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Tahqiq Al-Manath As a Judicial Review Method: Comparison Between Constitutional Law and Islamic Law

Abstract

Tahqiq al-manath is a method of applying general legal rules to specific contextual cases. The tahqiq al-manath process is to determine the law based on its sharia sources, then examine the case or reality that will be faced before the law is enacted. Thus, tahqiq al-manath is the process of describing cases based on reality. This is because the main key in realizing the law lies in a deep understanding of reality. Therefore, with this paper, the author aims to study and initiate tahqiq al-manath as a method of Judicial Review in Islamic law and its contribution if adopted for constitutional law science. The findings in this study, the idea of the tahqiq al-manath method can be adopted for use by constitutional judges in testing laws against the 1945 Constitution. This research recommendation states that Tahqiq al-manath can be applied in deliberation meetings of constitutional judges to prevent decisions that are counterproductive to the value of the public interest and this can be implemented through constitutional conventions. This article uses a normative research methodology that focuses on document studies.

Keywords: Tahqiq Al-Manat; Judicial Review; The 1945 Constitution of the Republic of Indonesia; Islamic Law.

Introduction

Islamic law has points of contact and intersection with positive or conventional law. One of these similarities is the review process (muraja'ah) of the findings of Islamic legal products. Legal review (muraja'ah hukm) is important in order to create Islamic law that is progressive and dynamic and avoids stagnation (jumud), which is unhealthy for people's lives, so that its comprehensive and contextual side is manifested in solving the problems of a dynamic society. Ismail Kouksal stated that Islamic law is plenary and comprehensive (khasshah kamaliyah), touching every line of human life.[1] Ahmad al Khimlisi emphasized the need to carry out reviews of legal products discovered by ulama (Islamic muraja'ah

[1] Ismail Kouksal, *Taghayyur Ahkam Fi Syari'atil Islamiyah* (Beirut: Muassasah Risalah, 2000), 37–42.

fiqh) in a continuous manner in order to perpetuate Islamic values and align them with the dynamics of life.[2]

Several studies have discussed the tahqīq al-manāṭ methodology in an effort to review legal products and make Islamic law realistic, whether studied on a specific topic or just a conceptual discussion. First, the book entitled: Tahqīq al-manāṭ fi an Nawazil al Fiqhiyah al Mu'ashirah (The Establishment of the Effective Cause in Contemporary Islamic Law) by Salimah Thalhawi and Musthafa Baju.[3] This article is research conducting an academic review by explaining how tahqīq al-manāṭ is applied to contemporary issues, especially modern animal slaughter. This article discusses tahqīq al-manāṭ in an applied manner by explaining the views of classical fiqh as well as modern technical and industrial realities. The classical ulama legal product that is used as the basis for review is regarding the slaughter of an animal's neck from behind. The points discussed in this research are the definition and scope of tahqīq al-manāṭ, contemporary challenges in slaughtering law, analysis of modern technical practices in slaughtering and their conformity with sharia and the relevance of sharia principles in the context of changing times.

Second, the book entitled: Ma'alim Manhaj al Wasathiyah fi Fiqh at Tanzil (Features of the moderate methodology in applied Islamic jurisprudence) by Mustapha Liarboui.[4] This article discusses the principle of moderation (wasatiyyah) in the realization of Islamic law (fiqh tanzili). This article uses a qualitative approach with descriptive analysis of the concepts of wasatiyyah and tanzili fiqh. The main points in this article are, first, the definition of fiqh al tanzil and wasatiyyah. This article explains that fiqh al tanzil is a discipline that focuses on the application of sharia law in the context of contemporary reality, while wasatiyyah refers to a

[2] Ahmad al Khimlisi, *Jumud Ad Dirasah Al Fiqhiyyah: Asbabuhu at Tarikhiyah, Wa Al Fikriyah Wa Muhawalatul 'Ilaj* (Egypt: Dar Kalimah, 2010), 145.
[3] Thalhawi Salimah and Musthafa Baju, "Tahqiq Al Manath Fi an Nawazil Al Fiqhiyah Al Mu'ashirah," *Majallah 'ulum Islamiyah Wa Al Hadharah* 7, no. 1 (2022), https://doi.org/10.55781/rsic.v7i1.217.
[4] Mustapha Liarboui, "Ma'alim Manhaj Al Wasathiyah Fi Fiqh at Tanzil," *Dauriyah Nama' Li 'Ulum Wahyi Wa Dirasat Insaniyah*, no. 18 (2022), https://doi.org/10.59151/.vi18.199.

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moderate approach that avoids extremism. Second, the urgency of wasatiyyah in fiqh al tanzil as a balancing bridge so that the sacred text of Islamic law can be applied appropriately, contextually, and bring benefits to the world. This article emphasizes that moderation is important to ensure that Islamic law is applied fairly and is relevant in various contemporary contexts. Third, wasatiyyah principles in the application of law. Tahqīq al-manāṭ is a balance in establishing law in conceptual and factual aspects. Modern issues, such as economic, political, and social ones, require taḥqīq al-manāṭ as a process of reviewing legal products to achieve a balance between tradition and innovation. However, tahqīq al-manāṭ in this article is not applied to a specific topic, but methodologically tahqīq al-manāṭ is formulated as an element to avoid the formation of fatwas, rulings, or other Islamic legal products that are not extreme and liberal.

Third, Atsar Dirasah Al Haalah Al Ijtima'iyyah Fi Tahqiq Manath Al Ahkam Wa Tanziliha 'Ala Al Mukallafin:Dirasah Ushuliyyah Tathbiqiyyah (The Impact Of The Study Of The Social Situation In The Realization Of Al Sharia Provisions' Matters And Connecting Them With Mukalafin: An Applied Fundamentalist Study) by Ahmad Al Shroosh.[5] This article discusses qualitatively how the social conditions of society (halah ijtima'iyah) are important in examining legal products before they are applied to society. This research uses inductive logic in examining several classical Islamic legal products that were produced based on considerations of the social conditions of society (halah ijtima'iyyah) at that time. Consideration of the social conditions of society (halah ijtima'iyyah) is included in the urgent series of tahqīq al-manāṭ and is an element in reviewing the findings of Islamic law. Elements are classified as material review elements in order to realize laws that bring beneficial value. Apart from discussing this element specifically and conceptually, the author

[5] Ahmad Al Shroosh, "Atsar Dirasah Al Haalah Al Ijtima'iyyah Fi Tahqiq Manath Al Ahkam Wa Tanziliha 'Ala Al Mukallafin: Dirasah Ushuliyyah Tathbiqiyyah," *Dirasat* 50, no. 2 (2023), https://doi.org/10.35516/law.v50i2.1154.

also discusses the application of tahqīq al-manāṭ by emphasizing this element in it to examine legal products relating to mustahiq zakat and nominal wife maintenance.

Fourth, Tahqīq al-manāṭ bi al Haqaiq al 'Ilmiyah: Dirasah Ta'siliyah Tathbiqiyah (Investigation Of Scientific Facts: An Applied Fundamental Study) by Farah bint Fahd bin Hussein Al Khuraisi.[6] This article is qualitative research that discusses scientific clarification as an important element in the tahqīq al-manāṭ methodology. This article uses inductive logic in looking at several classical legal products produced on the basis of scientific research. Scientific clarification is formulated as a material element in tahqīq al-manāṭ, either in the process of pre-manifesting law or reviewing classical legal findings so that they can be applied in the present. This research, apart from discussing it conceptually, also applies this concept to several specific topics, namely the law regarding fasakh (annulment) of marriage due to infertility, consumption of vitamins, and marriage due to industrially packaged breast milk.

