

***I'adah al-Nadzr (Reconsideration): A Critical Comparative Study between Indonesian Law and Saudi Arabian Law Perspectives (Fiqh Murafa'at)***

**Islamul Haq<sup>1</sup>, Muliati<sup>2</sup>, Muhammad Majdy Amiruddin<sup>3</sup>, Nur Misyuari Maddolangeng<sup>4</sup>, Hamza Abed Al Karim Hammad<sup>5</sup>**

Institut Agama Islam Negeri Parepare<sup>1,2,3,4</sup>, United Arab Emirates University<sup>5</sup>  
islamulhaq@iainpare.ac.id<sup>1</sup>, muliati@iainpare.ac.id<sup>2</sup>,  
muhammadmajdyamiruddin@iainpare.ac.id<sup>3</sup>,  
nurmisyuarimaddolangeng@iainpare.ac.id<sup>4</sup>, h.hammad@uaeu.ac.ae<sup>5</sup>

DOI: <http://dx.doi.org/10.29240/jhi.v7i2.5248>

Received: 11-05-2022

Revised: 16-07-2022

Approved: 03-10-2022

**Abstract**

The purpose of this study was to ascertain the *murafa'at fiqh* (Saudi Arabian Law) and the Indonesian Criminal Procedure Code's perspectives on a convict's plea for *i'adah al-nadzr* (reconsideration). This was a normative juridical inquiry, which entailed poring over relevant material to gather data, assess content, and draw similarities between positive law and Islamic criminal law. The findings of this study indicated that review in positive law, referred to in Saudi Arabia's *murafa'at fiqh* as *i'adah al-nadzr/al-mubakamah*, attempted to ensure legal justice and judge justice in their rulings. There were parallels between positive law and *murafa'at fiqh* in terms of the justifications for filing reconsideration. There were, however, distinctions regarding the *giyabi* case as a basis for submitting reconsideration. In Saudi Arabia's *murafa'at fiqh*, the reconsideration application in the *giyabi* case could be accepted, although positive law did not cite the *giyabi* ruling as a reason to seek reconsideration. Positive law, on the other hand, provides for the possibility of resistance (*verzet*) if the defendant was not present in court and has not protested *Verstek's* ruling. Another parallel between positive law and Saudi *fiqh murafa'at* was seen in the reconsideration application regulations, which prohibited suspending the execution of rulings. However, the researcher notes that this rule cannot be applied universally.

**Keywords:** Reconsideration; *murafa'at fiqh*; positive law

### Abstrak

Penelitian ini bertujuan untuk mengetahui perspektif *murafa'at fikih* Arab Saudi dan Hukum Acara Pidana Indonesia terhadap permohonan terpidana dalam mengajukan Peninjauan Kembali dan melakukan perbandingan antara konsep Peninjauan kembali dalam Hukum positif dan fikih *murafa'at* Arab Saudi. Penelitian ini merupakan penelitian yuridis normatif yang merupakan penelitian kepustakaan dengan menelusuri literatur terkait dengan permasalahan dalam rangka memperoleh data, menganalisis konten dan melakukan komparasi antara hukum positif dan hukum pidana Islam. Hasil penelitian ini menemukan bahwa peninjauan Kembali dalam hukum positif atau yang dikenal dengan *i'adah al-nadzr/al-muhakamah* dalam fikih murafaat Arab Saudi bertujuan untuk menjamin keadilan hukum dan keadilan hakim dalam putusannya. Terdapat persamaan antara hukum positif dan fikih *murafa'at* terkait alasan pengajuan PK. Namun terdapat perbedaan terkait perkara giyabi sebagai alasan pengajuan PK. Permohonan PK dalam perkara giyaby dapat diterima dalam fikih *murafa'at* Arab Saudi, sementara hukum positif tidak menjadikan putusan giyaby sebagai alasan untuk mengajukan PK. Akan tetapi hukum positif membuka peluang untuk melakukan upaya perlawanan (*verzet*), jika tergugat tidak hadir di persidangan dan keberatan dengan putusan *verstek*. Persamaan antara hukum positif dan fikih *murafa'at* Arab Saudi terlihat pada aturan permohonan PK yang tidak dapat menanggukuhkan eksekusi putusan, namun menurut peneliti aturan ini tidak dapat digeneralisasi pada semua kasus.

