

THE HISTORIOGRAPHY OF ISLAMIC LAW The Case of *Tārīkh al-Tashrī'* Literature¹

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Abstract

Tārīkh al-Tashrī' (the history of sharia affairs) is a relatively new genre of Islamic historiography and very popular among students of Islamic Law. Despite its popularity, academics of Islamic historiography seem not interested in studying it. There is hardly any academic paper seriously studied the literature. This paper is a first effort to explore the *Tārīkh al-Tashrī'* literature through a historiographical analysis. As an initial exploration, it argues that *Tārīkh al-Tashrī'* is the latest development of Islamic historiography, developed in the 19th century, but it is a genre of the old Islamic historiography with some new elements. The new elements are influenced by both modern Western historiography and the need to re-open the supposedly closed gate of *ijtihād*. The paper studied books of *Tārīkh al-Tashrī'* available during the research between 2013-2015.

[*Tārīkh al-Tashrī'* adalah genre yang relatif 'baru' dalam matarantai perkembangan historiografi Islam. Literatur ini sangat populer dan menjadi mata kuliah wajib di fakultas-fakultas Syariah di Indonesia maupun Timur Tengah. Hanya saja, meskipun ia sangat populer sebagai mata pelajaran, *Tārīkh al-Tashrī'* belum banyak menarik minat para peneliti historiografi. Makalah ini berusaha mengeksplorasi literatur *Tārīkh al-Tashrī'* dengan

¹ This paper is the revised, updated, but shortened version of my original argument in my doctoral thesis: Arif Maftuhin, "Historiografi Fikih: Studi atas Literatur Manāqib, Ṭabaqāt, dan Tārīkh at-Tasyrī'", Dissertation (Yogyakarta: UIN Sunan Kalijaga, 2016).

pendekatan historiografi. Makalah ini berpendapat bahwa Tārīkh al-Tashbrī‘, meski terlibat ‘modern’ dari segi kelahirannya, tidak banyak berbeda dengan literatur historiografi klasik. Perbedaan terjadi karena adanya pengaruh historiografi Barat dalam model penulisannya dan karena kebutuhan untuk membuka kembali pintu ijtihad yang tertutup. Kajian dilakukan terhadap kitab-kitab Tārīkh al-Tashbrī‘ yang dapat ditemukan selama riset antara 2013-2015.]

Keywords: Islamic historiography, *Tārīkh al-Tashbrī‘*, Islamic legal historiography.

A. Introduction

“History is not really a discipline. ... rather, history is a frame of mind, a way of thinking about human affairs.”²

If history is a frame of mind, a way we think about our affairs in the past, the literature of *Tārīkh al-Tashbrī‘* should be a fascinating subject to understand how Muslims think about the affairs of Islamic law. The word *Tārīkh al-Tashbrī‘* can be translated as “the history of *sharī‘a* affairs”. As the books of *Tārīkh al-Tashbrī‘* are written by Muslim scholars all over the world, *Tārīkh al-Tashbrī‘* would best represent the way Muslim scholars (not all are historians, unfortunately) think about Islamic law. The popularity of *Tārīkh al-Tashbrī‘* can be seen from the case of Bik’s work, *Tārīkh al-Tashbrī‘ al-Islāmī*. In its original Arabic version, the book has been reprinted for many times. I have a printed edition of 1960, when the book had been already re-printed for seven times,³ and continued to be published by other publishers in the following years.⁴ In addition to its popularity in the Arab world, the book is also popular in Indonesia. The book reached wider readers of the non-Arabic speaking Indonesians when

² R. Stephen Humphreys, “Tradition and Innovation in the Study of Islamic History: The Evolution of North American Scholarship Since 1960”, *Research Report*, <http://www.l.u-tokyo.ac.jp/IAS/English/Unit/Soukatu/Soukatu-1/humphreys.html#Humphreys>, accessed 29 Jan 2016.

³ Muḥammad al-Khuḍarī Bik, *Tārīkh al-Tashbrī‘ al-Islāmī*, 7th edition (Cairo: Maṭba‘ah al-Istiqāmah, 1960).

⁴ *Ibid.*

it was translated into Bahasa Indonesia in 1980 by Mohammad Zuhri.⁵ The students of Islamic law schools in my university, the Walisongo State Institute of Islamic Studies (IAIN), were required to read the book as the primary source for studying the history of Islamic Law. It seems to be a consensus that the way to study and understand Islamic legal history is through *Tārīkh al-Tashrī'* literature before the students, in advanced classes of graduate schools, learn the other models of studying Islamic legal history through the lenses of Western scholarship.

While it is a popular and important literature for Muslim scholars and students of Islamic law, interestingly, it is surprising that little has been given to study of the bulk literature of *Tārīkh al-Tashrī'*. On the one hand, scholars well known for their expertise in Islamic law, from Goldziher, Schacht, to Hallaq have not paid attention to the literature in their works. The search for the origin of Islamic law, the history itself, is more interesting than the historiography of Islamic law in *Tārīkh al-Tashrī'* literature.

On the other hand, as a part of historiographical literature, *Tārīkh al-Tashrī'* has also been neglected by scholars of Islamic historiography. My search to find any academic discussion about *Tārīkh al-Tashrī'* has yet to find any. The closer to it are few studies on earlier forms of Islamic legal historiography, represented by the literature of *manāqib* and *ṭabaqāt*.⁶ Studies on Islamic historiography in general, on the other hand, are abundant. Rosenthal's seminal work, *A History of Muslim Historiography*, presents a comprehensive study of Islamic historiography but is limited to the classical one.⁷ Others, such as El-Hibri,⁸ Peacock,⁹ Kennedy,¹⁰ al-

⁵ Hudhari Bik and Mohammad Zuhri, *Tarjamah Tarikh Tasyrik: Sejarah Pembentukan Hukum Islam* (Semarang: Daarul Ihya, 1980).