Fifth Askari Razak et.al;[7] ***Sixth***, Emy Hajar Abra and Rofi Wahanisa;[8] ***Seventh,*** David Bernstein;[9] ***Eighth***, Christoph Bezemek;[10] ***Ninth***, Monica Claes;[11] ***Tenth***, Ronald Faber;[12] and ***Eleventh*****,** Pan Mohamad Faiz.[13] The gap between this research

[6] Fahd bin Hussein Al Khuraisi, "Tahqiq Al Manath Bi Al Haqaiq Al 'Ilmiyah: Dirasah Ta'Siliyah Tathbiqiyah," *Majallah Kulliyah Syar'iyah Wa Qanun Tafhuna Asyraf* 28, no. 4 (2024), https://doi.org/10.21608/jfslt.2024.369559.
[7] Askari Razak et.al, "Balancing Civil and Political Rights: Constitutional Court Powers in Indonesia and Austria," *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 1311–60, https://doi.org/10.15294/jils.v8i2.70717.
[8] Emy Hajar Abra and Rofi Wahanisa, "The Constitutional Court Ultra Petita As a Protection Form of Economic Rights in Pancasila Justice," *Journal Of Indonesian Legal Studies* 5, no. 1 (2020): 187–224, https://doi.org/10.15294/jils.v5i1.35965.
[9] David Bernstein, "The Supreme Court and Civil Rights, 1886-1908," *The Yale Law Journal* 100, no. 3 (1990): 725–44.
[10] Christoph Bezemek, "A Kelsenian Model of Constitutional Adjudication - The Austrian Constitutional Court," *Zeitschrift Für Öffentliches Recht* 67 (2012): 115–28.
[11] Monica Claes, "Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure," *German Law Journal* 16, no. 6 (2015): 1331–42.
[12] Ronal Faber, "The Austrian Constitutional Court: An Overview," *ICL Journal* 2, no. 1 (2008): 49–53.
[13] Pan Mohamad Faiz, "The Protection Of Civil And Political Rights By The Constitutional Court Of Indonesia," *Indonesia Law Review* 6, no. 2 (2016): 159–79, https://doi.org/10.15742/ilrev.v6n2.230.

and the eleven previous studies is that none of the previous studies stated that tahqiq al-manath is a Judicial Review in Islamic Law and that the tahqiq al-manath method can be used by Constitutional Judges in testing laws against the 1945 Constitution.

From eleven previous studies, the author concludes that the originality of this study lies in the idea of the tahqiq al-manath method which is commonly used by Ulama to determine Islamic Law, both fatwas and non-fatwas, which can also be used by constitutional judges in testing laws against the 1945 Constitution. Tahqiq al-manath can be applied in deliberation meetings of constitutional judges to prevent decisions that are counterproductive to the value of public interest and this can be implemented through constitutional conventions.

Methods

This analysis uses a normative legal research method with a qualitative orientation.[14] The normative legal research involves analysing deductive conclusions derived from statements found in data sources such as library materials (e.g., laws and court decisions)[15] or secondary data as its sources (e.g., journals, books, expert opinions, documents and legal theories) that are relevant to the topics discussed in this paper.[16] The utilised approaches encompass statutory, cases and

[14] Abd Wachid Habibullah et.al, "Actualization of Public Service Principles by the Ombudsman of the Republic of Indonesia," *Journal of Indonesian Constitutional Law* 1, no. 2 (2024): 126–39, https://doi.org/10.71239/jicl.v1i2.30.
[15] Bambang Sumantri et.al, "Fulfillment of the Constitutional Rights for Persons with Intellectual Disabilities in General Elections," *Journal of Indonesian Constitutional Law* 1, no. 3 (2024): 176–89, https://doi.org/10.71239/jicl.v1i3.28.
[16] Ousu Mendy, "Constitutional Amendments in Indonesia: An Analytical Perspective of the Reformation Agenda," *Journal of Indonesian Constitutional Law* 2, no. 3 (2025): 406–25, https://doi.org/10.71239/jicl.v2i3.201.

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conceptual.[17] This study uses a prescriptive-analytical approach, where qualitative research methods are used to synthesise data and draw conclusions.[18]

Discussion

Tahqīq al-Manāṭ as a Review Instrument: Essence, Understanding and Basics

Abdullah bin Bayyah identified tahqīq al-manāṭ as muraja'ah or review:[19]

إنَّ هذه الأمة بحاجة ماسة بل في ضرورة حاقة لمراجعة مضامين شريعتها في كليها وجزئيها؛ لتعيش زمانها في إنَّ المراجعة يسر من أمرها وسلاسة في سيرها، في مزاوجة بين مراعاة المصالح الحقة ونصوص الوحي الأزلية. ليست مرادفة للتراجع

Means: "*In fact, this ummah needs, even in an emergency, a review (muraja'ah) of the contents of the Shari'a, whether in a universal or partial order, so that this ummah can live in their time easily while being able to collaborate in maintaining real benefits with the original revealed texts. Muroja'ah is not the same as taraju' (merely turning over the pages of an old manuscript).*

Legal review is termed "muraja'ah" in authentic Islamic legal literature. The application can be in the form of legal reviews in academic settings, legal reviews, and judicial reviews. The authoritative application of judicial review is reflected in Umar bin Khattab's message to Abu Musa Asy'ari—the governor and judge in Basrah, Umar bin Khattab's caliphate—in the Amir's Decree, which is the basis for judicial review of Islamic law decisions. In the early days before Islamic laws were constitutional, the Islamic government adhered to a common law system within the framework of a sect, even now, so that every product of the legal findings of previous

[17] Putra Perdana Ahmad Saifulloh et.al, "Political Dynasties in General Elections According to Human Rights and A Comparison in Four ASEAN Countries," *Trunojoyo Law Review (TLR)* 7, no. 1 (2025): 123–60, https://doi.org/10.21107/tlr.v7i1.28492.
[18] Antony et.al, "Legal Reform in Indonesia's Response to the Digital Manipulation Era: A Responsive Legal Theory Approach," *Trunojoyo Law Review (TLR)* 8, no. 1 (2026): 1–26, https://doi.org/10.21107/tlr.v8i1.30732.
[19] Abdullah bin Bayyah, *Al Ijtihad Bi Tahqiqil Manath: Fiqh Waqi' Wa Tawaqqu'* (Saudi Arabia: Muassasah Thabah, 2014), 2.

scholars and judges becomes a reference and is always corrected.[20] It is written in Umar bin Khattab's letter as follows:[21]

وَلَا يَمْنَعَنَّكَ قَضَـاءٌ قَضَـيْت بِهِ الْيَوْمَ فَرَاجَعْت فِيهِ رَأْيَك وَهُدِيت فِيهِ لِرُشْـدِك أَنْ تُرَاجِعَ فِيهِ الْحَقَّ، فَإِنَّ الْحَقَّ قَدِيمٌ، وَلَا يُبْطِلُهُ شَيْءٌ، وَمُرَاجَعَةُ الْحَقِّ خَيْرٌ مِنْ التَّمَادِي فِي الْبَاطِلِ

Means: "*And don't ever be held back by the decisions you take today, so that you don't review (muraja'ah) your opinion and be guided by your intelligence to review it towards the truth. Truth is absolute; nothing can cancel it, and reviewing the truth is much better than persisting in error*".

Tahqīq al-manāṭ is a systematic contemporary development method (taushi') for reviewing Islamic law in order to produce innovative Islamic law. The concept of tahqīq al-manāṭ itself was basically not prepared for legal review but to strive for pragmatic and effective implementation of the law. Etymologically, tahqīq al-manāṭ is formed from two word elements, namely tahqīq (تحقيق) and *al-manāṭ* (المناط).[22] *Tahqīq is a derivation of the word haqq* (حق) which means decree and determine. Meanwhile, manāṭ is a derivative of the word nauth (نوط) which means hanger or backrest.[23] In terms of terminology, Bin Bayyah explained that tahqīq al-manāṭ is an instrument for realizing law (tanzil hukm) into reality. The term "tanzil" or "tathbiq" (in some literary uses) refers to a dialogue between the world of ideas and the world of reality. Balqam quoted Ash Syathibi's words in the book Al Muwafaqat that law is an empty idea that is still general and does not contain a specific scope.[24] Thus, Bin Bayyah emphasized that the process of tahqīq al-manāṭ lies in contextualizing sharia law to real cases by paying attention to external existence before the law was revealed. Ali Al Abyari stated that tahqīq al-manāṭ does not only lie in the process of

[20] Muhammad bin Ali asy Syaukani, *Al Qoul Mufid Fi Adillah Ijtihad Wa Taqlid* (Kuwait: Dar Qolam, 1396), 45.
[21] Ibnul Qayyim al Jauziyah, *I'lamul Muwaqqi'in 'an Rabbil 'Alamin* (Beirut: Dar Kutub Ilmiah, 1991), 86.
[22] Muhammad ibn Manzhur al Anshari, *Lisan Al 'Arab, Vol. 10* (Beirut: Dar Shadir, 1994), 49.
[23] Hasan bin Muhammad al 'Atthar, *Hasyiyah Al 'Atthar "Ala Syarh Jam" Al Jawami,' Vol. 2* (Beirut: Dar Kutub Ilmiah, n.d.), 237.
[24] Balqam bin Dzakir az Zabidi, *Al Ijtihad Fi Manath Hukm Syar'i: Dirasah Ta'siliyah Tathbiqiyah* (Riyadh: Markaz Takwin li Dirasatw a Abhats, 2014), 7-8.