**Kata Kunci:** Peninjauan Kembali; fikih *murafa'at*; hukum positif

### Introduction

John Griffith depicted the judicial process as a paradigm of conflict between concerned parties.<sup>1</sup> In criminal cases, the opposing parties are the prosecutor and the accused, as well as their legal counsel. Each party will do everything possible to win the trial, including divulging facts and presenting proof in the courtroom, as well as relying on laws that remain nonsensical due to their numerous interpretations.<sup>2</sup> Criminal cases that have already been determined and have a decision can still be examined because of the use of illogical and widely interpreted rules and regulations as arguments.<sup>3</sup>

---

<sup>1</sup> Dragan Milovanovic Loreta Capeheart, *Social Justice, Theories, Issues and Movement* (Rutgers University Press, 2007).

<sup>2</sup> Marcus Priyo Gunarto, 'Mengembalikan Pelaksanaan Peninjauan Kembali Sesuai Asas Hukum', 2004.

<sup>3</sup> Steven J Lindsay, 'Timing Judicial Review of Agency Interpretations in Chevron's

KUHAP Article 263 to 269 of the Criminal Procedure Code (KUHAP) governed the extraordinary legal remedies that can be used to challenge a final decision. Long-term force of law (*inkracht van gewijsde*). If a criminal case has been decided, but the decision is based on substantial evidence and the claimed crime was committed by someone other than the accused, this institution is a miscarriage of justice.<sup>4</sup>

In Indonesia's general justice system, the Supreme Court conducts the review through the reconsideration Institution, as specified in article 263 paragraph (1) of the Criminal Procedure Code<sup>5</sup> This clause demonstrates Indonesia's commitment to human rights as a constitutional state; the review demonstrates that the Indonesian state offers an opportunity for every citizen (convict) to obtain justice.<sup>6</sup>

*Murafa'at fiqh*, like the Criminal Procedure Code, regulates judicial review. In *murafa'at fiqh*, reconsideration falls under the category of *ijtihad*. Ijtihad is a requirement in Islam.<sup>7</sup> Ijtihad is a critical tool in the development of Islamic law.<sup>8</sup> Without the role of ijtihad in Islamic law, it will be difficult to remain solid in the face of the challenges of the times, which will become increasingly complex as time passes. It should be noted that, though the review falls under the purview of *ijtihad*, it does not rule out the possibility of differing perceptions as well as differing methods when it comes to its implementation.

These findings were drawn from the literature on judicial review in Indonesian Judicial Procedures and Saudi Arabian *Fiqh Murafa'at*, which was conducted for this study. Saudi Arabia is one of the countries that is considered to be a representative of Islamic law. Saudi Arabia bases all regulations, including *fiqh murafa'at*, on the Islamic law of Sharia (Sharia Court Procedure Code). So the researcher did a comparison between the reconsideration system in Positive Law and the *fiqh murafa'at* (Islamic Jurisprudence) system in Saudi Arabia.

Shadow', *Yale LJ*, 127 (2017), 2448.

<sup>4</sup> Seno Wibowo Gumbira, 'Problematika Peninjauan Kembali Dalam Sistem Peradilan Pidana Pasca Putusan Mahkamah Konstitusi Dan Pasca SEMA RI No. 7 Tahun 2014 (Suatu Analisa Yuridis Dan Asas-Asas Dalam Hukum Peradilan Pidana)', *Jurnal Hukum & Pembangunan*, 46.1 (2016), 106–19.

<sup>5</sup> Rustanto, 'Analisis Pengajuan Peninjauan Kembali Putusan Pengadilan Yang Telah Memperoleh Kekuatan Hukum Tetap Oleh Jaksa Dalam Praktik Peradilan Pidana Di Indonesia', *Tesis*, 2011, 6.

<sup>6</sup> Rustanto.

<sup>7</sup> Ihsan Yilmaz, 'Ijtihad and Tajdid by Conduct', *MH Yavuz, John L. Esposito, Turkish Islam and the Secular State: The Gülen Movement. Syracuse University Press*, 2003.

