next stage, there is another faqih wrote a comment (*syarh*) against the book of *mukhtashar*. Apparently, the contents of this *syarh* book is much different from the first book of the book of *mukhtashar*. This occurs because among other things, the difference of condition (ie is place and time) which is controlled by the writer of the book of *syarh* and the writer of the first book. Through different topic, Prof. Hallaq re-learns about the differences in time, place, and circumstances that are very concerned about the formulations of thought that exist in the book of *fiqh*. History proves, firmly Prof. Hallaq, that the provisions of the law concerning a particular matter often differ not only between scholars of one school and another, but among scholars with other scholars in one school. Actually, Prof. thesis. The second Hallaq is intended to support his first thesis; namely, the existence of dialogue and dialectics between theory and practice in the history of Islamic law strongly proves the existence of *ijtihad* activities that continue continuously among Muslims so that the door of *ijtihad* is always open.

Thesis Prof. Hallaq the third is about foreign influence on the formulation of Islamic law. This problem of foreign influence has been a prolonged polemic since the beginning of Islamic studies in the West. The great Orientalist Ignaz Goldziher<sup>45</sup> seeks to convince the Muslim law scholars that the current formulations of Islamic law are heavily influenced by pre-existing legal formulations, especially Jewish and Christian law. The Goldziher thesis was further elaborated by later scholars such as Schacht<sup>46</sup> and followed later by Patricia Crone. Through his works, Crone tried to prove that the practice of law in Syria (the center of Islam at the time),

<sup>44</sup> Joseph Schacht, *Die Arabische Ijaz-literatur* (Der Islam: 15, 1926), 211.

<sup>45</sup> Ignaz Goldziher, *Intruductioan to Islamic Theology and Law*, trans. Andras dan Ruth Hamori (Princeton: Princeton University Press, 1981), 176.

<sup>46</sup> Joseph Schacht, *Foreign Elements in Ancient Islamic Law*, (Journal of Comparative Legislation and International Law 32, 1950), 9-17.

Roman law and Jewish law greatly influenced the formulation of Islamic law. In this case Crone took the example, for example about the institution of representation (patronate, wala') and the oath system (qasama).<sup>47</sup>

The fourth Thesis of Prof. Hallaq is about the position of Shafi'i (d.820) as the founder of the science of ushul fiqh. Schacht, once again, has an important role in developing this thesis, especially through his *The Origins of Muhammadan Jurisprudence*. This fact has prompted Majid Kadduri to translate the work of Shafi'i Risalah,<sup>48</sup> as well as Philip K. Hitti to give the title of one of his papers "*Al-Shafi'i: Founder of the Science of Islamic Law*".<sup>49</sup> In short, Shafi'i as The founder of the science of ushul fiqh has gained widespread among the writers of Islamic law, a view that also developed among Islamic societies.

In subsequent developments, the thesis on Shafi'i's role in the development of ushul fiqh is increasingly questionable; some authors even point out an indication that, although Shafi'i's role is immense in ushul fiqh, he is not the founder of that science. Nevertheless, Prof. Hallaq was the first to discuss the issue at length through his work "*Was al-Shafi The Master Architect of Islamic Jurisprudence?*" After tracing the history of ushul jurisprudence, Prof. Hallaq came to the conclusion that the thesis about Shafii as the founder of ushul fiqh science is not supported by historical reality. Among other things, he argues that the work of Shafi'i Risalah, regarded as a monumental work in the field of ushul fiqh, does not offer a systematic methodology, whereas a systematic methodological study is seen as a basic topic for a work of ushul fiqh. Moreover, according to Prof. Hallaq's treatise does not attract the attention of scholars of his time, either to support or criticize the thoughts that exist in the book. Only a century later, the treatise received the attention of the fuqaha like Abu Bakr al-Sairafi, al-Qaffal al-Shasyi, Abu al-Walid al-Naisaburi, al-Jauzaqi, Abu Muhammad al-Juwaini and Abu Sahl al-Naubakhti. It seems that Prof. Hallaq "succeed" proves that Shafi'i is not the father of ushul fiqh, a view that until now no other writer has denied it. If it is correct, then who is the founder of ushul jurisprudence? This is the question Prof. Hallaq himself has not answered it in his published works.