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contextualizing the law but also in ensuring the truth and validity of the law itself as an idea.[25] However, with the common law tradition that is entrenched in Islam, as well as the dynamics of contemporary issues that are increasingly sophisticated and complex, it is inevitable that tahqīq al-manāṭ is used to review previous Islamic legal products, as well as the latest legal products before they are implemented in reality.

1. Scope of *Tahqīq al-Manāṭ*

Islamic law in the methodological study of the discovery of contemporary Islamic law (ushul fiqh) has experienced a definitive expansion. Assessing contemporary Sharia law issues can be done through 3 perspectives; First, this issue is explicitly stated in the texts of the Koran and Sunnah. Second, this issue does not conflict with the universal principles presented by the Koran and Sunnah. Third, this issue has values that are in accordance with the values conveyed by the Al-Qur'an and Sunnah.[26] Sheikh Ali al Jumu'ah stated that all activities and products in this world cannot be separated from the Shari'a in substance, even though they may not emerge from the Shari'a in nomenclature.[27] On this basis, tahqīq al-manāṭ is not only carried out on laws extracted directly from the Al-Qur'an and Sunnah, but conventional legal products can also be reviewed using tahqīq al-manāṭ. This is because conventional law has sharia legal propriety to be studied in substance. Balqam az Zabidi stated the following:[28]

الاجتهاد في المناط يشمل جميع الأحكام الشرعية

Meaning: "ijtihad using tahqīq al-manāṭ touches all forms of sharia law".

Islamic law in an empirical order has developed in formation from time to time. Firstly, Islamic law is only an academic result of unidirectional interpretation of the text of the Shari'a, which is taught in halaqahs and written in books; then this

[25] Ali bin Ismail al Abyari, *At Tahqiq Wa Al Bayan Fi Syarh Al Burhan Fi Ushul Fiqh, Vol. 3* (Kuwait: Dar Dhiya', 2013), 20.
[26] Afifuddin Muhadjir, *Negara Kesatuan Republik Indonesia (NKRI) Dalam Timbangan Syariah (Kajian Pancasila Dari Aspek Nushūsh Dan Maqāshid)* (Semarang: UIN Sunan Wali Songo Semarang, 2021).
[27] Ali Jumu'ah, *Sejarah Ushul Fiqh: Histori Ilmu Ushul Fiqh Dari Masa Nabi Hingga Sekarang (Terjemahan)* (Depok: Keira, 2018).
[28] Balqam bin Dzakir az Zabidi, *Al Ijtihad Fi Manath Hukm Syar'i: Dirasah Ta'siliyah Tathbiqiyah, 7*.

idea is pragmaticized into a fatwa, which is non-legally binding, as Ibn Nujaim defines fatwa as a dialogical process of the text of the Shari'a and reality.[29] The format of Islamic law can be legally binding if it takes the form of a judge's decision (qadha'). And the most recent is Islamic law, which is codified and legislated (taqnin) into a binding law (qanun), such as the Majallah al-Ahkam al-Adaliyyah, which was implemented in Turkey (Ottoman) and its ruling countries from the 13th century to the 20th century.[30] Apart from this dynamic, we can understand that the review of Islamic law applies to every finding of legal product, so that tahqīq al-manāṭ can touch all formats of Islamic law, including judge decisions and the constitution. Likewise, Islamic law review actually does not have a special authoritative institution other than integrity in carrying out ijtihad. It is well known that Imam Syafi'i once carried out his own judicial review of several Islamic legal products he discovered when he moved from Baghdad to Egypt, so that the terms qoul qadim (Baghdad legal products) and qoul Jadid (Egyptian legal products) emerged.[31]

Qaul qadim and qaul jadid are collections of fatwas, not one or two fatwas. It is true that the term "aqwal," which has a plural meaning, should be used, but for some reason this term has stuck, so it has become commonplace to simply be called "qaul qadim" and "qaul Jadid." Qaul qadim is the opinion of Imam al-Syafi'i, whofirst issued a fatwa when he lived in Baghdad, Iraq (195 AH), after he was given the authority to give a fatwa by his teacher, namely Sheikh Muslim bin Kholid (a great scholar who became mufti in Mecca) and Imam Malik (the founder of the Malikiyah school, who first had the initiative to collect hadith in the book of Sunnah).[32] Meanwhile, qaul Jadid is the opinion of Imam al-Syafi'i when he lived in Egypt, who

[29] Ibnu Nujaim al Mishri, *Asybah Wa Nazhair Li Ibni Nujaim* (Beirut: Dar Kutub Ilmiah, 1999), 336.
[30] Yusuf Ahmad Al-Badawy, *Madkhal Al-Fiqh Al-Islamy Wa Ushuluhu* (Oman: Dar Hamid, 2008), 368-371.
[31] Ahmad al Khimlisi, *Jumud Ad Dirasah Al Fiqhiyyah: Asbabuhu at Tarikhiyah, Wa Al Fikriyah Wa Muhawalatul 'Ilaj, 77*.
[32] Yulia Rahmi et.al, "Qaul Qadim and Qaul Jadid: A Sociological Review On The Evolution Of Islamic Law," *Al-Hurriyah : Jurnal Hukum Islam* 9, no. 2 (2024): 143–58, https://doi.org/10.30983/al-hurriyah.v9i2.8637.

saw the social phenomena occurring in society at that time by updating and rewriting his old opinion when he was in Iraq.[33]

2. Tahqīq al-manāṭ Methodology and Its Application as a Judicial Review

Al Abyari revealed that tahqīq al-manāṭ is not only a process of legal contextualization but also validation of the truth of legal ideas. This is confirmed by Asy Syathibi's statement in the book Al Muwafaqat, as quoted by Balqam:[34]

عرَّفه الشاطبي بقوله: أن يثبت الحُكْم بمُدْرَكِه الشرعي لكن يبقى النظر في تعيين محلِّه

Meaning: "Asy Syathibi defines tahqiq al manat as a process of ascertaining the law from its Sharia sources, but it still requires reflection in determining the case."

Balqam stated that based on this definition, there are two aspects to the technical tahqīq al-manāṭ: firstly, it is related to the process of istinbath, or legal extraction from syar'i propositions. Second, related to the process of understanding the cases and issues faced. This is more appropriate because viewing tahqīq al-manāṭ etymologically means ensuring legal support, both ensuring the formation of ideas and the contextualization of ideas. The first can be done through the methodology of discovering Islamic law (ushul fiqh) in its examination.[35] This part can be called a formal test in tahqīq al-manāṭ. While the second concerns the spirit of the Shari'a, the maqashid of the Shari'a (the aims of the Shari'a), legal philosophy, and benefits. This part can be called a material test in tahqīq al-manāṭ.[36] However,

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[33] Nawirman et.al, "Sociological Factors Of Imam Syafi'is Qaul Qadim And Qaul Jadid," *Al-Afkar, Journal For Islamic Studies* 6, no. 4 (2023): 321–33, https://doi.org/10.31943/afkarjournal.v6i4.739.

[34] Balqam bin Dzakir az Zabidi, *Al Ijtihad Fi Manath Hukm Syar'i: Dirasah Ta'siliyah Tathbiqiyah, 238–39*.

[35] This conclusion aligns with the definition of formal testing itself, namely the assessment of the conformity of legal or statutory legislative procedures with those stipulated in applicable laws and regulations. In Islamic law, ushul fiqh is a procedural methodology recognized by scholars in the formation of law (in any format). Abdul Karim an Namlah stated,:

موضوع أصول الفقه: هو الأدلة الإجمالية الموصلة إلى الأحكام الشرعية العملية وأقسامها، واختلاف مراتبها وكيفية أخذ الأحكام الشرعية على وجه كلي

This means: "the objects of ushul fiqh are global sources that lead to applicable sharia law and its division, hierarchical differences in sharia law, and conceptual procedures (kayfiat) for producing sharia law." See Abdul Karim al Namlah, *Al Jami' Li Masail Ushul Fiqh Wa Tathbiqatuha 'ala Mazhab Rajih* (Riyadh: Maktabah Rusyd, 2000), 13.