⁶ Maftuhin, "Historiografi Fikih: Studi atas Literatur Manāqib, Ṭabaqāt, dan Tārīkh at-Tasyrī'".

⁷ Franz Rosenthal, *A History of Muslim Historiography* (Leiden: E.J. Brill, 1968).

⁸ Tayeb El-Hibri, *Reinterpreting Islamic Historiography: Harun Al-Rashid and the Narrative of the 'Abbasid Caliphate*. (Cambridge: Cambridge University Press, 2003).

⁹ A.C.S. Peacock, *Mediaeval Islamic historiography and political legitimacy: Balami's Tārīkh-nāma* (London; New York: Routledge, 2007).

¹⁰ Hugh Kennedy and Conference on "The Historiography of Islamic Egypt", *The Historiography of Islamic Egypt (c. 950-1800)* (Leiden [etc.]: Brill, 2001).

Azmeh,¹¹ Marianna Klar,¹² and Donner¹³ have added valuable studies on various periods of Islamic historiography. But, none of these studies included *Tārīkh al-Tashrīʿ*.

Based on the absence of research on *Tārīkh al-Tashrīʿ*, this paper elaborates its historiographical aspects. Historiography, according to Rosenthal, may be defined as:

“... [the] writing about the writing of history by any particular group or in any particular period means only one thing: to show the development which the concept of history underwent in the thinking and in the scholarly approach of the historians of that particular group or period, and to describe the origin, growth, or decline of the forms of the literary expression which were used for the presentation of historical material.”¹⁴

In this paper, the primary focus is the object of *Tārīkh al-Tashrīʿ*: its periodization, sources it relies upon, and its objectives. Looking at these aspects of historiography, the paper argues that *Tārīkh al-Tashrīʿ* literature is similar to the more common form of classical Islamic historiography, but adopting elements of Western historiography, and were written to open the closed gate of *ijtihād*. A brief review of Islamic historiography is elaborated to give a theoretical context of my study on *Tārīkh al-Tashrīʿ*.

B. Islamic Historiography: The Main Features

For Muslims, the past is the model. The Prophet is reportedly said that “the best of my people (*khayra ummati*) is my generation (*qarni*); and then the generation afterward; and the generation afterward; and afterward...”, and what constitutes a good Muslim is the one who follows the examples of the first good generations of the past (*as-salaf as-ṣalih*). If so, how do we know the past? For centuries, Muslims can access the past mainly through two main kinds of literature: the *Ḥadīth* and the *Tārīkh*. Scholars are divided to see which one was developed from the other. According to Khalidī, “It was under the general rubric of *Ḥadīth* that the

¹¹ ‘Azīz ‘Azmah, *The Times of History: Universal Topics in Islamic Historiography* (Budapest; New York: Central European University Press, 2007).

¹² Marianna Klar, *Interpreting Al-Thaʿlabī’s Tales of the Prophets: Temptation, Responsibility, and Loss* (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2009).

¹³ Fred McGraw Donner, *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing* (Princeton, N.J.: Darwin Press, 1998).

¹⁴ Rosenthal, *A History of Muslim Historiography*, p. 3.

basic religious sciences, including historical writing, were to develop.”¹⁵ Following this argument, *tāriḳh* is a later development of Ḥadīth. It is understood that the primary objective of studying the past is to find the specific examples of the Prophet, and the most prominent form of this endeavour is the Ḥadīth literature. It then continues to be a search for other important and influential figures of *Fiqh*, Sufism, and others. According to Khalidi, *Tāriḳh* was part of Ḥadīth that focuses on ‘the sacred history’ and developed as a distinct literature of *sīrah* and *maghāzī*.¹⁶ Because Islamic historiography is part of the Ḥadīth literature, it is simply understandable that Islamic historiography brings the features of Ḥadīth.

In the Ḥadīth literature, the past is accessible through the chain of narrators, called *isnād*. Muslim scholars, regardless of the Western criticism on the nature of *isnād*,¹⁷ believe that the method of investigation (*‘Ulūmul-ḥadīth*) they developed is comprehensive enough to validate whether someone in the chain of *isnād* is trustworthy and, therefore, the information about the Prophet they deliver is valid. Within the *‘Ulūmul-ḥadīth* discipline, branches of knowledge were developed to verify, collect, and compile the prophetic sayings and reports. Among them are *‘Ilm Tāriḳhur-ruwāt* (biographies), *‘ilm al-jarḥ wa’l-ta’dīl* (impugment and validation), *al-mutābi‘ wa’l-syahīd* (confirmation and follow-up), *‘ilm gharibi-ḥadīth* (unfamiliar expression in *ḥadīth*), and others.¹⁸

The practice of Ḥadīth validation through *isnād* influences the way Islamic historiography find its historical sources. *Isnād* is a chain of information from generation to generation, and it is oral in nature. It is very different to what modern-Western historiography think of historical source. There is a proverb among modern historians that “no document, no history.” According to Bloch, “... the struggle with documents is one of the things which distinguish the professional historian from the

¹⁵ Tarif Khalidi, *Arabic Historical Thought in the Classical Period* (New York: Cambridge University Press, 1994), p. 7.

¹⁶ *Ibid.*, p. 30.

¹⁷ G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance, and Authorship of Early Ḥadīth* (Cambridge [etc.]: Cambridge University Press, 1985).

