THEORETICAL REVIEW OF ISLAMIC LEGAL SOURCES ACCORDING TO THE MISREPRESENTATION THEORY OF HALLAQ

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Abstract: The existence of Islamic law from time to time in a Muslim community is believed to be the result of an in-depth study of the sources of Islamic law: the Qur'an (the Word of God), Hadith (sayings of the Prophet Muhammad), *Ijtihad* (the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah), *Qiyas* (the deduction of legal prescriptions from the Qur'an or Sunnah by analogic reasoning), as well as *Ijma* (the result of the agreement of the Scholars). These sources of Islamic law were then poured into *Usul al-Fiqh*, which was then considered as a concrete form of Islamic law itself. This is reinforced by the classical teachings of orientalist Scholars who acknowledge that Islamic law is preserved in *Usul al-Fiqh* by great Scholars. However, this concept was challenged by Hallaq with a misrepresentation of his theory. He stated that Sharia can exist in society, not because of the role of *Usul al-Fiqh* but the role of the *Fatwa* (authoritative legal opinion), which is given by the Mufti and is applied by practitioners of Islamic law in Muslim-majority societies.
Keywords: Islamic Legal Source, Sharia, Islamic Jurisprudence, Mufti, Fatwa

Abstrak: Eksistensi hukum Islam dari masa ke masa di suatu komunitas muslim diyakini sebagai hasil kajian mendalam dari sumber Hukum Islam berupa Al- Quran, Hadist, Ijtihad, Qiyas, maupun berupa hasil kesepakatan para ulama (Ijma). Sumber – sumber hukum Islam ini kemudian dituangkan ke dalam Ushul Fiqh yang kemudian dinaggap sebagai wujud konkrit dari hukum Islam itu sendiri. Hal ini diperkuat oleh ajaran – ajaran klasik para sarjana orientalis yang mengakui bahwa hukum Islam dipelihara di dalam Ushul Fiqh karya ulama – ulama besar. Namun konsep ini mendapat tentangann dari Hallaq dengan misrepresntasi teorinya. Hallaq menyatakan bahwa Syariah dapat eksis di masyarakat bukan karena peranan dari Ushul Fiqh namun karena adanya peranan Fatwa yang dihidupkan oleh Mufti, dan diaplikasikan oleh para praktisi Hukum Islam di masyarakat mayoritas Islam.
Kata Kunci: Sumber Hukum Islam, Syariah, Ushul Fiqh, Mufti, Fatwa

Introduction
The development of the Islamic community globally has attracted Western world figures' interest to explore various aspects of Islam. This interest arises because the western world considers that Islamic society has its uniqueness that is not found in the western world. It includes the relationship between trust and social relations with the law, which

is always considered as an inseparable whole. As one of the religions with the second-largest adherent in the world, Islam has its own privileges compared to other religions, where it does not separate the relationships between spiritual, individual, and social life.

Although many Western scholars underestimated the Islamic tradition initially, they finally concluded that Islam is still attractive to its adherents even though from the point of view of western thinkers, it has many flaws. However, seeing how deeply rooted Islam, it is one of the ideologies that have influenced the mindset of civilization for hundreds of years, and with the tremendous followers, it becomes interesting to study that Islam has a strong magnet for humans, both Muslim and non-Muslim, to affirm this ideology as their way of life.

One of the interesting aspects of Islam is its legal system which is commonly known as Sharia. It is a legal system that is considered as a legal representation of Allah sourced from the Qur'an, Sunnah, *Ijtihad*, *Qiyas*, and the views of the Scholars who formulate Islamic law, hereinafter known as *Usul al-Fiqh* (Islamic Jurisprudence). Sharia is covering the fields of state, criminal law, civil law, business law, and general public relations. This legal system is recognized as the ideal law exemplified by Prophet Muhammad PBUH, taught by the Prophet's Companions, and developed by ulama *Tabi'it* and *Tabi'in* to keep up with the times and society.