[36] This aligns with the definition of material testing itself, which examines the hierarchical conformity of the substance of norms. In tahqiq al-manath, the dominant focus of the study is on discovering

formal tests in tahqīq al-manāṭ in many practices are very rarely carried out. Generally, legal products are trusted through procedural stages that are formulated because there is a tradition of khasyyah (fear) in the souls of every cleric in the Islamic world, unless the credibility and integrity of the cleric is in doubt. However, in general, the two parts of the formal test component are the main elements of the science of ushul fiqh, namely qawa'id ushuliyyah lughawiyah (textual ushul rules) and qawa'id ushuliyah tasyri'iyah (legislative ushul rules).[37] Therefore, both the concept and application of tahqīq al-manāṭ also have similarities with the concept of material testing and legal contextualization in Judicial Review, as stated by Abdullah Bin Bayyah, namely:[38]

فعملية تحقيق المناط عبارة عن البحث عن الواقع وملاحظة هذا الواقع حتى نطبّق عليه حكم الاصل

Meaning: "Then the application of tahqīq al-manāṭ (becomes) a term for studying reality and paying attention to this reality so that we can implement the law from the source (Islam)."

Because of the emphasis on tahqīq al-manāṭ put forward by Bin Bayyah, as well as the breadth of the formal test methodology, the author focuses on the important points in tahqīq al-manāṭ, namely the subject of material testing. Samirah Ghali, in her dissertation, fully formulated the methodology for material testing in the concept of tahqīq al-manāṭ. In the results of his research, tahqīq al-manāṭ has three main points (ushul 'ammah), namely complete identification (tashawwur) of

laws that embody the primary objective of sharia (God), namely, human welfare. Asy Syathibi explains in his book al-Muwafaqat the importance of the material aspect in legal discovery:
إنه لا يكفي النظر في هذه الأدلة الجزئية دون النظر إلى كليات الشريعة، وإلا؛ لتضاربت بين يديه الجزئيات، وعارض بعضها بعضا في ظاهر الأمر، إذا لم يكن في يده ميزان مقاصد الشارع، ليعرف به ما يأخذ منها وما يدع
This means: "Indeed, it is not enough to only look at partial sources of law without looking at the universal values of sharia, otherwise, partial laws will be chaotic, and contradict each other, because in the hands (of the inventor of the law) there is no balance of maqashid sharia (the goals of sharia), so that he can know which should be taken and which should be left behind." See Ibrahim asy Syathibi, *Al Muwafaqat, Vol. 6* (Saudi Arabia: Dar Ibn Ghatafan, 1997), 6.

[37] Abdul Wahab Khalaf, *Ilm Ushul Al-Fiqh* (Beirut: Daar al-Kutub al-'Ilmiyah, 2010), 173.

[38] Abdullah bin Bayyah, *Al Ijtihad Bi Tahqiqil Manath: Fiqh Waqi' Wa Tawaqqu', 7*.

the real cases faced, configuration of fiqh (takyif fiqhi), and legal realization (tanzil ahkam):[39]

1. *Tashawwur*. Complete identification of the case at hand is termed "tasawwur." Tashawwur means producing a picture of a case in reason and finding its essence (mahiyah) without giving laws. Imam al-Baqillani stated that most legal errors start from errors in identifying the problem correctly. Tashawwur has two stages; first, tasawwur fi dzatiha, namely describing the essence of the problem clearly. This can be achieved if all information regarding the case is captured, the case is analyzed in certain elements, and experts are referred to. Second, tasawwur ma yuhitu biha, namely looking at the external factors of the case at hand. This can be achieved in several ways, namely going into the field (mu'ayasah) with observation tools (mulahazhat), interviews (muqabalah), questionnaires (istibyan), or statistics (ihsha').
2. *Takyif fiqhi*. According to Uthman Syabir—quoted by Samirah Ghali—takyif fiqhi is an adjustment to a case that has been identified on the basis of its fiqh, which has been specified by Islamic jurisprudence with the provisions of fiqh as well. This is intended to provide these provisions to the phenomenon being studied when it is ensured that there is homogeneity between the basis of jurisprudence and the essence of the phenomenon. The emphasis of this section is on inventorying the basis of Islamic law and its enabling provisions and configuring them with case law findings. This section is closely related to formal tests but does not discuss legal discovery procedures. The case law found will be ensured in accordance with the text of the Shari'a, ijmak, rules of fiqh, and maqashid of the Shari'a, which are in accordance with it.
3. *Tanzil ahkam*. This section pays attention to how the law looks when it has been converted from an idea ('ulu) to a reality (nuzul). There is a process of "lowering" in this section, so it is called tanzil (lowering). There are two steps that need to be studied during the tanzil ahkam process: first, ensuring the reach of maqashid sharia law when it will be implemented. Second, predicting the impact of the law in the long term (ma'alatul af'al). The first step is carried out by comparing the benefits and mafsadat that the legal object will receive, while the ma'alatul af'al stage compares the current impact with the long-term impact. The process of predicting legal impacts must not be based on conjecture (wahm) or guesswork (iftiradhiyat). In fact, this prediction is not the same as anticipation (istibaq). What must be considered in predictions are the elements, events, and empirical changes that become future risk variables (probability theory).

[39] Samirah Ghali, *Al Ijtihad Bi Tahqiq Al Manath Wa Atsaruhu Fi Taujih Fatawa Al Mu'ashirah* (Syria: Muassasah Risalah, 2019), 222-257.

Salim Sarar, in his dissertation, stated that predicting the impact of the law is the final stage of testing the law, whether the law is suitable to be implemented or not.[40] From here we can see the difference with conventional legal judicial review, that the judicial review of conventional legal review lies in the takyif fiqhi section, as well as the basis of fiqh, which is not only in the sources of sharia but also the maqashid of sharia and legal philosophy. Apart from that, Islamic law requires a specific study of the case at hand and consideration of benefits in the short and long term.

In legal science doctrine, judicial review has two models, namely judicial review in the field of courts and judicial review in the field of constitution. These two models of judicial review have been carried out in the history of Islamic law. It was recorded in Islamic history that, during the time of the Prophet Muhammad and Abu Bakar as Siddiq, all legal policies were made by the state leader. The Caliph is an executive, legislative, and judicial institution.[41] One of the policies of the Islamic caliphate, which became the ruling of the caliph as well as the law at that time, was the status of war booty land, which had to be distributed equally among the army as ghanimah. This policy was based on the Al-Qur'an surah Al Anfal verse 41. Then during the time of Umar bin Khattab, this policy was reviewed and resulted in a different policy. Umar bin Khattab did not question the formal aspects of previous policies because the founder was Rasulullah. However, regarding the material aspects, namely geopolitical dynamics and public benefit, Umar revised the policy. This happened right after the Khaibar War occurred. The Khaibar land, which based on the previous policy had to be distributed to the soldiers, was not implemented by Umar bin Khattab based on material test considerations; first, the geopolitical situation of Islam, which is increasingly widespread due to invasion, means that every new land must be guarded, while the number of Muslim communities is not

[40] Salim Sarar, *Nazhariyah Ruh Tasyri' Wa Atsaruha Fi Istinbath Wa Tathbiq Ahkam* (Algeria: University Haj Lakhdhar of Bathna, 2019), 863.
[41] Nashir bin 'Aqil ath Tharifi, *Al Qadha' Fi 'Ahd Umar Bin Khattab* (Riyadh: Maktabah Taubah, 1994), 341.

balanced with the size of the country's land. Second, a fiqh configuration that does not only look at Surah Al Anfal verse 41 as a reference but also needs to look at the universal values brought by Islam, namely the power of leaders in managing state assets on the basis of benefit. Third, consideration of the general benefit of citizens—Muslims and non-Muslims—as well as the long-term impact of making the land of Khaibar a ghanimah, namely that there will be land left unmanaged and the emergence of feudalism in the structure of society. On the basis of these 3 material tests, Umar reviewed the old policy and revised it into a new policy.[42] According to the author, based on the practices that were carried out during the reign of the Prophet Muhammad SAW and the Khulafaur Rasyidin, tahqiq al-manath fulfills the requirements to be considered as a method of judicial review in Islamic law.