¹⁸ Mohammad Hashim Kamali, *A Textbook of Ḥadīth Studies: Authenticity, Compilation, Classification and Criticism of Ḥadīth* (Kube Publishing Ltd, 2014).

amateur.”¹⁹ There are two reasons why contemporary historians are so ‘obsessed’ with the document. First, “an academic conservatism”, by which historians take a very careful consideration of using historical materials. For most contemporary historians, research is confined to libraries and archives. Second, from the High Middle Ages (c. 1000–1300) onwards, the written documents are more available than any other source for Western history. Third, written sources are more accurate in revealing the thoughts and actions of past figures than other sources.²⁰

While Western historiography regarded written sources as superior, Islamic historiography relies on oral sources because the oral tradition was the main source of information transmission. There are three ‘natural’ processes of information transfers where oral transmission plays an important role. **First**, an act of listening to information delivered orally by a historical witness. This had to be a pure oral transmission (*‘amaliyyah shafahiyyah kbhāliṣah*) between a witness, the prime historical source, and collector(s) of information. Most of the Islamic historical materials were in this form. **Second**, the act of recording information (*biḥjẓu’l-ma’lūmāt*). This process involved memorising by heart and writing. The writing (*tadmīn*), both as an individual or a state-supported project, would help the memorising project and prevent the misinterpretation or corruption of the memorising process. **Third**, an act of transmitting from one source to another. In Muslim tradition, this process mainly relies on an oral transmission rather than writing transmission because of the principle hold by Ḥadīth experts that the trustworthy information is the one obtained through a direct meeting, oral communication, between the source and the collector.²¹

Based on those processes, *isnād* criticism is the most important way of validating information. Information is valid when it is based on who transfers the information from a witness to his collector and those afterwards. Because of this tradition that oral source is more important than the written one.

¹⁹ John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (London [u.a.: Longman, 2002), p. 85.

²⁰ *Ibid.*, p. 56.

²¹ Shākir Muṣṭafā, *al-Tārīkhul-‘arabī wa al-mu’arrikhūn: Dirāsah fī’l-ṭaṭawwur ‘ilm at-tārīkh wa ma’rifati rijālīhi fī al-Islām*, Third edition (Beirut: Dār al-‘Ilm li al-Malāyīn, 1983), pp. 75–6.

According to Scholer, the practice of oral transmission as a primary source of knowledge is an old tradition used by ancient civilisations, from Aristotle to Judaic traditions. The Arabs only follow their paths. He argues that books written in the second century of Hijrī were initially not a book in the modern sense. It was a compilation of teaching delivered by the imam to his students. He may say something that is exactly similar to each of his students but may also add something for other students. During that time, this open to revision book was hardly a defect. It was a common practice.²²

Scholer identifies three models of knowledge transmission in Islamic tradition. The most superior one is *samā'* (audition). This form of knowledge transmission involved the students listening (*sami'a*) to a teacher or his representative who recite from memory or note. The second form is *qirā'ah* or *'araḍ* which is considered as valid as *sama'*. In this form, it is the student, rather than the teacher, who recites from memory or his notes. The teacher would listen to his recitation to validate. The third and the less superior form of knowledge transmission is *nijādah* or *kitāba*, where a student just rewrites or copy the notes he finds from a book. As long as he did not support his copy by listening to a teacher, this is regarded inferior.²³ It is in this context that *isnād* and *oral transmission* is the most reliable source of history in Islam.

C. The *Tārīkh al-Tashrī'* Literature

In addition to Khudāri's famous *Tārīkh al-Tashrī' al-Islāmī*, there are dozens other books with similar titles, *Tārīkh al-Tashrī'*, and books with slightly different titles such as *Tārīkh al-Fiqh al-Islāmī* or *al-Madkhal ilā'l-fiqh al-Islāmī*. Aḥmad 'Arafah, for example, listed 37 reference books on *Tārīkh al-Tashrī'*.²⁴ I found copies of these books during my research:

- Muḥammad b. al-Ḥasan al-Tha'ālabī (1291-1376 H), *al-Fikru's-sāmī fī' tārīkh al-fiqh al-islāmī*,²⁵

²² Gregor Schoeler, *The oral and the written in early Islam* (New York, NY: Routledge, 2006), pp. 87–110.

²³ *Ibid.*, p. 30.

²⁴ Aḥmad 'Arafah, "Marāji'u tārīkhī't-tashrī'i'l-islāmī", *forumegypt.net*, <http://almosleheenway.forumegypt.net/t174-topic>, accessed 2 Feb 2011.

²⁵ Muḥammad al-Ḥajwī al-Tha'ālabī, *al-Fikru's-sāmī fī' tārīkh al-fiqh al-islāmī*, First edition (Beirut: Dāru'l-Kutub al-'Ilmiyyah, 1995).

- Mannā‘ b. Khalīl al-Qaṭṭān, *Tārīkh al-Tashrī‘il-Islāmī: al-tashrī‘ wa’l-fiqh*.²⁶
- Mannā‘ b. Khalīl al-Qaṭṭān, *Tārīkh al-Tashrī‘al-Islāmī*,²⁷ another edition of the previous book.
- ‘Abd al-Wahhāb Khallāf, *Khulāṣatu’l-Tārīkh al-Tashrī‘al-Islāmī*.²⁸
- Ja‘far al-Subhānī, *Tārīkhul-fiqhīl-Islāmī wa adwāruhu*.²⁹
- ‘Umar Sulaymān al-Ashqar, *Tārīkhul-fiqh al-Islāmī*.³⁰
- Aḥmad Sha‘labī, *Tārīkh al-Tashrī‘al-Islāmī wa tārīkhul-niẓāmi’l-qaḍā’iyyah fīl-Islām*.³¹
- ‘Abd al-‘Azīm Sharafu’d-dīn, *Tārīkh al-Tashrī‘il-Islāmī wa aḥkāmū’l-milkiyyah wa’sb-shuḥ‘ah wa’l-‘aqd*.³²
- Badrān Abu al-‘Aynayn Badrān, *Tārīkhul-fiqhīl-Islāmī wa nazariyyatu’l-milkiyyah wa’l-‘uqūd*.³³
- Muḥammad ‘Alī al-Sāys, *Tārīkhul-fiqhīl-Islāmī*.³⁴
- Muḥammad Yūsuf Mūsa, *Tārīkhul-fiqhīl-Islāmī*.³⁵
- ‘Alī Muḥammad Mu‘awwad and ‘Ādil Aḥmad, *Tārīkh al-Tashrī‘al-Islāmī: Dirāsah fī’l-tashrī‘ wa taṭawwuruḥu wa rijāluhu*.³⁶
- Muḥammad Anīs ‘Ubadah, *al-Muntaqā fī tārīkhī’l-tasyrī‘il-Islāmī wa ḥikmatuhu wa ash-barū’l-fuqabā’*.³⁷

²⁶ Mannā‘ b. Khalīl al-Qaṭṭān, *Tārīkh al-Tashrī‘il-Islāmī: al-tashrī‘ wa’l-fiqh* (Riyāḍ, 1996).