Sharia with its *Usul al-Fiqh* is unique because it is a law purely based on religious teachings. This fact raises the stigma that a Muslim is obliged to apply Sharia in every aspect of his life. Sharia is a sacred law in which the word of Allah is obliged to be obeyed by Muslims as a form of devotion to God. The practice of *Usul al-Fiqh* is considered to be the application of Sharia.[1]

Usul al-Fiqh is an ideal form of a legal system that can be applied in society or government. A government that enforces Sharia through *Usul al-Fiqh* as a source of law is considered an Islamic government. This raised the assumption that Sharia is a legal representation that comes from Islamic teachings, or at least is a law that is sourced from the Qur'an and Hadith.

Wael B. Hallaq, a professor from Columbia University, is an expert in history and Islamic law. He provided an overview of his various findings that there is a misrepresentation in viewing Islamic law itself. Hallaq outlined the results of these findings in his book entitled An Introduction Of Islamic Law. He stated that this misrepresentation occurs because of the mistaken assumption that Sharia comes only from *Usul al-Fiqh*, but in practice, it turns out that Islamic law does not always reflect the *Usul al-Fiqh*. Sharia is also not a law established by an Islamic government even though they claimed that they are very islamic. This can be seen by the variety of Sharia norms that are applied in different places. Hallaq identified an error in the assumption that Sharia is the *Usul al-Fiqh* that is practiced in society. That's why, it is interesting to examine the theory of misrepresentation of Hallaq about *Usul al-Fiqh* as the main source of Sharia.

Discussion

With the source of *Usul al-Fiqh*, Sharia is a guideline for the Islamic community in formulating various laws in society. The sequence of legal sources in *Usul al-Fiqh* in the form of Qur'an, Sunnah, *Ijma*, and *Qiyas* is a unit of support in formulating legal concepts. This is reinforced by several theories, for example, that offered by Joseph Schacht in his book

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1   Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016); Tamir Moustafa (ed), 'Islam and Liberal Rights in the Federal Constitution', *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press 2018).

the Origins Muhammadan Jurisprudence that *Usul al-Fiqh* originates from the teachings and life journey of the Prophet Muhammad PBUH, which was applied from the beginning of Islam to the development of Islamic dynasties.[2] According to Snouck Hurgronje in his book Muhammadanisme, Sharia is a historical reality, religious teachings, and full of the interests of the Prophet Muhammad PBUH in fostering Islamic society. The Prophet Muhammad PBUH was a lawmaker for his ummah because he spoke in the name of Allah. The Islamic ummah later correctly understood it in the early period that the explanations of the Prophet Muhammad PBUH have the power as a source of law.[3]

These classical orientalist views have inspired Hallaq to further explore whether the *Usul al-Fiqh*, the foundation of Sharia, is indeed the source of true Islamic law. Hallaq assumed that the foundation of Sharia, which comes from *Usul al-Fiqh*, is a necessity for the Islamic countries all over the world. However, Hallaq found various interesting things about Sharia in its practice.

Starting from a study on the document of *Usul al-Fiqh*, Hallaq then compared it with the application of Islamic Sharia in various Islamic countries that carry the appendage of being an "Islamic State". He selected several Muslim-majority countries as objects of comparison, namely Egypt, Pakistan, Iran, Indonesia, and a few historical records of cultivating Islam that developed in Iraq, Morocco, and the Islamic community of Spain. These countries were used as objects of his research because they were considered the representations of Islamic Sharia today.

Hallaq expressed his criticism to the classical orientalists like Schacht, who said that Sharia is *Usul al-Fiqh* applied to society. Based on his findings, Hallaq concluded that Sharia is not *Usul al-Fiqh* and not a product of agreement by the Islamic community. It is also not a product of a country labeled as Islam because there is no single legal product in these countries that makes *Usul al-Fiqh* as the basis for forming the law. Therefore, he argued that there had been an error in representing Sharia as *Usul al-Fiqh*, outlined in the form of state law. Hallaq assumed there is a great power and force behind the society and the state that have represented something other than *Usul al-Fiqh* into a legal product called Sharia.