3. **Judicial Review in Constitutional Law**

Based on historical tracing carried out by Mauro Cappelletti, the concept of judicial review began in the Ancient Greek legal system, which stipulated that the content and form of psephisma must not conflict with nomoi; in other words, lower regulations must not conflict with the value of regulations above them. The idea of judicial review is to purify the legislative products produced by lawmakers.[43]

Related to this idea, Hans Kelsen, in his book: "*General Theory of Law and State*," argued that the judiciary has the authority to declare a lower-level regulation contrary to a higher-level regulation. Therefore, the idea of judicial review continues to develop, especially after John Marshall coined the term "judicial review.". Meanwhile, in its institutionalization, Hans Kelsen is known as the pioneer of the establishment of the first Constitutional Court. In Kelsen's terms, the legislative process "recognized the need for an institution with the power to control or regulate legislation.".”[44]

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[42] Fathi ad Darini, *Al Manahij Al Ushuliyyah Fi Ijtihad Bi Ra'yi Fi Tasyri' Islami* (Beirut: Muassasah al-Risalah, 2013), 141-142.
[43] Saldi Isra, *Pergeseran Fungsi Legislasi Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* (Jakarta: PT. Rajagrafindo Persada, 2010).
[44] John Ferejohn, “Constitutional Review In The Global Context,” *New York University Journal Of Legislation And Public Policy* 6 (2002): 49–59.

Hans Kelsen further emphasized that the judiciary has the authority to cancel a law or declare a law not legally binding. In carrying out this function, the holder of judicial power acts as a negative legislator. Hans Kelsen added as follows:[45]

> *The power to examine the laws as to their constitutionality and to invalidate unconstitutional laws may be conferred, as a more or less exclusive function, on a special constitutional court... The possibility of a law issued by legislative organ being annulled by another organ constitutes a remarkable restriction of the former's power. Such a possibility means that there is, besides the positive, a negative legislator. An organ which may be composed according to a totally different principle from that of the parliament elected by the people.*

It is this idea that then establishes the inevitability of the existence of special powers to control the results of legislation issued by the legislative body. Later, this idea was read by Bojan Bugaric as Hans Kelsen's attempt to create a positive legislature, which was played by parliament, while the negative legislative model was played by the Constitutional Court.[46] With this model, it means that the Constitutional Court becomes a part that can influence the legislative process in the legislative body. In this regard, Anna Rotman confirms Hans Kelsen's view because its decisions have the power "to make a statute disappear from the legal order".[47] Still referring to Hans Kelsen's opinion, when the constitutional court is a negative legislator, then the parliament that produces laws is called a positive legislator. In this sense, not only parliament has a legislative function but also the constitutional court.[48]

Explaining the significance of judicial power in the legislative process, Vicky C. Jackson and Mark Tushnet state that when constitutional judges review the results of the legislative process, their decision-making process is closer to that of

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[45] Hans Kelsen, *General Theory of Law and State* (New Jersey: Transaction Publishers, 2006), 268-269.
[46] Bojan Bugaric, "Courts as Policy-Makers: Lessons from Transition," *Harvard International Law Journal* 42, no. 1 (2001): 247–88.
[47] Anna Rotman, "Benin's Constitutional Court: An Institutional Model for Enforcing Human Rights," *Harvard International Law Journal* 17 (2004): 286.
[48] Gustavo Fernandes de Andrade, "Comparative Constitutional Law: Judicial Review," *U. Pa. J. Const. L* 3 (2001): 977–89, https://doi.org/https://scholarship.law.upenn.edu/jcl/vol3/iss3/6.

the legislative body. Furthermore, given the importance of judicial review in the legislative process, Vicky C. Jackson and Mark Tushnet refer to it as a third chamber in the legislative process. This is emphasized as follows: *As a description of function, constitutional courts exercising politically initiated abstract review can be conceptualized profitably as a third legislative chambers whose behavior is nothing more or less than the impact –direct and indirect-- of constitutional review on legislative outcomes.*[49]

Thus, overall the concept of judicial review is very closely related to legislative mechanisms. Theoretically, the concept can be considered as a replacement for the need for other chambers in the legislative body. Its existence is very clear as a counterweight to legislative products both after being approved by the legislative body and after being passed into law. In addition, judicial review is a guarantee for the people of legislative results that deviate from the people's fundamental aspirations.[50] Therefore, judicial review is an external control tool in the legislative process.[51]

Hans Kelsen's main thoughts on the Constitutional Court in Austria[52] have influenced the "way" of law in many countries,[53] namely regarding the purification of the legislative process or the formation of laws through Judicial Review. [54] According to Lars Vinx, Pure Legal Theory is a path that brings together Legal Naturalism and Legal Positivism. Control in the form of judicial review is a necessity, especially if the majority in the legislative body are supporters of the president. This

[49] Vicki C Jackson and Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999), 706.
[50] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Court in Asian Case* (Cambridge: Cambridge University Press, 2003), 2.
[51] Po Jen Yap (Ed), *Judicial Review of Elections in Asia* (London: Routledge, 2016).
[52] Edwin W Patterson, "Hans Kelsen and His Pure Theory of Law," *California Law Review* 40, no. 1 (1952): 5–10.
[53] Saldi Isra et.al, *Perkembangan Pengujian Undang-Undang Di Mahkamah Konstitusi (Dari Berfikir Tekstual Ke Hukum Progresif)* (Jakarta: Setjen, dan Kepaniteraan Mahkamah Konstitusi RI Bekerja Sama Dengan Pusat Studi Konstitusi (Pusako) Fakultas Hukum Universitas Andalas, 2010), 1.
[54] Saldi Isra, "Purifikasi Proses Legislasi Melalui Pengujian Undang-Undang," *Jurnal Legislasi Indonesia* 7, no. 1 (2010): 109.

means that judicial review can be said to be a means of purifying laws produced by legislative institutions. This is what Hans Kelsen said: "recognized the need for an institution with power to control or regulate legislation." The basic idea is to purify the results of legislation issued by legislative institutions that are contrary to the constitution.[55] Without control from the judiciary, with strong political interests in the legislature, it is very possible for laws to be detrimental to society. Thus, the presence of the Constitutional Court, which is given the authority to conduct judicial reviews directly, has influenced the legislative process in Indonesia. In this way, the Constitutional Court has become a controller for legislative power in the event of possible errors, both formal and substantial, in the legislative process.[56]

According to Leonard W. Levy, the concept of judicial review began when anger arose from a member of the United States Congress. “Judicial review is a usurpation of authority!” shouted Richard Dobbs Spaight. This cry was later noted by Levy as the beginning of the emergence of the concept of judicial review. Spaight's outcry in 1787 was a sign of his rejection of the justices' proposal that Congress' decision could be amended. By Spaight, this concept is considered to usurp Congress' power.[57]

An event that is also best known in the history of judicial review is what was done by John Marshall, Chief Justice of the United States Supreme Court. He canceled the Judiciary Act of 1789 because its contents were deemed to be contrary to the United States Constitution. The reason given is that judges have been sworn in to uphold the constitution, so if there are regulations that are deemed to conflict with the constitution, then the judge must carry out a review of these regulations. The second reason put forward by Marshall is that the constitution is the supreme law

[55] Lars Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2009), https://doi.org/10.1093/acprof:oso/9780199227952.001.0001.
[56] Lars Vinx, “Hans Kelsen and the Material Constitution of Democracy,” *Jurisprudence* 12, no. 4 (2021): 466–90, https://doi.org/10.1080/20403313.2021.1921493.
[57] Edward S Corwin, “Marbury v Madison and the Doctrine of Judical Review Marbury v Madison and the Doctrine of Judical Review,” *Michigan Law Review* 12 (1914): 538–72, https://repository.law.umich.edu/mlr/vol12/iss7/2.

of the land, so there must be an opportunity to test the regulations under it so that the contents of the constitution are not violated. The next reason is that judges cannot reject cases, so that if someone requests a judicial review, then that request must be fulfilled.[58]