The last thesis of Prof. Hallaq is contained in a book that is in the hands of readers, namely: Shari'ah is a paradigm of Muslims who gave birth to moral and legal and also anti-

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<sup>47</sup> Patricia Crone, *The Jâhilî and Jewish Law: The Qasâma* (Cambridge: Cambridge University Press, 1987), 153-201.

<sup>48</sup> Majid Kadduri, *Islamic Jurisprudence: Shâfi'i's Risâlah* (Baltimore: The John Hopkins Press, 1961).

<sup>49</sup> Philip K. Hitti, *Makers of Arab History* (London: London Macmillan, 1968), 167.

thesis against the Western paradigm that puts man as the beginning and end of everything as well as separating between Something ought (Ought) In the form of moral values and Something based on the fact (Is) in the form of reality and real life. In its concrete form, Prof. Hallaq then asserted that Muslims who based themselves on shari'ah impossible to build a country that is basically a creation of modern-western world based on the paradigm of Enlightenment, a different paradigm even contradict the paradigm of shari'ah. He said: "The heritage of Muslims provides a good example and a model for a good government, even better than a government based on the Enlightenment of a nation-state that exists today."

Of course, all is not the last of Professor's thinking. Hallaq. Until now he is still diligent and spirit doing research and study of Islam and Muslims. In the near future, he insists, will write about the Qur'an in the context of the perspective of revisionist and postmodern thought. He also promised that the work will be different from the works that have been there so far. Probably, Prof. Hallaq's claim can be understood, at least, the works of the Qur'an published so far (if not all) are written by scholars whose fields are outside of Islamic law. In fact, not a few works-al-Qur'an written by scholars who make Enlightenment as a paradigm which of course is different from Prof. Hallaq who elaborates the Qur'an by placing the sharia as a paradigm as shown by pre-modern Islamic history.

### **The relevance with the development of Islamic law in Indonesia**

After we see and examine the process of ijtihad by Prof Hallaq above. There is relevance of several points relating to the Islamic Law, like Marriage Certification in Indonesia. In this case the authors associate with the view in terms of Maqasid Sharia which every law is produced or in the product has a legal purpose, as well as Islamic marriage law in Indonesia also has a legal purpose summarized in the objectives of national law. In view of this Maqasid Sharia then it is worthy to reread Yudian Wahyudi's theory about Maqasid Syari'ah from theory to methodology, in one of his book there is the concept of Maqasid Syari'ah which comes from Imam Juwaini which then developed by the same student that is Imam Al-Ghazali, the theory was ultimately stagnated and its peak was popularized by Imam Syatibi, the later Ulama-Ulama such as Muhammad Abduh, Rashid Ridha and al-Mawdudi also developed this theory. In this case Maqasid Shari'ah can be used in two ways the first use, Maqasid Syari'ah as a doctrine as a doctrine then Maqaid Syari'ah only as a guarantee and preserve the benefit for mankind, especially as an Ummah, then there are three things . The interrelated, firstly, Dharuriyyat, al-

hajiyat, and al-tahsiniyat.<sup>50</sup> The brief explanation of the three themes is first, Dharuriyyat is something that must exist, must exist, if its absence is the total destruction of life; second, Maqasid Hajiyat, Secondary purposes in it sebagai something that is needed by humans to simplify the interests, and Thirdly, Maqasid al-Tahsiniyyat Tertiary Goals, defined by the presence of neither necessity nor necessity, but beautify, as an attempt to manifest Dharuriyyat and Hajiyat. And not against the growing locality with the community. The two use Maqasid Al-Syar'iyyah here as an analytical blade or glasses to read the reality around us<sup>51</sup>, The example is the objectification of the law of Islamic Marriage, in this case a small example is about the age of marriage, in Islamic law or in KHI (Indonesia Law Compilation) in Indonesia.