Hallaq then took a historical approach to the development of Sharia prevailing in Muslim-majority societies. This approach was combined with the political development in society at that time because he believed that the historical and political aspects had a strong relationship. He emphasized the approach in the last two centuries where society has been classified as a modern society, and the interactions between countries were much more complex than previous. With this historical-political approach, his ultimate goal was to find out how Sharia can be practiced in society.

The method used by Hallaq was a historical interpretation method[4], by reviewing backward the Sharia products applicable in society. He compared them with previous Sharia products and traced them to *Usul al-Fiqh* until a conclusion was reached. Whether the Sharia product is the result of the representation of *Usul al-Fiqh*, which has been believed to be the primary source of the Sharia. Hallaq obtained the data sources through the study of the *Usul al-Fiqh* books, texts, guidelines for scholars in an area, *Fatwas* (decisions of past religious leaders relating to problems in the community), local customs, and also the development of legal politics related to changes in the direction of sharia law in a country. The data collected are analyzed continuously so that the connecting line can be

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2   Joseph Schacht, *The Origins Muhammadan Jurisprudence* (Oxford University 1979), 1-2.
3   ibid.
4   Sudikno Mertokusumo, *Bab – Bab Tentang Penemuan Hukum* (PT Citra Aditya Bakti 1993), 17-18.

drawn that there is a correlation between *Usul al-Fiqh*, *Fatwas*, the development of Sharia in society, and the influence of legal politics on Sharia products in a country.

In analyzing his findings, Hallaq used the Consensus Theory (agreement) on the results of *Ijtihad* by *Usul al-Fiqh* Scholars in the early days to then compare them with Sharia products that have been applied in society[5]. Based on this theoretical basis and the approach method used on his research object, Hallaq then formulated a theory of misrepresentation between Sharia and *Usul al-Fiqh*.

Hallaq did initial searches by examining the original texts and main references of *Usul al-Fiqh*. Through the Qur'an and the collections of authentic hadiths, he formulated the standard norms in the provisions of Islamic teachings serving as general guidelines in determining the law. Qur'an and Hadith are the standard references in establishing the law. They are the holy texts that the rules can never be altered. They are rigid, coercive, and tend to be applied universally. However, Hallaq highlighted this method of the Qur'an interpretation and Sunnah caused dissent when these two sources of law are used as references. Interpretation is very much influenced by the subjective side of the Mufassirs (the author of tafseer) and the social conditions when they are alive. Hallaq thought that authentic interpretations could still be found from Mufassirs who lived until the end of the first century of Hijri (Islamic lunar calendar). After that period the Mufassirs mostly interpreted legal aspects in the Qur'an and Hadith which tended to adjust to the development of society. Hallaq concluded that the interpretation of the Qur'an and Hadiths need to be reviewed from the conditions of the times and society in which the Mufassirs lived.

Likewise, with the results of Ijtihad and Qiyas as a source of Sharia law agreed upon by the Scholars, Hallaq believes that Ijtihad and Qiyas have a narrower portion in bringing up legal products because they are limited by the provisions of the Qur'an and Hadith. Ijma and Qiyas refer to the discovery of laws for the cases that the Qur'an and Hadith have not regulated. Ijtihad and Qiyas are local products of the Islamic law that can only be applied to certain areas and cases. Even so, Ijtihad and Qiyas collide on the practical side, for the same cases, the results of the same Ijma and Qiyas from the previous case cannot necessarily be used.

The use of four sources of law has gone through a very long history. Since the birth of Islam, the development of Islam inside and outside regions of the Arabian Peninsula, to the downturn of the Islamic State since the collapse of the Ottoman Turks, has brought many changes to the application of these law sources. In the implementation, these sources of law were confronted with local customs, habits, legal awareness, and a sense of justice that live in the community. These things have forced significant changes to the method of interpretation, as well as the decision-making.