²⁷ Mannā‘ b. Khalīl al-Qaṭṭān, *Tārīkh al-Tashrī‘il-Islāmī* (Cairo: Wahbah).

²⁸ Abd al-Wahhāb Khallāf, *Khulāṣatu’l-Tārīkh al-Tashrī‘al-Islāmī* (Kuwait: Dār al-Qalam).

²⁹ Ja‘far al-Subhānī, *Tārīkhul-fiqhīl-Islāmī wa adwāruhu* (Beirut: Dār al-Adwā’).

³⁰ ‘Umar Sulaymān al-Ashqar, *Tārīkhul-fiqh al-Islāmī*, 3rd edition (Amman, Jordan: Dār al-Nafā’is, 1991).

³¹ Aḥmad Sha‘labī, *Tārīkh al-Tashrī‘al-Islāmī wa tārīkhul-niẓāmi’l-qaḍā’iyyah fīl-Islām* (Cairo: Maktabah al-ḥadārah al-Islāmiyyah, 1976).

³² ‘Abd al-‘Azīm Sharafu’d-dīn, *Tārīkh al-Tashrī‘il-Islāmī wa aḥkāmū’l-milkiyyah wa’sb-shuḥ‘ah wa’l-‘aqd*, 3rd edition (Riyāḍ: al-‘Arabi, 1985).

³³ Badrān Abu al-‘Aynayn Badrān, *Tārīkhul-fiqhīl-Islāmī wa nazariyyatu’l-milkiyyah wa’l-‘uqūd* (Dāru’n-Nahḍah al-‘Arabiyyah, 1999).

³⁴ Muḥammad ‘Alī al-Sāys, *Tārīkhul-fiqh al-Islāmī* (Kairo: Dāru’l-Kutubi’l-‘Ilmiyyah, 2005).

³⁵ Muḥammad Yūsuf Mūsa, *Tārīkhul-fiqhīl-Islāmī* (Cairo: Dār al-Ma’rifah).

³⁶ ‘Alī Muḥammad Mu‘awwad and ‘Ādil Aḥmad, *Tārīkh al-Tashrī‘al-Islāmī: Dirāsah fī’l-tashrī‘ wa taṭawwuruḥu wa rijāluhu* (Beirut: Dār al-Kutubi’l-‘Ilmiyyah, 2000).

³⁷ Muḥammad Anīs ‘Ubadah, *al-Muntaqā fī tārīkhī’l-tasyrī‘il-Islāmī wa ḥikmatuhu wa ash-barū’l-fuqabā’*.

- ‘Abd Allāh b. ‘Abd al-Muḥsin b. Maṣṣūr al-Ṭarīqī, *Tāriḫbu’t-tasyrī’ wa Marāḫiluhū’l-fiqhiyyah*.³⁸
- ‘Abd al-Hādī al-Faḍlī, *Tāriḫbu’t-tasyrī’l-islāmī*.³⁹

If we look at the titles, there are two principal terms typically used in the *Tāriḫbu’t-tashrī’* literature: the first one is *Tāriḫ al-Tashrī’* and the other is *Tāriḫbu’l-fiqhī’l-islāmī*. This difference is the result of their different understandings of what *sharī’ah* means. For those who use *sharī’ah* as the synonyms for *fiqh*, the term *tashrī’* means “the interpretation or understanding of *sharī’ah*,” or it is *fiqh* in its very terminological meaning. For them, *tashrī’* will never mean “the making of divine law” or *sharī’ah*. On the contrary, for those who use *sharī’ah* as the synonyms for *dīn* (religion in general) and *fiqh* is one part of it, the use of term *Tāriḫbu’l-fiqhī’l-islāmī* is more appropriate.

Sulaymān al-Ashqar, who used *Tāriḫbu’l-fiqh* for his book, has a reason not to use *Tāriḫbu’t-tasyrī’*. According to him, the process of *tashrī’*, which means “the legislation of *sharī’ah*,” occurred only during the lifetime of the Prophet. There is no more *tashrī’* afterwards. As the book discusses more on the history of *fiqh* (the understanding of *sharī’ah*), the use of *Tāriḫbu’l-fiqh* is, therefore, more accurate. On the use of *Tāriḫbu’t-tashrī’*, he is suspicious of what he believes as the influence of the orientalist, which considers *sharī’ah* like other secular disciplines.⁴⁰

On the other hand, those who preferred *Tāriḫbu’t-tashrī’* have reasons to consider as well. Mannā’ al-Qaṭṭān, for example, changed his book’s title from *al-Tasyrī’ wa’l-Fiqh fī’l-Islām: Tāriḫ wa Manhaj* into *Tāriḫbu’t-tashrī’l-islāmī* in the fourth edition. His reasons to change are: first, *Fiqh* is an extension of *Sharī’a*, a product of its interpretation; and second, *Tāriḫbu’t-tashrī’l-islāmī* has already been widely used in academia. The previous editions of his book had been criticised for not using the more reader friendly term: *Tāriḫ al-Tashrī’*. Professors who used his book to teach suggested him to change the title.⁴¹

³⁸ ‘Abd Allah b. ‘Abd al-Muḥsin b. Maṣṣūr al-Ṭarīqī, *Tāriḫbu’t-tashrī’ wa marāḫiluhū’l-fiqhiyyah* (Riyāḍ: Muassasah al-Ḥarasī li’t-tawzī’, 1405H).