What Marshall decided was related to a case involving William Marbury against James Madison. This case began at the end of President John Adams' administration. Adams' successor was Thomas Jefferson, who defeated him in the election of 1800. During the transition period before handing over the presidency, Adams then made letters of appointment to appoint judges and ambassadors. Among those appointed were William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper. Meanwhile, John Marshall, who at that time served as Supreme Court Justice and Presidential Secretary, also helped prepare the letters. Unfortunately, the letter was not handed over as it should have been. The next day, when President Thomas Jefferson went to work, the letter was still in the presidential office. The letter was eventually retained by James Madison, whom Thomas Jefferson appointed as Secretary to the Presidency, replacing John Marshall. The basis for withholding this letter then became the root of the problem and led Marbury to file a lawsuit at the Supreme Court. Basically, the appointment letter has been approved by Congress and has received an official presidential seal.[59]

Marbury and his friends, through their attorneys, argued that the Supreme Court had the right to decide on the case they submitted and issue the appointment letter. The legal basis was the Judiciary Act of 1789. However, this was rejected by the Jefferson government. Instead, Congress, controlled by Republicans who sided

[58] Eric J Beckerman, "Great Ironies of History: The Peculiar Historic Fable of Marbury v. Madison," *Hofstra Law Student Works* 5 (1990): 1–42, https://scholarlycommons.law.hofstra.edu/hofstra_law_student_works/5.
[59] Wolfgang Hoffmann-Riem, "Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe," *German Law Journal* 5, no. 6 (2004): 685–701, https://doi.org/10.1017/S2071832200012797.

with Jefferson, passed a law. Its contents are to freeze all trials conducted by the Supreme Court for one year.[60]

Despite this, the trial was still held. In its decision written by Marshall himself, the Supreme Court confirmed that the decree was valid. This means that the letter of appointment issued by John Adams was legally valid. Marbury and his friends have the right to occupy the positions in question. However, according to its decision, the Supreme Court does not have the authority to order government officials to hand over the letter. The Supreme Court also rejected the plaintiff's request for the Supreme Court to issue a decision letter as a replacement for the decision letter issued by former President Adams. The reason is that the decision letter originating from the mandate of section 13 of the Judiciary Act of 1789 is considered to be contrary to Article II, Section 2 of the United States Constitution. This basis was the beginning of the emergence of the concept and practice of judicial review. In this case, Marshall also stated that all laws made by Congress, if they conflict with the Constitution as "the supreme law of the land," must be declared invalid.[61]

Judicial review provides a mandate for the judiciary to carry out assessments. This organ can completely remove laws that are deemed unconstitutional so that the law cannot be implemented by other organs. On the other hand, if the organ does not cancel it, then it can still be said to be valid. The form of supervision carried out on regulations issued by representative institutions, in this case the legislature, can be considered as a reflection of the "checks and balances" mechanism. In contrast to the principle of "separation of powers," which reflects a rigid separation of powers,

[60] Robert F Nagel, "Marbury v. Madison and Modern Judicial Review," *Wake Forest Law Review* 38 (2003): 613–33, https://scholar.law.colorado.edu/faculty-articles/537.
[61] William W Van Alstyne, "A Critical Guide To Marbury V. Madison," *Duke Law Journal* 1969, no. 1 (1969): 1–47.

the principle of "checks and balances" analyzes more the process of monitoring and balancing power and is not a principle of rigid division.[62]

The initial proposal regarding the judicial review of laws in Indonesia was during the second session of the Indonesian Preparatory Committee for Independence (BPUPKI) on July 11, 1945. M. Yamin's primary points were the need for the Supreme Court or High Court to act as a comparator of legislation to determine whether or not they were in accordance with the Constitution. Then, during the Large Meeting of the Investigating Committee for Preparatory Work for Independence on July 15, 1945, M. Yamin again proposed comparing laws with the Constitution. However, this proposal was rejected by Seopomo on the grounds that a system for comparing laws with the Constitution does exist, but we must know what that system means. Moreover, according to Soepomo, the Draft Indonesian Constitution does not use a system that differentiates in principle between three bodies, namely legislative, executive, and judicial, meaning that the judicial power will not control the power of law. Apart from these two reasons for rejection, Soepomo also stated that in practice when there is a dispute whether a law is in conflict with the Constitution or not, it is not a juridical issue but a political issue, so this system is not good for the Indonesian State that will be formed. Moreover, there are not many legal experts in Indonesia, and they do not have experience regarding this matter.[63]

The rationale behind the Supreme Court being given this authority during the New Order era was because some legal experts at that time were of the opinion that the lack of regulation regarding the Constitutional Court and judicial review in the 1945 Constitution of the Republic of Indonesia (UUD) did not mean that judges did not have the authority to review laws against the Constitution because judges

[62] Puguh Windrawan, "Gagasan Judicial Review Dan Terbentuknya Mahkamah Konstitusi Di Indonesia," *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 2, no. 1 (2013): 1–26, https://doi.org/10.14421/sh.v2i1.1885.
[63] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional Di Berbagai Negara* (Jakarta: Konstitusi Press, 2006).

automatically had this authority as a logical consequence of the position and function of judicial power as stipulated in the 1945 Constitution.[64]

Along with this, there is an urge that the tradition of reviewing legal regulations needs to be improved, not only limited to regulations under the law but also laws against the Constitution. The authority to review laws against the Constitution is given to a separate court outside the Supreme Court. Based on this idea, having an independent Constitutional Court alongside the Supreme Court is a necessity. [65] Indonesia itself then implemented this concept in the third constitutional amendment in 2001. The Constitutional Court of the Republic of Indonesia was then formed on August 13, 2003. From the beginning of its formation until now, the Constitutional Court of the Republic of Indonesia was based on Article 24 of the 1945 Constitution of the Republic of Indonesia (UUD 1945) and Article 10 of Law No. 24 of 2003, Law No. 8 of 2011, and Law No. 7 of 2020 concerning the Constitutional Court and has four authorities and one obligation.[66] This authority is to test laws against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide disputes about the results of general elections.[67] Meanwhile, its obligation is to provide a decision on the opinion of the House of Representatives regarding violations by the President and/or Vice President according to the Constitution. Apart from that, the decision of the Constitutional Court is final and binding, so no other legal action can be taken.[68]

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[64] Jimly Asshiddiqie, *Perkembangan, Dan Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006).
[65] Luthfi Widagdo Eddyono, "The Constitutional Court and Consolidation of Democracy in Indonesia," *Jurnal Konstitusi* 15, no. 1 (2018): 1–26, https://doi.org/10.31078/jk1511.
[66] Luthfi Widagdo Eddyono, "Independence of Indonesian Constituttional Court In Norms and Practices," *Constitutional Review* 3, no. 1 (2017): 71–97, https://doi.org/10.31078/consrev314.
[67] Putra Perdana Ahmad Saifulloh et.al, "Legal Standing to the Corruption Eradication Commission As a Applicant for the Dissolution of a Political Party at the Constitutional Court," *Jurnal Konstitusi* 20, no. 2 (2023): 318–39, https://doi.org/10.31078/jk2028.
[68] Putra Perdana Ahmad Saifulloh, "The Obligation of the Constitutional Court of Indonesia to Give Consideration in the Process of Dissolution of Societal Organizations," *Constitutional Review* 4, no. 1 (2018): 131–156, https://doi.org/10.31078/consrev416.