The situation above has an impact on *Usul al-Fiqh* as a science of law in Islam. *Usul al-Fiqh* explores norms, theoretical foundations, and legal sources from the four main sources of law, leading to the emergence of various mazhabs (sects) of thought related to it. The differences in the history and politics of society's law dominated the form and existence of *Usul al-Fiqh*. It can be said that *Usul al-Fiqh* plays an important role from the practical side of the source of Islamic law itself. However, what needs to be observed is that the products of *Usul al-Fiqh* still experienced obstacles in terms of practicality when dealing with

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5   Wael B Hallaq, An Introduction to Islamic Law (Cambridge University Press 2009) <https://www.cambridge.org/core/books/an-introduction-to-islamic-law/ EFE6192467D2302522998BA33C34233D>, 17.

problems and social realities in society. It still has a rigid side when it is faced with social realities. People often seek justice from other parties that are considered to understand Sharia and *Usul al-Fiqh* even though the obtained decisions were not necessarily in line with *Usul al-Fiqh*.

Society needs the practical side of the law, and this cannot be obtained from *Usul al-Fiqh* because it will deal with different cultures and conditions of society. The social conditions of the Arabian Peninsula are much different from those in Iraq and Syria, and likewise, Egyptian society will be very different from those in Southeast Asia. *Usul al-Fiqh*, which was brought from the Middle East, will encounter obstacles when it is practiced in Indonesian society. This difference in social conditions is due to the historical background of each different society. Local wisdom and different cultures further add to this social diversity. To overcome the issue, the Islamic community which is separated by distance and culture, then looks for other ways so that Islamic Sharia can still be upheld by considering the social conditions of a region.

In the structure of Islamic society, Sharia is recognized as the main guideline in dealing with legal problems. However, it is not known who has the authority to determine Sharia so that it can be enforced in society. The state does not have the authority to establish Sharia. Unlike western countries, no country is wholly based on Islam or Sharia. State authority over the law only covers a centralized region with a central government. The farther a society is from the center of government, the weaker the constitutional law is, and this is where Sharia emerges as a legal option to provide a sense of justice for the community. The state does not have the authority to form Sharia like the welfare state. The community also does not have a share in the formation of this Sharia. This gives the impression as if the Sharia is a law that has come down directly from God to be given to society. However, this is not a scientific answer.

Hallaq then sought the answer by taking an approach to legal politics in which the Sharia region was used. He noticed that Sharia practitioners are the people who are considered practitioners in terms of Islamic religious knowledge and have the authority in society so that what they convey will be obeyed by their community, including the teaching of Sharia. They are not just the judges as adherents of the stare decisis doctrine thought that the law is obtained from law courts. They are not the legal product of the law-forming party like the legislature in Montesquie's trias politica. Wael B. Hallaq then formulated that four parties are considered responsible for the implementation of Sharia in society, namely:

1. Mufti;
2. The Author-Jurist;
3. *Qadi* (Judge);
4. *Fakih* (the Law professor).

According to Hallaq, these four "people" are the principals in the Sharia legal system and responsible for the existence of Sharia in society. They are not political rulers, but they have a role as social controllers by providing policy formulations for the rulers, taking decisions on disputes that occur in society, and passing down the knowledge to the next generation in maintaining the existence of the Sharia. Sometimes these four tasks are carried out by several parties, but not infrequently, just by one or two people.

Having the central position in the early evolution of Sharia, Muftis have contributed significantly so that Sharia continues to develop and adapt in society for centuries. As an independent person and a legal expert who is free from the influence of the local

authorities, Mufti is considered to have the best morals and responsibility in his community and environment. They do not have to be liable for the authority of the area.

Mufti has the main task of establishing Fatwa, which answers the questions that arise in the community. They will accept anyone who asks them about spiritual life, social life, family problems, business fields, and even almost all aspects of social life will be asked to a mufti. The questions addressed are fundamental about the legal status of an act from a Sharia point of view, whether the act is halal (permitted), haram (unpermitted), mubah (permissible/neutral), makrooh (disapproved), and so on. In addition, the Mufti's job is to find answers to problems that have never existed before in the community. The answers issued by the Mufti are then referred to as Fatwas and recognized as an important part of Sharia because they are considered a representation of Islamic teachings. Over time, these Fatwas are then collected, arranged systematically, and finally transmitted in a memory which is then called the "Book of the Law".