<sup>8</sup> Mohamed A Abdelaal, 'Taqlid v. Ijtihad: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence', *J. Juris*, 14 (2012), 151.

With the goal of strengthening this investigation, the researcher did a search for scientific publications that explored the case of reconsideration (reconsideration). Several studies were discovered as a result of the search, including one published in the *Journal of Law and Development* by Seno Wibowo Gumbira, entitled "Problematic of Review in the Criminal Justice System After the Decision of the Constitutional Court and Post-SEMA RI No. 7 of 2014 (A Juridical Analysis and Principles in Criminal Justice Law)" and another published in the *Journal of Law and Development* by Seno Wibowo Gumbira, entitled "Problematic of Review in the."<sup>9</sup> These two decisions, No. 34/PPU-IX/2013 of the Constitutional Court and SEMA RI No. 7 of 2014 of the SEMA, were decided by the Supreme Court and both have legal problems, as they are in violation of the *lex superior derogate inferior* principle, the *ne bis in idem* principle, and the principles of expeditious, simple, and low-cost trial. The challenges of judicial review in *fiqh murafa'at* are not discussed in any depth in this study project. This research focuses solely on the legal examination of the decisions of the Constitutional Court Number 34/PPU-IX/2013 and SEMA RI No. 7 of 2014, as well as the decisions of the Supreme Administrative and Judicial Tribunal.

Marcus Priyo Gunarto published a paper in the journal *Mimbar Hukum* Vol. 21 2009 with the title "Restoring the Implementation of reconsideration in Compliance with Legal Principles" that was based on his research.<sup>10</sup> It is discussed in this study how the Supreme Court has been inconsistent in its adjudication of judicial review cases. In one case, the Supreme Court rejected the prosecutor's request for a re-application because, according to article 26 of the Criminal Code, only a convict and his heirs were entitled to apply for judicial review, but in another case, the Supreme Court accepted the prosecutor's application under the pretext of protecting public interest. In addition, there is no mention of the difficulties associated with judicial review in Islamic criminal law in this study. It is the sole aim of this study to determine who has the greater right, between the prosecutor and the convict and their heirs, to petition the Supreme Court for a judicial review.

It is not specifically addressed in the thesis written by Nashir Abdul Aziz al-Madhi, titled "*al-Iltimas l'adab al-Nadhr fi Nidham al-Murafaat al-Sharia al-Saudi Dirasah Muqaranah*", that the views of Islamic criminal law regarding the review procedure in *fiqh murafa'at* are discussed in the context of *fiqh murafa'at*.

According to the definition, this research is a normative juridical research, which is a library research in which researchers browse through relevant books to acquire data, assess content, and draw similarities between

---

<sup>9</sup> Gumbira.

<sup>10</sup> Marcus Priyo Gunarto, 'Mengembalikan Pelaksanaan Peninjauan Kembali Sesuai Asas Hukum', *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, 21.3 (2009), 462–76.

positive law and Islamic criminal law.

This study is based on the argument that reconsideration is carried out in order to realize justice or guarantee justice for the law and judges in their decisions. Justice is the core purpose of law<sup>11</sup>, therefore all legal rules should lead to justice.<sup>12,13</sup> In fact, in the practice of reconsideration, there are several differences of opinion<sup>14</sup> such as the maximum limit for submitting a reconsideration,<sup>15</sup> the reasons for submitting a reconsideration,<sup>16</sup> the requirements for submitting a reconsideration and so on. For this reason, researchers will make a comparison between Indonesian law and Saudi Arabian law regarding reconsideration in order to anticipate the development of criminal procedural law according to the times.

## Discussion

### Terms of Reconsideration in Indonesian Law

Andi Hamzah defined reconsideration as the convict's right to seek reversal of a court decision that has become permanent as a result of the judge's errors and negligence.<sup>17</sup> Reconsideration is classified as an extraordinary legal remedy in the Criminal Procedure Code because it possesses unique characteristics, including the ability to unearth a legally binding conclusion whereas, in essence, a judge's decision with legal power must still be implemented within the framework of legal certainty.