Maqasid al-Syar'iyyah that developed in the marriage law of Islam is Maqasid based on Indonesian, and modernity that is Human Rights, in the development science that kuntwojoyo develop in the form of Social Science of Prophetic, and that made into three pillars, transcendence, humanization, and Liberalization, or by analyzing the views of Maqasid Al-Syar'iyyah ala Nurcholis Madjid, with dialectics of three ideas of Islam, Indonesian, and modernity.<sup>52</sup> It is also similar to the jargon of the classical Ulama of Al-Muhafazah Ala Qadim as-Shalih wa Al-akhzhu bi al-Jadid Al-Aslah, (*Maintaining the good old thing, and and taking the new good thing*), related to this principle Amin Abdullah As a principle of *Tradition and Translation*.<sup>53</sup>

*First*, the rule of al-'ibrah bi al-maqāṣid la bi al-alfaz. This rule should be the main concern of the interpreters and mujtahids in the legal sense of the Qur'an and Sunnah, not the letters and actions of the sailors of the goals it contains. The secret is the ethical-moral aspect of a verse or not specific legislation or literal formulation, so it is required to know and understand the context. *Second*, the rule of jawāz naskh al-nuṣūs bi al maslahah. The doctrinal rules disallowed by using the logic of benefit are permissible. This rule is deliberately set because Islamic law is specific to realize the benefits and rejection of damage. This principle must be the basis and substance of the entire contents of the law, must always exist in the minds of jurists, so that deviation from this rule means violating the ideals of the law. *Third*, the rule of yajuzu tanqih al-nusus bi al-'aql al-mujtama'. This rule of thumb reveals the reason the public

<sup>50</sup> Yudian Wahyudi, *Ushul Fiqh versus Hermenuetika Membaca Islam dari Kanada dan Amerika* (Yogyakarta, Pesantren Nawasea Press, 2010), 45.

<sup>51</sup> Wahyudi, *Ushul Fiqh*...., 48.

<sup>52</sup> Nurchalis Madjid, *Islam Kemoderenan, dan Keindonesian* (Bandung: Mizan, 1987) *Islam Dokrin dan Peradaban Sebauah Telaah Kritis tentang masalah Keimanan, Kemanusiaan, dan Kemoderenan*. (Jakarta: Paramadina1992).

<sup>53</sup> Amin Abdullah, *Mempertautkan Ulum Ad-Din, Al-Fikr Al-Islami dan Dirasah Islamiyyah* Islamic Science Contribution for untuk Globalize civilization, in “Workhop Pembelajaran Inovatif berbasis Integrasi Interkoneksi” (Yogyakarta, 19 Desember 2008), 55.

has the authority to amend some relatively relative and tentative specifics of the legal-specific. So that, when there is a conflict between the common sense and the literal sound of the teaching text, the public minds the authority of editing, refining, and modifying.

Whereas in KHI there must be objectivation of Islamic marriage law based on Maqasid al-Syar'iyyah in KHI there are still many articles that must be proved objectively based on Maqasid Al-Syar'iyyah among others are:

The problems are being the subject of the study as follows:

No	Formulation In KHI	Problems need to be amended
1	Minimum age limit may be married	Women's age is lower than men's
2	Guardian of Marriage	Guard rights only belong to the male gender
3	Witness in marriage	Women can not be a witness of marriage
4	Head of household	Only the husband
5	Nusyûz	Only applies to women (wife)
6	Dowry	Husband as if buying a wife (haqq al-tamlik or haqq al-intifa')
7	Polygamy	1. Not in line with the principle of monogamous marriage 2. The practice of polygamy hurts women
8	Marriage different religion	This prohibition is contrary to the reality of plural Indonesian society

In this paper only will perform fundamental analysis sala one of 8 problems that have been seen in the KHI. That is an objective review of marriage age in Indonesia based Maqasid al-Syar'iyyah in Islamic law the principle of maturity is considered proficient in huku in call with the Ahliyyah or in another language is the feasibility<sup>54</sup> The expert's issues in the Jurisprudence proposal are included in the discussion of legal subjects called mukallaf (law-abiding people) or mahkum álaíh (the person to whom the law is applied). The word of Allah (khitab syari') which deals with the actions of mukallaf in the form of demands (command or

<sup>54</sup> Syamsul Anwar, *Hukum Perjanjian Syariáh* (Bandung: Rajawali Pers, 2010), 109.