A Mufti has full authority in issuing Fatwas without being interfered with by any power, including the influence of local authorities. The power of the Mufti can affect the legal politics of a country/kingdom, the direction of the ruler's policies, and the determination of war. The ruler who is opposed to the Mufti will be considered as an authoritarian who has abandoned religious law and acted arbitrarily. This happens because a Mufti is considered as a religious figure who is very knowledgeable in all fields of religious knowledge and is also recognized as an individual who has the best morals in his society.

Muftis, who have a great degree in the community's eyes, are the real role model for the perfect individual in society. They will usually not interfere too much with state or social affairs. They will only issue the Fatwa when the questions are directed to them. The issues arise because of the inability of the people and the rulers of the state/kingdom to provide satisfactory answers to certain cases. Even so, Fatwas have legal consequences that are not binding, as make court decisions or statutory regulations. However, a fatwa issued by a Mufti has been recognized as a result of the high level of knowledge that the Mufti possesses. Fatwas can be valid for a long period; they cannot be deleted unless a new fatwa replaces them. Fatwas are general in nature, so that court decisions or legal products must conform to this Fatwa. Mufti does not have to participate in court proceedings but it is sufficient to convey the Fatwa so that the court can use it as a legal basis for deciding a case. Fatwa has a position as a science of law (jurisprudence) and does not have a legally binding force, but it will affect every decision, product of law, and legislation. Legal products that are contrary to Fatwas will be considered as legal products that are controversial, not ideal, and are determined to violate religious rules. The public will react when the legal product is not in accordance with the Fatwa.

According to Hallaq, the muftis with their Fatwas are considered as part of Sharia itself. They directly affect the product of statutory regulations and court decisions that are more binding and applicable in society. The second position that has a crucial role in enforcing Sharia in Islamic society is The Author-Jurist. Most muftis are not The Author-Jurist. In drafting the rule of law, The Author-Jurist rely heavily on big mufti Fatwas as their basis. They were more specialized in their work and only wrote laws based on expertise in specific fields. In addition, The Author-Jurists are tasked with compiling the legal systematization based on the grouping of certain Fatwas. They have the task of drafting laws based on the political power of local authorities in the corridor of Fatwas from the Mufti.

The product of The Author-Jurist is a reflection of social change and times condition. The resulting laws are the form of practical laws that are used to regulate social relations,

state political relations, and also as a basis for judges in making decisions. However, the judges themselves do not completely have to be the mouthpiece of the laws written by The Author-Jurist. The Judges have a limited level of independence where the decisions can adjust to certain cases based on the value of justice but must remain within the corridor of written Fatwas and laws.

In Islamic society, the duties of the court are carried out by *Qadi*. A *Qadi* has broader duty than a judge as in western countries. Apart from having the duty to decide the outcome of community disputes, the *Qadis* also have the authority to regulate the order of social life. They have social roles such as determining the direction of the mosque's qibla, resolving trade disputes, solving household problems, resolving agricultural affairs, determining urban planning, and the direction of urban development carried out by local authorities. *Qadis* have a duty as the guardian of Sharia with the guidelines of Fatwas and Written law. The actions of a *Qadi* are considered to be the enforcement of Sharia which is recognized as a product of Islamic law that regulates all aspects of social life. A *Qadi* has a vital role as a mediator of cases and as far as possible to resolve the case fairly by making all parties feel satisfied with the decision issued. So, it is somewhat different from the modern judges where they have to prove the truth based on legal regulations. In the end, the *Qadi* wants to resolve the case with a peaceful end and build a positive relationship between the parties in the case.