The review is described as an unusual effort since it is a legal endeavor aimed at accepting or rejecting the judge's final legal ruling.<sup>18</sup> By contrast to the general rules, every decision that has been made into permanent law is totally binding on the basis of the "*finin opperte*" concept, which means that all decisions with permanent legal force are final and cannot be appealed in any way. In the

<sup>11</sup> Philip Selznick, *Law, Society, and Industrial Justice* (Quid Pro Books, 2020), xxx.

<sup>12</sup> William Lucy, 'Access to Justice and the Rule of Law', *Oxford Journal of Legal Studies*, 40.2 (2020), 377–402.

<sup>13</sup> Meirison Meirison, Desmadi Saharuddin, and Rosdialena Rosdialena, 'Takhrij Fikih Dan Permasalahan Kontemporer', *Al-Istinbath: Jurnal Hukum Islam*, 5.1 (2020), 51–70.

<sup>14</sup> Yoeffanca Halim and Hardy Salim, 'Keabsahan Putusan Pengadilan Yang Belum Inkraacht Sebagai Novum Dalam Pengajuan Peninjauan Kembali', *Jurnal Suara Hukum*, 2.1 (2020), 86–104.

<sup>15</sup> Dedi Rahman Hakim, 'Prinsip Kepastian Hukum dalam Pembatasan Upaya Hukum Peninjauan Kembali', *Fairness and Justice: Jurnal Ilmiah Ilmu Hukum*, 16.1 (2018), 31–49.

<sup>16</sup> pricylia Eunike Tatuhah, 'Alasan Mengajukan Permohonan Peninjauan Kembali Dalam Praktek Pradilan Pidana', *Lex Crimen*, 8.9 (2020).

<sup>17</sup> Parman Soeparman, *Pengaturan Hak Mengajukan Upaya Hukum Peninjauan Kembali Dalam Perkara Pidana Bagi Korban Kejahatan* (Refika Aditama, 2007), h. 17.

<sup>18</sup> Harahap M Yahya, 'Pembahasan Permasalahan Dan Penerapan KUHAP, Pemeriksaan Sidang Pengadilan, Banding, Kasasi Dan Peninjauan Kembali' (Sinar Grafika, Jakarta, 2005), h. 586.

event that a case no longer has the ability to be presented for legal remedies, including appeals and cassation, the case is said to have permanent legal force.<sup>19</sup>

Normatively, the Criminal Procedure Code divides legal remedies into two types: first, regular legal remedies in the form of appeals to cassation, which are governed by KUHAP articles 233 to 258; and second, extraordinary legal remedies, which are governed by KUHAP articles 233 to 258. Second, unusual legal remedies, namely reconsideration (reconsideration), which is governed by KUHAP articles 263 to 269, are available to the public. In addition to cassation for the sake of the law, which is governed by KUHAP articles 259 to 262, there is another unique legal remedy. Through a series of attempts in the KUHAP, the parties can submit a single legal remedy, regardless of whether the judge's judgment is considered incorrect or not fair.<sup>20</sup>

The Sengkong and Karta cases, which occurred in 1977, marked the beginning of the legal action for judicial review. In that particular instance, the judge made the incorrect decision to convict an innocent person. In an attempt to address the error that occurred in the Sengkong and Karta cases, the Supreme Court adopted Supreme Court Regulation No. 1 of 1980 about the Review of decisions that have achieved permanent legal force in an effort to correct the error that occurred. This case also served as the impetus for the creation of Chapter XVIII of the Criminal Procedure Code, namely sections 263 to 269, which governs the reconsideration process.

As a result, there are several differences of opinion about various aspects of the reconsideration (reconsideration), such as the clause on who has the right to submit an application for reconsideration (reconsideration), whether it is the suspect or the prosecutor. Article 263 of the KUHAP additionally specifies that "a criminal or his heirs may submit a request for reconsideration to the Supreme Court against a court decision that has achieved permanent legal force, unless the decision is acquitted or free from all legal claims."