³⁹ ‘Abd al-Hādī al-Faḍlī, *Tāriḫbu’t-tasyrī’l-islāmī* (London: al-Jāmi’atu’l-‘Ālimiyyah lil-‘Ulūmi’l-Islāmiyyah, 1992).

⁴⁰ al-Ashqar, *Tāriḫbu’l-fiqh al-Islāmī*, p. 39.

⁴¹ al-Qaṭṭān, *Tāriḫbu’t-tashrī’l-islāmī*, p. 3.

D. The Historiography of *Tārīkh al-Tasbrī'*

1. *The Idea of Progress*

The influence of modern Western ideas can be seen in the adoption of 'progress' – an idea that was dominant in modern Europe.⁴² A history or narration of the past had not been a mere story of the people living before us, or a story of divine scenario who governs human life. More than that, it had become a narration of *change* and *movement*. Jamal Malik found this model of adopting the idea of progress in Muslim historiography in South Asia. Researching on Ahmad Khan's works, known as the father of modern Urdu historiography, he concluded that Khan's understanding of Enlightenment in Western Europe brought him to realise the importance of *change* and *movement* in the history and historiography.⁴³

In the same vein, Tarif Khalidi, basing on his research on "politics of periodization" in Arab historiography, argued that for many centuries Arab historiography – with Ibn Khaldun as an exception – has its own established unique historiographical framework. This well-established category only began to change when the Arab world was colonised by Europe and European historians' framework began to influence Arab historians. At these moments, the periodicity that emphasised progress, especially «the rise and decline» themes, dominated Arab historiography. Historians' work was closely related to nationalist's agenda: establishing the Arabness identity by showing their glory in the past.⁴⁴ According to Reinskowi, the history was written specifically by showing the Arab glory in the pre-Turkey era and the decline of Arab nations at the time of its writing. In the history that they wrote, the glory took place when Arab was in power until the decline came due to the power of other nations, whether it was Turkey, Persia, or Europe.⁴⁵

⁴² Robert A. Nisbet, *History of the Idea of Progress* (New Brunswick, N.J.: Transaction Publishers, 1994), p. 4.

⁴³ Jamal Malik, *Islam in South Asia: A Short History* (Leiden; Boston: Brill, 2008), p. 63.

⁴⁴ Tarif Khalidi, "Reflections on Periodisation in Arabic Historiography", *The Medieval History Journal*, vol. 1, no. 1 (1998), pp. 107–24.

⁴⁵ Maurus Reinskowi, "Late Ottoman Rule over Palestine: Its evaluation in Arab, Turkish, and Israeli Histories, 1970-90", *Middle Eastern Studies*, vol. 35, no. 1 (1999),

Tārīkh al-Tashrī‘ literature was born in the same exact context with that of modern Arab historiography literature studied by Choueiri, Khalidi, and Reinskowi as mentioned earlier: the Arab context of the 19th to 20th century and the search for identity under the oppression of foreign power (The West-Christian). If the Arab nationalists emphasised the decline and the rise of Arab nations, the author of *Tārīkh al-Tashrī‘*, the earlier generations, in particular, emphasised on the aspects of the rise and decline of Islamic law. Islamic law used to be powerful, and now it suffered a decline as *taqlid* propagated and the gate of *ijtihād* was closed. Their mission was not the rise of Arab nationalism; but the rise of Fiqh. In the following sections, we will see how the theme of progress, decline, and revival dominate *Tārīkh al-Tashrī‘* literature.

2. *Periodization in Tārīkh al-Tashrī‘*

Periodization is an attempt to divide history into groups or categories of time.⁴⁶ There is no single rule, theorem, or standard guidelines for making periodization.⁴⁷ “It is simply an analytical tool for historians”,⁴⁸ said professor of history at the University of Edinburgh, UK, Arthur Marwick. Periodization that is commonly used by Western historians is not necessarily suitable for historians in the East and vice versa. Periodization is necessary so that historians can present the course of events better, because it provides a beginning and an end, rise, and decline, and there is a kind of direction, a destination whether it goes according to God’s plan or an idealisation based on a theory (Marxism, for example).⁴⁹

As other modern historians, the authors of *Tārīkh al-Tashrī‘* also use periodization as an analytical tool. As discussed earlier, all *Tārīkh al-Tashrī‘* books at a certain extent are concerned with the history of Islamic law regarding its periodization and every author of *Tārīkh al-Tashrī‘* offers

pp. 66–7.

⁴⁶ *Periodization - New World Encyclopedia*, <http://www.newworldencyclopedia.org/entry/Periodization>, accessed 1 Mar 2016.

⁴⁷ Lawrence Besserman, *The Challenge of Periodization: Old Paradigms and New Perspectives* (New York and London: Garland, 1996).

⁴⁸ *History in Focus: What is History?*, <https://www.history.ac.uk/ihr/Focus/Whatishistory/marwick1.html>, accessed 1 Apr 2012.