The written law products, *Fatwas*, and also *Usul al-Fiqh* will be taught by the Professor of Law to the next generation that is very important to ensure the continuity of Sharia in the future. A Law Professor will sit in the middle of a forum surrounded by a circle or a semicircle of students sitting on the floor with their legs crossed, listening to a lecture by the law professor. The lectures are related to various sources of Islamic teachings, *Usul al-Fiqh*, and also the previous Fatwas that were followed by the community at that time. The role of this Law professor is no less important in ensuring the existence of Sharia in society so that the regional version of the Sharia will be transmitted from generation to generation on an ongoing basis. The basic curriculum taught by the Law professor is the content of the Qur'an and its interpretations, the life history of the Prophet Muhammad S.A.W, the hadiths, and also various *Usul al-Fiqh* which are followed by various Law professors. They received no fees from their students, just as the Mufti, who does not collect fees from those who consulted with them. They receive payments from local authorities. The students who studied from the Law professor were not recorded formally. Their graduation is also not followed by academic degrees. They will continue to study indefinitely even until this Law professor dies, or the students move on to another Law professor who is considered more competent to explain more specific legal problems.[6]

Hallaq formulated that basically Sharia is alive, and its existence is maintained by the four actors in this predominantly Muslim society. The door to Ijtihad will always be open, considering new problems that arise in society will always be answered by the Muftis armed with their knowledge of *Usul al-Fiqh*, experience, and wisdom. Hallaq concluded that the Muftis play an important role in the existence of Sharia because they have become the benchmark and society's agreement that only they have the right to determine what can be considered Sharia for society. Sharia in the form of a fatwa is a social fact that is always developing and maintained by the Mufti. Society and state have no role in forming Fatwas. Likewise, *Usul al-Fiqh* is not the main actor in shaping Sharia. Sharia will only remain alive as long as the Mufti issues a fatwa to address problems in society.

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6   Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan, *Routledge Handbook of Islamic Law* (2019).

The circle of this Sharia practitioner plays a role that the Sharia which lives in society is not based solely on *Usul al-Fiqh*. Many variables influence the validity of Islamic law in Muslim societies. Because Fatwas have a major role in upholding Sharia law, the sequence of Fatwas births is the main variable in the formation of Islamic law in society. The variables of the enforceability of Islamic law are including the factors of economic society, social relations, cultural, ethnic diversity, and so on. Therefore, Sharia can be interpreted as a complex representation of socio-economic, educational, intellectual, and cultural practices. It permeated structurally into social institutions so that the authorities cannot directly regulate the existence of this Sharia in society.

Sharia also involves intellectuals who are very professional in their fields. A legal system requires legal experts, legal professionals, decision-makers, and educators, in which there are historians, mystics, theologians, logicians, philosophers, and writers. The combination creates a political ideology that is embedded in society and greatly influences the politics of law in a region.

Although not in a formal form as in the law, the implementation of Sharia has more or less influenced the legal traditions of Muslim communities in a particular area. Society compliance with Sharia products is a major breakthrough in law enforcement in a country. The pattern created in Sharia can be an important contribution to see how a legal rule can be obeyed. For example, there is a smoking ban in a room, that rule will not be effective if in the room everyone continues to smoke. However, it will be very effective when someone in the room who is considered a respected person reprimands the smokers. Then some people are appointed to crack down on smokers by forcefully extinguishing the cigarettes they smoke, and this smoking ban is then taught to children who have never smoked so that these children will become a generation that does not want to smoke any more. This is a description of a Sharia system that is generally applicable in a region. A system that remains steady, respected, and continuously passed on to the next generation. According to Friedman, the existence of law is closely related to legitimacy and obedience to the law. The law will not work and exist if there is no legitimacy and obedience. There is a relationship between legal behavior and attitudes that determine whether certain norms or processes are legitimate or not, fair or not, moral or not. It can be expected that when people agree on rules, as validated things, they are more likely to comply than if they thought otherwise. In other words, legitimacy tends to guide people, through their agreement, towards compliance. Procedural legitimacy will ultimately lead to substantive agreement on regulations or what we call trust[7].