A explicit provision of the criminal procedure law specifies that the right of judicial review is reserved exclusively for the offender or his heirs. In practice, however, the reconsideration is frequently submitted by the prosecutor, rather than by the convict. It is important to note that this legal practice is a sign of judicial error (*rechtelijke dwaling*), which is defined as an execution of the law in such a way that it violates or breaks the law itself, in this case the principles of criminal procedural law. In order for the court review procedure to be completed later on, the state must face the state that has been represented by the prosecutor in this legal action. As a result, following a judicial examination

---

<sup>19</sup>Manan Abdul, 'Penerapan Hukum Acara Perdata Di Lingkungan Peradilan Agama' (Kencana, Jakarta, 2006). h. 359

<sup>20</sup> M Lutfi Chakim, 'Mewujudkan Keadilan Melalui Upaya Hukum Peninjauan Kembali Pasca Putusan Mahkamah Konstitusi', *Jurnal Konstitusi*, 12.2 (2016), h. 333.

of Article 263 Paragraph (1), the Constitutional Court issued Decision Number 33 of 2016, in which it determined that the prosecutor did not have sufficient grounds to file a reconsideration application.

An application for a protective order (reconsideration) can only be filed once, according to Article 268 paragraph 3 of the Criminal Procedure Code and Law No. 3 of 2009. As soon as the Supreme Court of the Republic of Indonesia has considered and rendered its decision on the reconsideration case submitted by the plaintiffs, the parties' entitlement to re-apply for the reconsideration becomes null and void. The Supreme Court's judgment on whether to grant a petition for reconsideration is carried out at two levels: the first and the final. Consequently, instances that have been filed for reconsideration consideration can no longer be re-submitted for reconsideration consideration. According to Antasari Azhar's application for judicial review (Decision Number 34/PUU-IX/2013), the Constitutional Court determined that Article 268 paragraph (3) of the Criminal Procedure Code is in conflict with the 1945 Constitution and is therefore not binding. In other words, reconsideration applications can be submitted several times without penalty.

### **Reconsideration application requirements**

A clear explanation of the requirements for a reconsideration application may be found in the Criminal Procedure Code; specifically, article 263 paragraph 2 of the Criminal Procedure Code specifies the requirements for an application for a reconsideration which can be finished in four ways, namely:

1. There is a new state in the union (*Novum*)
2. Disputes in the Courts (*Conflict van resthspraak*)
3. Error on the part of the judge or genuine error.

Unprecedented or unchallenged situation (*Novum*) that constitutes the basis for an application for judicial review is one that develops later after a court decision has gained permanent legal effect but has never been addressed or called into question in a court of law<sup>21</sup> Basically, the judge was not aware of *Novum* during the course of the case examination; *Novum* was only made aware after the judge reached a decision on the case. As a result, the judge's decision was not in accordance with the new situation; therefore, it was highly suspected that if the judge had been aware of the new situation during the course of the case examination, the judge would reach a different decision.<sup>22</sup>

In the following reason, the Court's Conflict (*Conflict van resthspraak*) was invoked, which served as the foundation for the request for judicial review.

---

<sup>21</sup> Hadari Djenawi Tahir, Bab Tentang Herziening Didalam Kitab Undang-Undang Hukum Acara Pidana (Alumni, 1982), h. 37.

<sup>22</sup> Hadrawi, h. 49.

In a court of law, a disagreement arises when there is a discrepancy between many court rulings, even though all of them have been legally established. The conflicting decisions, according to Soedirjo, could come from different courts against the same convict for committing different crimes at the same time in their respective territories that are not close together, or they could come from a single court against several convicts in the same case, but they could also come from another court.<sup>23</sup>

The conclusion is that judicial conflict arises when multiple separate courts or the same court rule against the same convict for committing different crimes, or vice versa, when different convicts for doing the same crime rule against different convicts.

The next cause for resubmitting the application is due to the judge's error. A judge may make an error or omission from his judgment. However, because PERMA number 1 of 1980 does not include judge errors that can be used to initiate a judicial review (reconsideration), it appears as though judges are perfect human beings who never make mistakes while performing their jobs. In subsequent modifications, the Criminal Procedure Code regulates the judge's error as a basis for judicial review.

### **Reconsidering: *Fiqh* Perspective on *Murafa'at* (Saudi Arabia)**

Although a judge is appointed on the basis of outstanding talent and strong integrity, a judge is also an ordinary human being who can be right or wrong; sometimes a judge makes a correct and fair decision, but sometimes a judge makes an incorrect choice.