⁴⁹ *Periodization - New World Encyclopedia*.

his own periodization. For example, al-Khudari Bik, one of the earliest authors of *Tārīkh al-Tashrī‘*, provides the following periodization:

- The Period of the Prophet (*al-Tashrī‘ fī ḥayāti rasūlil-lāh*)
- The Period of Senior Companion (*al-Tashrī‘ fī ‘ahdi kubbāriṣ-ṣaḥābah*)
- The Period of Junior Companion (*al-Tashrī‘ fī ‘ahdi ṣiḡbāriṣ-ṣaḥābah*)
- The Period of the Birth of Islamic Law as A Discipline (*al-‘ahd alladhī ṣāra fībil-fiqh ‘ilmān*)
- The Peak Period (the period where wide variety of Fiqh books were written until the Tartar army raid)
- The *Taqīd* Period (the period of stagnation following Tartar invasion until present time)⁵⁰

As mentioned earlier, periodization has become one of the distinct characters of modern Arab historiography in general, and this is apparent in the writing of almost all *Tārīkh al-Tashrī‘* books. While Bik offered six periods, other authors offered their own periodization. Muḥammad al-Ḥajwī Al-Tha‘ālabī introduces an alternative periodization as follows:

- The Infancy Era (*Ṭaurut-tufūliyyah*) – The Prophet Period.
- The Adolescence Era (*Ṭaurush-Shabab*) – The Four Caliphs Period until the end of the second century Hijri.
- The Adulthood Era (*Ṭaurul-kubūlah*)-- until the end of the fourth century.
- The Aged Era (*Ṭaurush-shaikhubekbah wa’l-barām*) - after the fourth century Hijri to the present)⁵¹

The more recent authors of *Tārīkh al-Tashrī‘* follow the periodization in various ways. Some follow it as is; some do by modifying it. ‘Umar Sulaymān al-Ashqar, writing in the 1990s, made periodization as follows:

- The Prophet Period
- The *Ṣaḥābah* (Companion) Period
- The *Tābi‘ūn* (students of the Companions) Period
- The *Tadwīn* (codification) Period
- The *Jumud* and *Taqīd* Period
- Present time.⁵²

Another later generation author, Mannā‘ al-Qaṭṭān, uses a five-

⁵⁰ Bik, *Tārīkh al-Tashrī‘ al-Islāmī*, pp. 4–5.

⁵¹ al-Tha‘ālabī, *al-Fikru’s-sāmī fī tārikh al-fiqh al-islāmī*, p. 60.

⁵² al-Ashqar, *Tārīkhul-fiqh al-Islāmī*, p. 40.

periods system. Slightly different from al-Ashqar, al-Qaṭṭān combines the Prophet and Companion into one period, and emphasises periods of history more politically than Fiqh experts in his generation:

- Al-Tasyrīʿ Period, which includes the Prophet and the four Caliphs period.
- The Emergence of Fiqh Period (*taʿsīs al-fiqh*), which includes the Umayyad period, particularly during the period of Hijazi and Iraqi *Madhhabs* (a period before the Four Mazhabs).
- The Fiqh Revival Period (*an-nabdah al-fiqhiyyah*), which is the time of the emergence of the four *Madhhabs* until the time of the codification of the prophetic Ḥadith.
- The *Taqlīd* Period, after the formation of Madhhabs and the closing of the gate of *ijtihād*.
- Contemporary Revival and Renewal Period as an attempt to open the gate of *ijtihād* that is previously closed.⁵³

From the periodization models, it can be seen that earlier generation authors tried to argue that Fiqh –when the books were written – was in historical nadir. Muhammad al-Khudari Bik ends the period of *Tārīkh al-Tashrīʿ* with an endless *Taqlīd* period. Since their defeat to Mongolia invaders, Islamic nations seemed to be losing strength to rise, and nothing would restore Islamic glory. Al-Khudari Bik witnessed himself how the West in his lifetime was very dominant over Islamic countries. Compared to the genre of modern Arab historiography discussed earlier, it appears that the *Tārīkh al-Tashrīʿ* genre in the early colonial period also carried out the same mission: to show a historical nadir and motivate a revival.

Later generations, in the post-colonial era, seemed to believe that periodization made by earlier generation had not been relevant anymore. Both al-Ashqar and al-Qaṭṭān had seen and witnessed how innovations first kindled in the early generation of *Tārīkh al-Tashrīʿ* came to fruition. The gate of *ijtihād* was opened again in their time or, at least, attempts to open the gate of *ijtihād* were noticeable, and Fiqh was no longer dominated by *jumūd* and *taqlīd*. In later *Tārīkh al-Tashrīʿ* literature, the *al-ḥādīr* period was added as a separate period from the *Taqlīd* Period, which was put as the last period in the first generation of *Tārīkh al-tashrīʿ*.

Of the four examples of periodization models, it can be concluded

⁵³ al-Qaṭṭān, *Tārīkh al-Tashrīʿ il-islāmī*, pp. 23–4.

that history writing, including Fiqh, is not a neutral work. It is instead profoundly influenced by the spirit of the era. In the historiographical theory, this phenomenon represents the idealist school of historiography that carries the Idealism ideas formulated by Kant and Hegel. According to the Hegelian theory of history, the so-called «reality» is not the physical world, but *geist* (spirit of the age). In every age, there is a dominant idea or perception of reality or *thesis*.⁵⁴ In the case of early generation *Tārīkh al-Tashrī‘*, their thesis is about decline and *taqlīd*; whereas the later generation is about the beginning of *ijtihād* opening.

3. *The Object of History: From Human Subject to Islamic Law*

Dozens of *Tārīkh al-Tashrī‘* books share the same objects of discussion: Islamic law’s past and its development until the period of its respective authors. Summarizing the contents of *Tārīkh al-Tashrī‘* that he wrote, which represents the general contents of other *Tārīkh al-Tashrī‘* books, Manna al-Qattan says:

These are descriptions of the history of the development of law and Fiqh that cover relevant topics related to the development of Islamic law and its sources, schools of the Fuqaha, rules and methods adopted by each school, Mujtahids’ biographies and their thoughts related to the *dalil* analysis methods, and lawmaking practices. [This book also] examines the rise and development of Fiqh, effectual solutions it offers in dealing with problems in each era, which became the context of the rise and development of mankind, and became a milestone for a sophisticated civilisation, and underlaid the foundation of truth and justice.⁵⁵

Thus, according to al-Qaṭṭān, *Tārīkh al-Tashrī‘* literature discuss “relevant topics related to the development of Islamic law and its sources”. He breaks down the major theme in the following subjects:

- The schools of *Fuqahā’*.
- The rules and methods adopted by the respective schools.
- Mujtahids’ biographies and their thoughts related to the analytical methods of *dalīl* and approaches of lawmaking.
- The rise and development of Fiqh and how it deals with problems in each era.