Trust and legitimacy may have great powers in traditional societies that are not found in modern societies. In traditional societies, notions of legitimacy are engraved in the soul as far as there is socialization. The image of legitimacy in society may be the strongest inherent in those areas of law related to personal benefits or interests or at least the least likely to harm them. Legitimacy leads people to agree on what the system does. [8] It can only be obtained from certain groups or strata of society. The layer which is considered to have a feature that is not owned by the average person. Reuben Levy, in his book "The Structure of Islamic Society" explains that in Muslim-majority societies, there are still classes of people who are considered special. Beyond the borders of Saudi Arabia, the religion of Islam has brought about a similar change in the measure of glory, so that family ties to the Prophet Muhammad (peace be upon him) however distant, as well as his wealth and political power are all taken into account. In modern Egyptian life, those who

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7   Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial* (Nusa Media 2009), 150-151.
8   ibid, 155.

claim to be descendants of the first Caliphs Abu Bakr and Umar, belong to the Ashraf class. Bani Bakri (or Siddiq), descendants of Abu Bakr, from the early nineteenth century held high positions in religious affairs. However, the political rulers until the abolition of the monarchy in Egypt (1953) were held by a Turkish-blooded family, many of their ministers were drawn from the Turkish ruling group in the past. With the arrival of Islam in Persia, the priestly system in Persia disappeared, but in its place emerged a group of experts on Qur'anic commentators, hadiths, and jurists (*Fiqh*) who were extracted from these two sources. This group of experts, namely the Scholars and *Qadis*, had a high position but were still below the Shah (king) level and his assistants. The book of Siyasatnama or Treatise on Government, which was compiled around 1092 AD by the famous Nizam al-Mulk, a vizier from the Great Seljuk Empire, alluded to the problems of various state officials in the following manner:

1. King;
2. Provincial governors and tax collectors;
3. The viziers;
4. Landlords (feudal);
5. Farmers working for landlords;
6. The *Qadis*, Preachers, Police, and so on. [9]

Elite and era classification developed after the emergence of advances in science and technology. Classification is carried out to simply differentiate between those who control the territory and the large masses of the people. The truth is the classification in the Islamic meaning (text) is separated in the framework of referring to some selected individuals who have many advantages compared to others. They have advantages in terms of science, virtuous character, which can be emulated and be the source of socialization of Islamic values, and there is no gap between speech and his actions. [10]

A person who has advantages in terms of education and religious knowledge is considered to have superiority over ordinary people who may only be educated, or only have religious knowledge. According to Donald Black in his book "The Behavior of Law", through the Theory of Legal Behavior, a common person who is educated but not as special as a priest is not so cultured. But he is better than an illiterate person who is considered very uncultured. The same is true in other societies, where some are literate, and some are not literate, then literacy is a legal advantage. Likewise, in education, the more educated people are considered less serious in violation cases. In modern society, those who have university education are at least vulnerable to the law. [11] From the description given by Donald Black, it can be concluded that people who have better general and religious education backgrounds, such as Mufti and *Qadi*, have a strong position compared to people who only have expertise in certain fields.

Meanwhile, Hallaq's contribution to the study of Islamic law is enormous. He tried to revise that basically, Sharia is part of The Living Law even though it does not necessarily manifest itself as positive law, it will constantly adjust its position in society in its way. The caretakers of Sharia, such as Muftis, law writers, *Qadis*, and law professors in Sharia, have to keep this Sharia alive in Islamic society. Even though Sharia is not a law that results from an agreement by society or state law, it continues to be transmitted from generation to generation of Islamic society. Sharia will bring out a specific form of uniqueness in each

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9   Reuben Levy, *Susunan Masyarakat Islam, Pustaka Firdaus* (Pustaka Firdaus 1986), 72-74.
10   Syarifudin Jurdi, *Sosiologi Islam Dan Masyarakat Modern, Teori, Fakta Dan Aksi Sosial* (Kencana Prenada Media Group 2010), 53-54.
11   Ibid, 53-54.

different community.