4. Lessons Learned that can be taken from the Tahqiq Al Manath method add to the knowledge of Constitutional Law

If we pay attention to the considerations that are the background to the release of Tahqiq Al Manath, we will understand that the motives that include it are aspects of religion and benefit. Therefore, the author needs to explain the method for the birth of Tahqiq Al Manath to consider the method for the birth of Tahqiq Al Manath into the method for the birth of Judicial Review Decisions at the Constitutional Court again to prevent decisions that are counter-productive to the value of public benefit. The method for the birth of Tahqiq Al Manath is as follows:

a. Tashawwur Al Waqi' (Describing Real Phenomena as a Whole)[69]

It is the highest norm in legal science to design tasawwur before enacting the law. In the field of fatwa, tasawwur is presenting a complete description of a case in an abstract sense and finding its essence without providing justification or negation. Waqi' is the synergy of case, time, and place in one unified whole.

b. Takyif Fiqhi (Configuration of Jurisprudence Theory with Cases)[70]

After describing the legal phenomenon in its entirety, both its essence and impact, the next thing that must be done in the tahqiq al manath process is takyif fiqhi. According to Muhammad Syabir:

التكييف الفقهي هو تحديد حقيقة الواقعة المستجدّة لالحاقها بأصل فقهي, خصّه الفقه الاسلامي بأوصاف فقهية, بقصد للوافعة المستجدّة عند التحقق من المجانسة فى الحقيقة اعطاء تلك الاوصاف

"*(Takyif fiqhi) is to determine the essence of the phenomenon that is currently developing in order to adapt it to the basis of its fiqh, which has been specified by Islamic jurisprudence with the provisions of fiqh as well, which is intended to provide these provisions to the phenomenon being studied when it is confirmed that it is homogenous (between the principles of fiqh) and the essence of the phenomenon".*

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[69] Aksin Wijaya et.al, "Rethinking Gender Justice in the Quran: A Critical Exploration of Muslim Feminist Perspectives," *Jurnal Studi Ilmu-Ilmu Al-Qur'an Dan Hadis* 26, no. 1 (2025): 77–98, https://doi.org/10.14421/qh.v26i1.5704.

[70] Abu Umar Faruq Ahmad et.al, "Takyif Fiqhi on the Permissibility of Ijarah Mawsufah Fi Al-Dhimmah: A Critical Analysis," *International Journal of Islamic Thought* 17, no. 1 (2020): 1–14, https://doi.org/10.24035/ijit.17.2020.165.

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c. *Tanzil Ahkam* (Manifestation of Law into Reality)[71]

Tanzil ahkam is the final stage for a mujtahid to reduce legal ideas into reality. Here, a mujtahid truly qualifies the accuracy and effectiveness of legal ideas. The instrument required as a qualifier is ma'alatul af'al. Ma'alatul af'al is a contemplative effort to read the risks that arise when establishing laws. A law that should be strict can become lenient, and vice versa. In fact, ma'alatul af'al is part of the tasawwur process. Because tasawwur requires a contemplative attitude to read reality as a whole. Risk is part of the essence of reality itself.

Ma'alatul af'al in practice compares the current impact with the long-term impact, both in terms of benefits and mafsadat. Therefore, this stage is also called the prediction stage. The process of predicting legal impacts must not be based on conjecture (wahm) or guesswork (iftiradhiyat). In fact, this prediction is not the same as anticipation (istibaq). What must be considered in predictions are the elements, events, and empirical changes that become future risk variables (probability theory).

d. *Hukm Al Waqi'* (Legal Conclusions for Reality)[72]

This research's typology of tahqiq al manath aims at weighing the strength of the mukallaf in accepting the law (i'tibar ahwalmukallaf quwwatan wa dha'fan) and weighing the benefits and mafsadat (mizan bain al mashalih wa al mafashid). In the context of the birth of judicial review decisions at the Constitutional Court according to the Constitutional Court Law and Constitutional Court Regulation Number 06/PMK/2005 of 2005 concerning Procedure Guidelines in Legal Review Cases, the trial mechanism is related to the process of a case; the Constitutional Court trial can

[71] Ahmad Syafi'i Sulaiman Jamrozi et.al, "Maqashid Al-Sharia in the Study of Hadith and Its Implication for the Renewal of Islamic Law: Study on Jasser Auda's Thought," *Justicia Islamica: Jurnal Kajian Hukum Dan Sosial* 19, no. 1 (2022): 74–93, https://jurnal.iainponorogo.ac.id/index.php/justicia/article/view/3269.

[72] Ihsan Satrya Azhar, "Fikih Waqi'," *Tazkiya* X, no. 1 (2021): 100–112, http://jurnaltarbiyah.uinsu.ac.id/index.php/tazkiya.

be divided into 4 (four), namely Preliminary Examination, Trial Examination, Judge Deliberation Meeting, and Pronouncement of Decision.[73]

Article 40, paragraph (1), of the Constitutional Court Law states that Constitutional Court hearings are open to the public, except for deliberative meetings of judges. Thus, of the 4 (four) types of trials, all are held openly to the public except for judge deliberation meetings. This provision also indicates that the judge's deliberation meeting is a closed, confidential meeting. However, in practice, trial examinations can be carried out behind closed doors based on the decision of the panel of constitutional judges.[74] The trial mechanism at the Constitutional Court is as follows:

1) Preliminary Inspection

A preliminary examination is a trial conducted to check the completeness and clarity of the application material before entering the main case examination. In practice, this preliminary examination, in addition to examining the completeness of the case administration, also examines two aspects that determine the sustainability of the case, namely whether the applicant has the qualifications to submit the intended application or what is known as having legal standing, and whether the case being filed falls under the authority of the Constitutional Court.[75]

Clarity of the petition material is one of the areas of preliminary examination so that what is requested can be formulated and understood clearly, both by the applicant and by the constitutional judge. This is very necessary so that the trial examination can be carried out effectively and focus on the issues requested. Overall, the preliminary examination includes: 1). Applicant's identity and qualifications, authority to act, and power of attorney:2). The applicant's legal position; 3). The content of the petition is within the authority of the Constitutional

[73] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2005).
[74] Ibnu Sina Chandranegara, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sinar Grafika, 2021).
[75] Tim Pengajar Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Setjen dan Kepaniteraan MK RI, 2019), 76-84.

Court, and if necessary, simplification of the issues raised is carried out, including combining cases that have the same posita and petitum:4). Changes to the application either on the judge's advice or on the applicant's own wishes; 6). Evidence that will be submitted; 7). Witnesses and experts and the subject matter of the information to be given; 8). Setting the trial schedule and court order.[76]

The preliminary examination is usually carried out by a panel of judges. However, in certain cases that are considered important and must be decided immediately, a preliminary examination can also be carried out directly by a panel of plenary judges. In this preliminary examination, the constitutional judge is obliged to provide advice to the applicant on completing and/or revising the application. The provisions of Article 39, paragraph (2), of the Constitutional Court Law provide a time limit for applicants to complete or correct their application no later than 14 (fourteen) days.[77]

The preliminary examination is carried out in the form of a panel of judges, which is open to the public. Preliminary examination can be carried out more than once if it is necessary to correct or complete and clarify the application and to check the revisions to the application that have been made by the applicant. The results of the preliminary examination hearing will be reported by the panel of judges to the plenary of judges of the Constitutional Court, in the event that the preliminary examination is carried out by a panel of judges.[78]

The report is accompanied by a recommendation from the panel of judges on whether the case can be continued to trial due to the fulfillment of the requirements for legal standing and the authority of the Constitutional Court, or whether it is decided that it cannot be accepted without entering into the main case because one or both of the requirements for legal standing and the authority of the Constitutional

[76] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Setjen dan Kepaniteraan MK RI, 2006).
[77] Bambang Sutiyoso, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Bandung: Citra Aditya Bakti, 2006).
[78] Tim Pengajar Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi*.

Court are not fulfilled. Apart from these two alternatives, it may also happen that a case cannot be determined as to whether the applicant has legal standing or not or whether the case in question falls under the authority of the Constitutional Court or not before entering the main examination of the case. Therefore, the examination of these two matters is carried out simultaneously and becomes part of the main case examination. The plenary of judges can decide to accept the recommendation of the panel of judges or decide differently from that recommendation. Therefore, even though the preliminary examination that follows the trial is a panel of judges, the decision is still taken by a plenary of judges, namely 9 (nine) constitutional judges, or at least 7 (seven) constitutional judges.[79]

2) Trial Examination

A trial examination is a type of trial conducted to examine the application, evidence, the respondent's statement (if any), witness statements, expert statements, and statements from related parties. For the purposes of trial examinations, constitutional judges are obliged to summon the parties involved in the case to provide the necessary information and/or request written information from the state institutions related to the petition.The state institution in question is obliged to provide the requested information within a period of 7 (seven) days.[80] Trial examinations are in principle carried out by a plenary of constitutional judges, except for certain cases based on the decision of the Chief Justice of the Constitutional Court, which can be carried out by a panel of judges. Trial hearings are held openly, unless otherwise determined by the panel of judges. The stages of the trial examination are as follows:[81]

a. Submission of the main points of the application orally;
b. Submission of the main points of the respondent's answer or
c. Verbal statements from the parties involved.
d. Examination of evidence from the applicant as well as from the respondent and related parties.