To ensure legal justice and the impartiality of judges, Islamic courts include a tiered judicial system, spanning from lower-level courts to high-level courts. Additionally, there is court oversight from the time a case is reported until it is decided. If it is discovered that the judge's ruling was incorrect and unjust, the case must be reviewed in order to arrive at the main *maqshad*, which is to uphold justice and truth.

In essence, judicial judgments contain evidence that cannot be questioned, and this is a fundamental principle; yet, unless judges commit errors or are negligent in resolving cases, unusual objections may be submitted. Judicial review is one method for challenging unusual court judgments. The review process is referred to as *I'adah al-Nadzr* or *I'adah al-Muhakamah* in *Fiqh Murafa'at* (Islamic Criminal Procedure Law).

*Murafa'at fiqh* specifies that if a judge makes a judgment and it is subsequently discovered that he made a mistake, it is vital to pay attention to the

---

<sup>23</sup> Soedirjo, *Peninjauan Kembali Dalam Perkara Pidana* (Jakarta: CV. Akademika Pressindo, 1986), h. 26.



fact that if the decision is contrary to the texts, *ijma'*, and *qiyas*, the decision is annulled.<sup>24</sup> Abdul Karim Zaidan stated that if a judge performs *ijtihad* and resolves a matter and then discovers that the decision contradicts the Qur'an and the *mutawatir* hadith or the *ahad* hadith, or violates *ijma* and *qiyas jaly*, the judgment must be nullified even if the litigants make no protest.<sup>25</sup>

Caliph Umar bin Khattab ra is a Muslim leader. In addition, he once wrote a letter to a Qadhi Kufa, namely Abu Musa al Asya'ari, in which he stated:

"ولا يمنعك قضاء قضيته أمس فراجعت اليوم فيه عقلك وهديت فيه لرشدك أن ترجع إلى الحق؛ فإن الحق قديم لا يبطله شيء ومراجعة الحق خير من التماسي في الباطل"<sup>26</sup>

*"Maintain your independence from the decisions you made yesterday; if you review them today, you will be given instructions to return to reality, because the truth must always take precedence and cannot be canceled by anything, and returning to reality is preferable to continuing to believe falsehoods."*

According to the majority of madhhab scholars, it is permissible to annul a judge's decision if the judge's decision contains an error. This can be seen in the books of the school of thought, for example, in the book "*al-Bahr al-Raiq*," it is stated that one of the conditions for a judge's decision is that it is not contrary to the Koran, Hadith, and *Ijma*, and that if the judge's decision contradicts the three legal<sup>27</sup> "*al-Khulashab al-Fiqhiyyah 'ala Mazhab al-Sadah al-Malikiyyah*" states that "the judge's ruling must be nullified if the judge's error is readily obvious".<sup>28</sup> "If the judge decides the law of a case and discovers that the truth is not in favor of the judgment, if he discovers the truth in the new decision because the previous decision contradicts the Koran, hadith, and *ijma*, then the judge's original decision must be canceled," Imam al-Shafi'i stated.<sup>29</sup> According to the book "*Asna al-Mathalib*", if a court determines a matter based on the testimony of two witnesses and it is discovered that the two witnesses are unbelievers or slaves or two *fasiq* or two tiny children, the judgment can be nullified.<sup>30</sup>

<sup>24</sup> Al Imrani, *Al Bayan Fi Mazhab Imam Al Syafi'i* (Dar al Minhaj li Attibaah wa al Tauzi). Juz 13, h. 61

<sup>25</sup> 'Abd al-Karim Zaydan, *Nizam Al Qada' Fi Al Syariaat Al Islamiyah* (Amman: Maktabah al Batsair, 1989), h. 275.

<sup>26</sup> Muhammad Syarif Basuni, *Al Wasaiq Al Wanliyab Al Mu'niya Bi Huquq Al Insan* (Kairo: Dar Syuruq, 2003). J. II, h. 122.

<sup>27</sup> Zainuddin bin Nujaim, *Al-Babru Ar-Raiq Syarah Kanzu Ad-Daqaiq* (Beirut: Dar al-Marifah, tt). Juz 7, h. 231.

<sup>28</sup> Imam Ahmad Ad-Dardir, *Hasyiah Ad-Dasuqiala as-Syarb Al Kabir* (Isa Al babi Al Halbi, 2015). Juz 4, h. 154.