prohibition) and choice (to do or not to do) is called the law of taklifi. With the explanation then aka tone some things that must be fulfilled if considered as someone who is Mukallaf, one of the things is to obey the commands of God, and knowledge that is owned by the human reason limit in Islam called baligh (adult) and the second is to always implement the demands referred to (at-taklif) and in the study of ushul fiqh called Ahliyyah. In Islamic law Ahliyyah defined as a human finesse and competence which then to him the rights of form (Iltizam)<sup>55</sup> In the Islamic law of Ahliyyah there are two kinds of expert al-wujūb and al-adā 'experts. Ahliyyah al-wujūb is a human worth to receive the rights set for him and subject to obligations.<sup>56</sup> In the language of Prof. Samsul Anwar is the ability of Passive Law. While the expert al-adā 'is the feasibility of mukallaf to be taken into account of his words and deeds by sharia. In that sense, the masteryya al-adā 'is the responsibility, in the sense that all actions of mukallaf whether words or deeds are deemed valid with all its legal consequences, or Syamsul Anwar gives the term active skills prowess.

In Islamic law there are actually four kinds of Skills: first, the ability to accept imperfect law (pakyyatul wujūb an-naqışah), in which the subject of law is in the mother's womb. Secondly, the ability to accept the perfect law (pakyyatul wujūb al-kāmilah), is possessed by legal subjects from birth to death. Third, the imperfect legal acting skills (pakyyatul adā 'an-naqışah), owned by legal subjects in the age of tamyīz. Fourth, the ability of perfect legal acts (pakyyatul adā 'al-kāmilah), is owned by legal subjects from adulthood to death.

For more details, note the following table.

Law Skills ( <i>al-ahliyyah</i> )			
The skills of receiving the law ( <i>ahliyyatul wujūb</i> )		Legal acting skills ( <i>ahliyyatul adā'</i> )	
Not Perfect ( <i>an-naqışah</i> )	Perfect ( <i>al-kāmilah</i> )	Not Perfect ( <i>an-naqışah</i> )	Perfect ( <i>al-kāmilah</i> )
Embryo period	From birth to death	Tamyīz Period	From adult to death

Thus, in fiqh literature and usul fiqh it is stated that the new law acting skills are said to be perfect when the subject of law enters adult. According to the jumhur of Islamic jurisprudence, that maturity is substantially characterized by physical signs of *iħtilām* (wet

<sup>55</sup> Muhammad Abu Zahrah, *Uṣūl al-fiqh* (Jakarta: Pustaka Firdaus, 2005), 329.

<sup>56</sup> Abd al-Wahhab Khallaf, *Ilmu Uṣūl fiqh* (Kuwait: Dar al-Qalam, 1978), 135-136.

dream) or menstruation, but if the signs are not found, then maturity is characterized by age, ie 15 years. Hanafi lawyer stated that adults are 18 years old for men and 17 for women.<sup>57</sup>

If the law or system of laws of varying maturity styles, a person may be considered an adult because he or she is already married is also based on this age, and this becomes a parameter in the law of marriage boundaries. There are some legal rules governing the age limit Adults in Indonesia. The age limit of maturity in legislation is not the same.

Notice the following table.

No	Type of Invitation Rules	Terms of Age Maturity
1	Article 330 of the Civil Code	Age 21 Years old or already married
2	Article 47 Paragraph (1) of Law no. 1 Year 1974 About Marriage	Age 18 Years old
3	Article 63 Paragraph (1) of the Population Administration Act (UU No. 23 Year 2006)	Age 17 years old or already married
4	Article 7 of the Election Law (Law No. 10 Year 2008 juncto Law No. 42 Year 2008)	Age 17 years or already married
5	Article 1 point 1 of Child Protection Act	Age 18 years old
6	Article 1 Paragraph (2) of Child Welfare Act	Age 21 years old
7	Articles 39 and 40 of Notary Office Law	Age 18 years for confrontation and 18 years for witnesses
8	Article 98 (1) Compilation of Islamic Law	Age 21 years old
9	Article 1 number 26 of the Employment Law	Age 18 years old

<sup>57</sup> Khallaf, *Ilmu..*, 112.