[79] Tim Pengajar Hukum Acara Mahkamah Konstitusi.
[80] Tim Pengajar Hukum Acara Mahkamah Konstitusi.
[81] Tim Pengajar Hukum Acara Mahkamah Konstitusi.

e. Submission and examination of witness and/or expert statements submitted by the applicant.
f. Submission and examination of witness and/or expert statements submitted by the respondent or related parties.
g. Submission of conclusions by the applicant.
h. Submission of conclusions by the respondent and/or related parties.

In the Constitutional Court hearing, apart from the petition, the respondent's answers and statements from related parties as well as expert statements are also submitted in writing. Therefore, in the trial forum, oral delivery is carried out not by reading written documents that have been submitted to the Constitutional Court, but only by conveying the main points that are considered important. After that, it continues with an examination in the form of questions and answers with the applicant, respondent, related parties, and constitutional judges.[82]

3) Judges Deliberation Meeting

In the Constitutional Court Law there is only one provision relating to judges' deliberative meetings. Article 40, paragraph (1), of the Constitutional Court Law states that Constitutional Court hearings are open to the public, except for deliberative meetings of judges. There is no explanation of what is meant by the judge's deliberation meeting. Provisions regarding judges' deliberative meetings are also not regulated in the Constitutional Court Regulations. The Judges' Deliberation Meeting is a type of plenary session, which is closed in nature. Judges' deliberation meetings that discuss cases are confidential and are only attended by constitutional judges, clerks, and substitute clerks. In this judge's deliberation meeting, the progress of a case and decisions and provisions related to a case are discussed. Specifically for judges' deliberative meetings to make case decisions, regulated in Article 45, paragraph (4) to paragraph (10) of the Constitutional Court Law.[83]

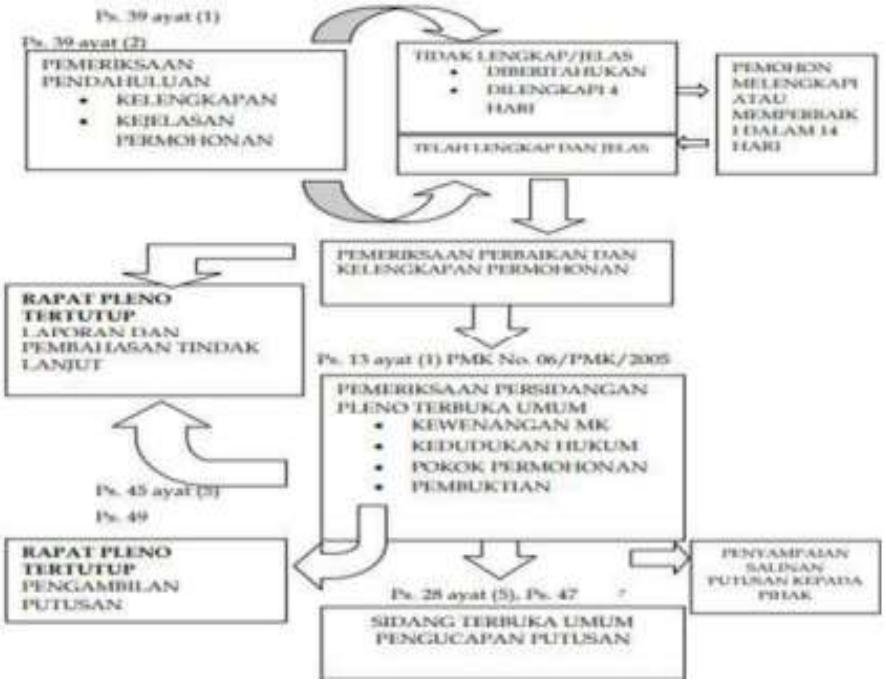
4) The Verdict

[82] Tim Pengajar Hukum Acara Mahkamah Konstitusi.
[83] Tim Pengajar Hukum Acara Mahkamah Konstitusi.

The decision-pronouncing session is essentially a plenary session, but it is different from the plenary session of the trial examination. In the plenary session, the pronunciation of the decision on the agenda is the reading of the Constitutional Court's decision or decision for a case that has been examined and tried. The decision is usually read out in turn by a panel of constitutional judges, starting with the chairman of the session, followed by the other constitutional judges, and in the conclusion section, the verdict and conclusion are read by the chairman of the session. Each constitutional judge will receive a certain part of the decision to be read sequentially, except for constitutional judges who are in a position to submit a different opinion (dissenting opinion). The judge who submits a dissenting opinion or concurring opinion reads his own opinion after the chairman of the trial reads the decision. The plenary session to pronounce the decision must be held openly to the public. This is a necessity because if the decision is pronounced in a closed trial, it will result in the Constitutional Court's decision being invalid and having no legal force. The decision of the Constitutional Court obtains permanent legal force from the time it is pronounced in a plenary session to pronounce the decision which is open to the public. Thus, the Constitutional Court's decision is permanent and binding from the moment the verdict is pronounced. The following is a Table of Constitutional Court Trial Flow.[84]

[84] Adeb Davega Prasna & Meri Yarni, *Proses Beracara Pengujian Undang-Undang Dan Sengketa Pilkada Di Mahkamah Konstitusi* (Tangerang Selatan: Young Progressive Muslim (YPM), 2025).

Table 1. Constitutional Court Trial Flow



Source: Adeb Davega Prasna & Meri Yarni, 2025.

The legal basis for decisions on constitutional cases is the 1945 Constitution as the written constitution of the Republic of Indonesia. The decision to grant must be based on at least 2 (two) valid pieces of evidence and the judge's belief that the request meets the constitutional reasons and requirements as intended in the constitution. Therefore, the decision must contain the facts revealed and legally proven at trial and the legal considerations on which it is based. Decision-making is carried out by deliberation to reach consensus in a judges' deliberation meeting through a closed plenary session.

In order to guard and uphold the supremacy of the constitution, democracy, justice and the constitutional rights of citizens, the 1945 Constitution has given four powers and one constitutional obligation to the Constitutional Court. In carrying out these constitutional authorities and obligations, procedural law is very necessary to

regulate the mechanisms or procedures for proceedings at the Constitutional Court.[85]

The law that develops in society requires the Constitutional Court to follow legal developments, including procedural law. The development of the Constitutional Court's procedural law in practice requires ijtihad from constitutional judges in order to find new laws to uphold the supremacy of the constitution, democracy, justice, and the constitutional rights of citizens. The procedural law of the Constitutional Court is formal law, which functions to enforce material law, namely the part of constitutional law that is the authority of the Constitutional Court. The procedural law of the Constitutional Court is intended as procedural law that applies generally in cases that fall under the authority of the Constitutional Court as well as procedural law that applies specifically to each authority in question. The existence of the Constitutional Court with its authority gives rise to the need for new law, namely procedural law, and to develop it in order to enforce law in Indonesia.[86]

According to the author, the tahqiq al-manath method can be used by constitutional judges in reviewing laws against the 1945 constitution, and it can be applied in deliberative meetings of constitutional judges so as to prevent decisions that are counterproductive to public benefit values and for academics to add to the scientific knowledge of constitutional law and Islamic constitutional law. This can be implemented through constitutional conventions.

Conclusion

Tahqiq al-manath is a method of applying general legal rules to certain contextual cases. The author concludes that tahqiq al-manath is a method of Judicial Review in Islamic law and its contribution if adopted for constitutional law science. The findings in this study state that the tahqiq al-manath method can be adopted for

[85] Saldi Isra, "Peran Mahkamah Konstitusi Dalam Penguatan Hak Asasi Manusia Di Indonesia," *Jurnal Konstitusi* 11, no. 3 (2014): 409–27, https://doi.org/10.31078/jk1131.
[86] Ahmad Fadlil Sumadi, "Hukum Acara Mahkamah Konstitusi Dalam Teori Dan Praktik," *Jurnal Konstitusi* 8, no. 6 (2011): 849–79, https://doi.org/10.31078/jk861.

use by constitutional judges in testing laws against the 1945 constitution. The recommendation of this study states that Tahqiq al-manath can be applied in deliberation meetings of constitutional judges to prevent decisions that are counterproductive to the value of the public interest and this can be implemented through constitutional conventions.

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