<sup>29</sup> Abdullah Muhammad Idris Al-Syafi'i, *Al-Umm* (Dar al-Kotob al-Ilmiyah, 2002). Juz 6, h. 204.

<sup>30</sup> A Al-Ansari, 'Asna Al-Matalib Fi Sharh Rawdhul Talib', *Beirut: Darul Kitab Al-Islami*, 2013. Juz 4, h. 359.

The principle of reconsideration of court decisions that have acquired permanent legal force was also widely recorded during the Ottoman Turks' reign, as evidenced by the Ottoman Turks' pre-*tanẓimat* judiciary, which consisted of the following:

1. *al-Juz'iyat* (Ordinary or Lower Court), which is responsible for resolving criminal and civil cases.
2. *al-Isti'naf* Court (Mahkamah Appeal), which is responsible for conducting research and reviewing pending cases.
3. The Court of *al-Tamayẓ au al-Naqd wa al-Ibram* (High Court), which is responsible for removing *qadhi* who have been found to have made errors in enacting legislation.
4. Supreme Court of *al-Ista'naf al-Ulya*

This court even in Egypt's judiciary, particularly during the time of Ismail Pasha, an *isti'naf* institution was in charge of examining subordinate court judges' verdicts. Egypt recognized the three levels of courts, each with its own set of functions and authorities, during the reign of Ismail Pasha, namely:

1. *Dawi Aqlamid* Legislative Assembly
2. *Dawil Balad* Council
3. The *Markaz* Assembly is responsible with examining the choices taken by the two preceding legislatures.
4. Ibtidai Assembly (lower court) e. *Isti'naf* Assembly, whose function is to reconsider court-decided cases.
5. The *al-Abkam* Assembly, headquartered in Cairo, is responsible for weighing in on the matter at hand.
6. The *Tijarah* Council adjudicates matters involving commerce.

The court level demonstrates that in Islamic criminal law, a judge-made decision can be appealed to the *isti'naf* Institution by the individual or institution harmed by the decision.

Saudi Arabia, which is well-known for enforcing Islamic law, currently recognizes the *isti'naf* (appeal) institution under its Sharia *murafa'at* system. Decisions made in the court of first instance may be appealed to a higher court. In Saudi Arabian courts, each case is decided by three judges, except for the criminal court, which hears cases including murder, amputation, stoning, and life sentences or less.

The Saudi Arabian High Court will evaluate the Court of First Instance's ruling and will give a decision after hearing the plaintiffs' statements in accordance with the Defense Law and Criminal Procedure Code. The following

decisions are subject to judicial review in Saudi Arabian courts:

1. Decisions are based on papers that appear to be forged following the decision, or on information determined to be erroneous by the competent authority following the ruling.<sup>31</sup>
2. If the applicant acquires substantial evidence after the judgment that he could not demonstrate prior to the decision.
3. The opponent commits deception, which will sway the verdict.
4. If the judge makes a decision that is contrary to the public prosecutor's request
5. If the judge's ruling is inconsistent with one another.
6. In the case of a *Giyaby* decision, the litigating party is not present throughout the trial.
7. If a judge rules against an individual who was not properly defended in a case.<sup>32</sup>

Reconsideration requests under Saudi Arabia's *Murafa'at Fiqh* must adhere to established procedures, norms, and special restrictions. Depending on the outcome of the reconsideration, the application proceeds through two stages. The first step evaluates whether the qualifications for reconsideration have been met, as well as the conditions for receiving reconsideration; if the conditions are approved, the case proceeds to the second stage, which considers the case's subject matter.

Prior to considering the case's subject matter, the court evaluates the extent to which the standards for judicial review are met; whether or not the application for judicial review is accepted is contingent on the application meeting the conditions and regulations established. If the court determines that certain circumstances have not been met, the court may deny the motion for reconsideration.

There are various instances in Saudi Arabia's *Murafa'at* legislation that are not subject to court review, including the following:

1. Non-appealable minor matters, such as those penalized by a fine of 50,000 Riyals or less.
2. Decisions in circumstances where the convict has been satisfied. If the judge has determined the matter and the criminal is happy with the outcome at the moment, the convict may not request for a reconsideration in the future.