10	Article 1 number 8 of the Correctional Law	Age 18 years old
11	Article 1 of the Law on Juvenile Justice	Age 18 years old
12	Article 1 point 5 of the Human Rights Law	Age 18 years old
13	Article 1 Paragraph (4) of the Law on Pornography	Age 18 years old
14	Article 4 of the Law on Citizenship of the Republic of Indonesia	Age 18 years old
15	Article 1 point 5 of the Penal Code of Trafficking in Persons	Age 18 years old
16	Article 81 of the Traffic Act (Law No. 22 Year 2009)	Age 17 years for SIM A, C, and D. Age 20 years for SIM B I 21 years old for SIM B II

If you look at the above rules, we can see a person at the age of 17 years under Article 81 Paragraph (2) Law Number 22 Year 2009 has the right to obtain a driver's license, while it collides with the logic and rules of the 17- Still categorized as a child, if there is a violation in the case of Traffic Violation, it may happen if the trial is a Child's trial.

The marriage age in Indigenous and Cultural review in Indonesia, customary law does not recognize the age limit of immature and adult. Customary Law only recognizes whether the person is identical to his or her age and mental development should be considered capable or incompetent, capable or unable to perform certain legal acts in certain legal relationships as well. It means whether he can calculate and maintain his own interests in the deeds he faces. Maturity according to customary view is detached from the age standard, so there is no uniformity, about when one can begin to be said to have grown, the size of maturity depends on each individual, although it actually still has a link with the understanding of mature according to the science of psychology in which adulthood is a phase On human life that describes the achievement of mental balance and mindset in every word and deed. Someone who has been able to work (*strong to work*) to earn a living, then actually he has been able to think and take responsibility for the needs of his life, although the process of early adulthood in the community is not included in that category.

This is also asserted by Suteki in Kompas Opinion on Wednesday, June 24, 2015, declared in Javanese custom, Inductively Qualitative that adult skill is above (Strong Gawe), and strong Banda (Strength of Treasure), but when the decision of Constitutional Court Amendment to Article 7 Paragraph (1) of Law No. 1 of 1974, to the 1945 Constitution. The reason the Court decided that the article is still relevant, that there is no guaranteed guarantee with the increase of marriage limit from 16 years to 18 years for women will reduce the number of Divorce and other social problems. The possible reason in the future age of married women if made in 18 years will not be ideal.

In the hearing, there was one Judge of the Constitution namely Maria Farida Indarti who had a different opinion, (Dissenting Opinion), Maria stated that the 16-year age in the Marriage Law (1) raises legal uncertainty for violating the Rights of the Child as governed by the article 1 Paragraph 3 article 24b verse 2 article 8 c Paragraph 1 of the 1945 Constitution. Because it will trigger the marriage legality of children and confound the children's dreams to achieve higher education, and it may be said that the passage is pedophilia legality.

Whereas the article of Law No. 1 of 1974 is 41 years old, and we realize that the world is Panterikh that is moving and society grows progressively, and the decision of the Constitutional Court has eliminated the humanity of the law in the sensitivity of the Law. If viewing in Maqasid al-Syar'iyyah Indonesian that one of the mechanisms of marriage age is to perpetuate the relationship of husband and wife is ready in normative sociological and philosophical, that Maqasid al-Syar'iyyah to keep women not become victims of divorce and children marriage, and vulnerability of reproductive disabilities. The practice of Pedophilia, so that the age of marriage needs to be based on Maqasid al-Syar'iyyah based on objectification that is to keep *Hifz Nasl, Din, Aql, and Nafs*, at the same time, to maintain no defects in reproduction for marriage with age and maturity, This is the Implementation of Hifz Nasl, and the death of the Young Mother as Hifz Nafs, and others partially.

## Conclusion

In this paper, there are three conclusions that we can comprehend, *first*, that the study of thought of Prof. Hallaq can be contributed to the development of Islamic law in Indonesia. *Second*, it reveals about the reasoning of the legal epistemological Prof. Hallaq who responds to other legal thoughts with critcal review. And *third*, there is relevance to the law *istinbath* of eradication articles in Islam law compilation, one of those is an article of KHI that has not been objective in the form of marriage age limit case. This article is still debatable and provides a view on the importance of marriage age from 16 years to women to 18 years related to the

Modern approach and customary law. It becomes a reference recommendation by prof. Hallaq to give permission to decide the law, because "*The door of ijtihad has closed*" is not right.

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