⁵⁴ Stephen Davies, *Empiricism and History* (Basingstoke [etc.: Palgrave Macmillan, 2003), p. 39.

⁵⁵ al-Qaṭṭān, *Tārīkh al-Tashrī‘ il-islāmī*, p. 5.

Meanwhile, according to ‘Abdu’l-Hādī al-Faḍlī, *Tārīkh al-Tashrī‘* covers: *Dirāsatu tāriḳbil-ḳiḳbil-islāmī wa min ḳaitsu nusyu’iḳi wa taḳawnuriḳi*.⁵⁶ According to him, *Tārīkh al-Tashrī‘* studies the history of the formation and development of Islamic Fiqh, which includes the historical development and periodization, contexts that influence its development, centres of its evolution, the history of its schools, as well as the methods and sources of Islamic law according to the schools.

The attention to ‘historical development’ and its periodization appears in the earliest until latest generation of *Tārīkh al-Tashrī‘* literature. The example is *Tārīkh al-Tashrī‘* by Sulaymān al-Ashqar. In his book, the discussion is divided into six periods of the development of Fiqh then explained in terms of (1) General condition, (2) The problems faced by each period, (3) The rise and decline, (4) The sources of Islamic law in each period, (5) The efforts of scholars in developing Islamic law - such as Companion’s efforts to codify the Qur’an, next generations’ effort in the codification of Sunnah, and research methods to distinguish the valid, weak, and even false Sunnah.⁵⁷

Besides, some *Tārīkh al-Tashrī‘* books also discuss materials that are typically found in Fiqh and Usul Fiqh books. Al-Tha‘ālabī, for instance, discusses at length about sources of Islamic law such as al-Qur’an, Sunnah, al-Ijma, and al-Qiyas, as well as Fiqh materials such as prayer, alms, fasting, war, marriage, Hajj and all Fiqh books materials. Its difference with Fiqh books is that it discusses periods in which the laws were applied. For example, it can be cited in its discussion on Eid prayer and Zakat El Fitri.⁵⁸

4. *The Dawn of Oral Tradition?*

In addition to periodization, another important aspect that can be seen in the historiography of *Tārīkh al-Tashrī‘* is its historical sources. For the discipline of modern history, ‘source’ is the most important aspect in historiography. With the ‘source’ or ‘evidence’ history claims to have knowledge of human existence and action in the past although historians do not experience and witness the events first hand. *Tārīkh*

⁵⁶ al-Faḍlī, *Tārīḳhu’t-tashrī‘il-Islāmī*, p. 7.

⁵⁷ al-Ashqar, *Tārīḳhu’l-ḳiḳb al-Islāmī*, p. 6.

⁵⁸ al-Tha‘ālabī, *al-Fikru’s-sāmī fī tāriḳb al-ḳiḳb al-islāmī*, p. 85.

al-Tashrīʿ literature is not generally too strict in selecting its historical sources and, different from al-Masʿūdī's criteria above, they only use written sources. Oral sources used by al-Masʿūdī in his day to test and verify data, for example in a country or region he had never visited,⁵⁹ were not used by the authors of *Tārīkh al-Tashrīʿ*. The same case happens with the experimental method employed by al-Masʿūdī to test the variety of information related to natural phenomena. Both of these methods might be deemed irrelevant in the writing of *Tārīkh al-Tashrīʿ* given its object of study is specifically related to Allah and His Law. Thus, the only source that is used to reach the past is written source.

As mentioned earlier, in the discipline of modern history, a source is also usually divided into two: primary and secondary. *Tārīkh al-Tashrīʿ* literature, from this perspective, does not strictly use primary sources. Books that are considered authoritative in Islamic studies in general, such as books of Fiqh, Tafsir, a collection of Ḥadīth (such as al-Bukhari and Muslim), and Tarikh, Tabaqat, and Tarjamah books, are used regardless being classified as primary or secondary.

In the book *Tārīkh al-Tashrīʿ al-Islāmī* written by al-Khudari Bik, footnotes are not used, and sources are generally cited and only when necessary. Telling the story of the end of Revelation Period, Bik cites al-Tabari, but not his history books.⁶⁰ He instead cites his *tafsir* works. However, naturally, biographies, encyclopaedias, and Tarikh become reliable reference sources (although rarely are they mentioned directly by their title and author). On a reference to Imam Malik, for example, he cites the al-Waqidi's⁶¹ views without mentioning the exact work: «*Qāla al-Wāqidi wa ghayruhu: Kāna majlisu Mālik majlisa waqqārin wa ḥilmin wa kāna rajulan muḥibban nabīlan ...*»⁶² Modern readers will find it difficult in verifying such references.

Arab authors of the 19th and early 20th century in general, as their predecessors, had not or rarely used footnote techniques. In *al-Fiqh al-*

⁵⁹ Tarif Khalidi, *Islamic Historiography: The Histories of Masʿūdī* (SUNY Press, 1975), pp. 3–4.

⁶⁰ Bik, *Tārīkh al-Tashrīʿ al-Islāmī*, p. 7.

⁶¹ *al-Waqidi* | *Arabian historian* | *Britannica.com*, <https://www.britannica.com/biography/al-Waqidi>, accessed 1 Mar 2015.

⁶² Bik, *Tārīkh al-Tashrīʿ al-Islāmī*, p. 240.