One example of the uniqueness of Sharia implementation in Indonesia is the position of Islamic law in Minangkabau Islamic society. So far, from the aspect of family law, they have been interpreted as having a patrilineal kinship line. However, the Minangkabau people, which are known to be very religious in Islam, apparently do not practice patrilineal kinship lines but practice matrilineal kinship lines. Many legal experts argued that this is a form of smuggling law into Islamic law. In the sense that the matrilineal kinship line is against Sharia. However, this opinion was strongly rejected by Hazairin. He argued that matrilineal kinship lines are not a form of denial of Sharia because there is not a single prohibition in *Usul al-Fiqh* regarding the application of matrilineal kinship lines. Sharia establishes parental kinship lines, but because Islam was first revealed in the Arabian Peninsula, which is very strict on its patriarchy, it is as if Sharia uses patrilineal kinship lines. The form of parenthood of Sharia can be seen from the position of women in inheritance law who also gets a share of the inheritance as well as the replacing positions held by women in the line of heirs. [12]

Agreeing with Hallaq, Hazairin also explained the conflict that occurred between Sharia according to *Usul al-Fiqh* and Sharia that live in society. Even though the legal system created by Ahlussunnah is patrilineal, it should not be assumed that the conflict in question does not exist in patrilineal Indonesian society. Conflicts persist both in the patrilineal and matrilineal communities over family law based on *Usul al-Fiqh*. The inheritance law carried in *Usul al-Fiqh* based on Arabic culture is very difficult for the Indonesian people to accept. The Qur'an did not generate this conflict but the results of human deviation created it. [13] This is where the role of Scholars, Muftis, and the Sharia guards provides new breakthroughs in Sharia so that the local community can accept it.

The efforts described by Hallaq and Hazairin have more or less opened our eyes that Sharia is not an independent law. It requires other components to stay alive and blend into the object. Sharia is manifested as a living law, so to bring it to life in society requires practitioners who understand where Sharia will be applied. Practitioners must understand who the legal subjects of Sharia are, and who are respected by society as those who teach the Sharia to them.

Conclusion

Hallaq explained that basically *Usul al-Fiqh* is not a true representation of Islamic law. When *Usul al-Fiqh* is treated as Islamic law, it will close the door to Ijtihad on various social problems that continue to develop. Hallaq argued that there are at least four main actors in the implementation of Sharia so that it remains exist in society today: Mufti, the Author-Jurist, *Qadi*, and Professor of Law. These four main actors guard the principles of Sharia in society. The principle of the Sharia can be found in the *Fatwa* issued by the *Mufti*. A *Fatwa* is a new form of Sharia that is adhered to by the community because it has a character of authority in society and has a dynamic character on problems that arise in society. The door to Ijtihad will always be opened through the existence of this *Fatwa*.

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12   Hazairin, *Hukum Kewarisan Bilateral Menurut Al-Qur'an* (Tinta Mas 1964), 13-16; A Hamid Sarong & Nur A Fadhil Lubis, 'The Child Rights In Islamic Law With A Special Focus On Aceh' (2019) Volume 4 Petita : Jurnal Kajian Ilmu Hukum dan Syariah; Devi Soraya, 'Konsep Penetapan Wali Harta Dalam Pemikiran Mazhab Syafi'i Dan Praktek Masyarakat Aceh Besar' (2016) 1 Petita : Jurnal Kajian Ilmu Hukum dan Syariah 41 <http://www.petita.ar-raniry.ac.id/index.php/petita/article/view/79/27>; Ali Abubakar, 'The Chance on Islamic Family Law in Indonesia' (2019) 4 Petita : Jurnal Kajian Ilmu Hukum dan Syariah 42.while the sunnah that represents the latter should be seen through adjusting the context to particular places and times. In general, the former is much related to the issues of ritual practices (Ibadah / God worshiping

13   Hazairin (n 12), 2.

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