Sāmi,⁶³ the 1990s edition, the editor adds notes to assist readers finding sources used by al-Tha‘ālabī. The original author, on the other hand, uses footnotes merely for clarifying some terms. As from the editor’s footnotes, Al-Tha‘ālabī, as well as Bik, also uses all written sources of Islamic studies literature as optimally as possible. The accuracy of the information seems to be not based on the contemporariness of a source (the concomitance of the document writing with the event), but rather on the authority of the source and author, as well as on how information from a written source can be verified by other written sources. The books of Tafsir, Ḥadīth, Fiqh and others, as long as relevant, are referred to as sources that are mutually reinforcing.

As a comparison, the tradition that uses sources loosely is different from modern historiography developed by orientalists. Orientalists working on the problem of *the origin of Islamic law*, which has the same object with that of *Tārīkh al-Tashrī‘*, take seriously the debates on sources, which are taken for granted in *Tārīkh al-Tashrī‘* literature. Joseph Schacht and his fellows orientalists developed a discourse on originality based on the search of primary sources.⁶⁴ The age of Islamic law and its time of creation are determined solely based on primary sources available, not only from secondary sources used in *Tārīkh al-Tashrī‘* literature.

Strict requirements, as demanded by the discipline of empirical history that develops in the West, were not easy or even impossible to attain if the object being studied is Islamic law. The extreme dilemma is: to write based on available sources, or not to write altogether. The most widely quoted statement regarding the Orientalist dilemma is what Harald Motzki wrote about the history of the Prophet Muhammad:

At present, the study of Muḥammad, the founder of the Muslim community, is apparently caught in a dilemma. On the one hand, it is not possible to write a historical biography of the Prophet without being

⁶³ al-Tha‘ālabī, *al-Fikru’s-sāmi fī tārikh al-fiqh al-islāmī*.

⁶⁴ Joseph Schacht, *The origins of Muhammadan Jurisprudence* (New York: American Council of Learned Soc., 2001); Joseph Schacht, *An Introduction to Islamic law* (Oxford [Oxfordshire: Clarendon Press, 2012]; David Stephan Powers and Arif Maftuhin, *Peralihan Kekayaan Dan Politik Kekuasaan: Kritik Historis Hukum Waris* (Yogyakarta: LKiS, 2001); Noel James Coulson, *A History of Islamic Law* (New Brunswick; London: Aldine Transaction, 2011); Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge [u.a.: Cambridge Univ. Press, 2011).

accused of using the sources uncritically, while on the contrary, when using the sources critically, it is simply not possible to write such a biography.⁶⁵

Tārīkh al-Tashrīʿ literature chose the former, which is to write based on available sources, and did not take into account the criticism of it being ‘not critical’ to the source. Even if being critical to sources were needed, indeed, Muslim criticism is different from Orientalists. For Muslim historians, Ḥadīth texts have already passed a rigorous selection process by experts. The validity of Ḥadīth texts has been the subject of criticism since the beginning of Islam until the trusted corpus *al-ḥadīth al-sittah* arose. The rationale is, if the Ḥadīth collection of al-Bukhari and Muslim can be accepted as valid sources of their religious doctrine and practice, why not for the ‘source’ of history?

The second extreme option, namely not to write, is not an option. Thus, the difference with Orientalists’ approach is perhaps only at the level of carefulness in using the sources that they classify as a secondary source. They kept writing and using the same sources used by historians of *Tārīkh al-Tashrīʿ*. In the bibliography of the Hallaq’s book, all Arabic literature was in fact classified as primary sources. However, compared to the authors of *Tārīkh al-Tashrīʿ*, Hallaq appears to be more selective. Prominent names such as al-Ṭabari and al-Wāqidī were not listed as primary sources, while three other historians, al-Baghdadī, Al-Dhahabī, and al-Dimasyqī were used as primary sources.⁶⁶ Until this paper is written, information about the reasons or criteria in the limited selection performed in Hallaq’s has not been found. The requirement to be critical to sources, as mentioned previously by Motzki, may be one of the explanations.⁶⁷

Because of ‘source’ dilemma as experienced by Orientalists was not experienced by authors of *Tārīkh al-Tashrīʿ*, the debate about the origins of Islamic law, whether from the 1st century or 2nd century Hijri, were not part of the discussion agenda of *Tārīkh al-Tashrīʿ* books. *Tārīkh al-Tashrīʿ*

⁶⁵ Solomon Alexander Nigosian, *Islam: its history, teaching, and practices* (Bloomington (Ind.): Indiana University Press, 2004).

⁶⁶ Hallaq, *The Origins and evolution of Islamic law*, p. 217.

⁶⁷ In hadith literature, Motzski mentioned there are four types of criticism commonly used by Orientalists until today: text criticism in *matn*, text criticism in hadith compilation books, *isnad* criticism, and criticism that combines *matn* and *isnad* criticism. See Harald Motzki, “Methods of Dating Muslim Traditions”, in *ISIM Newsletter 7/01*, 32.

literature is not hesitant in outlining the history of Fiqh from the time of Prophet Muhammad, believing the development of Fiqh as a practice since the time of Qur'an revelation, and putting the Prophet's Sunnah as the source of Islamic law before the emergence of the Islamic state.

E. Concluding Remarks

From the previous discussion, we can conclude that the influence of modern-Western historiography can be seen at least from the adoption of the idea of progress, the use of new models of periodization, and the use of less oral historical sources. However, it is not a strict adherence to the modern idea of historiography. Notably, the *Tārīkh al-Tashrī'* literature treats textual sources in a way less selective than Modern historiography requires. In addition to its similarity to modern Western historiography, their mission is also 'modern'; similar to that of modern Arab historiography. While Arab historiography seeks to revitalise Arab identity; *Tārīkh al-Tashrī'* strives to revitalise the *ijtihād* spirit. This mission can be seen from the way *Tārīkh al-Tashrī'* literature shapes periodization and the move to present Islamic law as the object of history instead of the great men of Islamic Law. These findings show that 'History' is always "a frame of mind, a way of thinking about human affairs." *Tārīkh al-Tashrī'* is a way to think about the contemporary situation during which the literature was written.

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