---

<sup>31</sup> Abu Bakr al Kasani, 'Badai'al-Shanai'fi Tartib Al-Syarai', *Beirut: Dar Al-Kutub Al-Ilmiyah*, t. Th. Juz 7, h. 239.

<sup>32</sup> 'Mahakim Al Isti'naf Al Idariyyah', *Wikipedia*.<https://ar.wikipedia.org>

3. Cases in which the maximum time restriction for submitting a reconsideration has passed. If the court has determined the matter, the litigating party has 30 days to file an objection or reconsideration; beyond 30 days, the litigating party cannot file a reconsideration.
4. Cases that have been filed to the *isti'naf* court for reconsideration but have been refused.
5. If the judge grants all of the demands, he is no longer permitted to file reconsideration.
6. The party filing the reconsideration is no longer a party to the underlying case. As someone who runs a business, he is qualified to apply for a reconsideration, but only once he ceases to serve in the business

Reconsideration requests in *murafa'at fiqh* must adhere to the established procedures, norms, and special requirements. Depending on the outcome of the reconsideration, the application proceeds through two stages. The first step evaluates whether the qualifications for reconsideration have been met, as well as the conditions for receiving reconsideration; if the conditions are approved, the case proceeds to the second stage, which considers the case's subject matter.

Prior to considering the case's subject matter, the court evaluates the extent to which the standards for judicial review are met; whether or not the application for judicial review is accepted is contingent on the application meeting the conditions and regulations established. If the court determines that certain circumstances have not been met, the court may deny the motion for reconsideration.

*Murafa'at fiqh* has established the following rules for reconsideration:

1. The party authorized to file for reconsideration must be the one litigating or representing him and cannot be another individual.
2. The reconsideration's decision is final.
3. The application for reconsideration is made to the court that previously decided the case.
4. If the application for reconsideration is made for one of various reasons, it is permitted to make the application.
5. The duration of the reconsideration application is 30 days.<sup>33</sup>

The requirements for applying for reconsideration are as follows:

1. There is an advantage for applicants with reconsideration status.
2. Both the applicant (plaintiff) and the defendant have ability.

---

<sup>33</sup> Muhammad Liba, 'Al Tha'n Bi Iltimas P'adah Al Nadhr Fi Nidham Al Murafaat Al Syariah Al Saudi', *Egyptia Journal*, 35.1 (2020), 998-1073.

3. Neither the applicant (plaintiff) nor the respondent (defendant) has ever received a decision, either officially or implicitly.
4. That the application for reconsideration is made in line with the applicable legal provisions.
5. A reconsideration is a decision rendered by a court of first instance that is appealable.
6. The reconsideration's decision is final.

After meeting all of the prerequisites for filing a judicial review, the application may be approved in either the *ulya* or *isti'naf* courts. The following stage is a re-examination of the matter that has been decided. The court must convene a hearing and reconsider the case. Decisions based on the reconsideration's findings have permanent legal effect; they can reverse a prior decision and establish a new one, which may include an acquittal, a decision to reject the prosecution's claim, a decision to dismiss all litigation, or a lower sentence.

### **Comparison of Positive Law's reconsideration and *Fiqh Murafa'at***

The evaluation stated above is used in positive law and *fiqh murafa'at* as a means of ensuring legal fairness and the impartiality of judges in their judgments. There are numerous parallels between positive law and *murafa'at fiqh* in terms of the conditions, causes, and review procedures.

According to Article 263 paragraph 2 of the Criminal Procedure Code, the reasons for the reconsideration application in positive law for criminal cases are the existence of *Novum*, the existence of court disagreements, and the occurrence of judge errors or genuine mistakes. Meanwhile, in civil cases, the reason for submitting a reconsideration is a lie or deception by one of the litigants, new evidence is discovered after the case is decided, a matter that is not demanded or is demanded in excess of the demands is made, or a portion of the claim is not decided without considering the reasons. -because if the same parties are involved in the same action, the same court rules on the same facts, but the judge rules differently, the judge made an error in his judgment.

The reason for the reconsideration application, according to *fiqh murafa'at*, is that the decision is based on documents that appear to be fake after the decision, or on information judged to be false by the competent authority after the decision, if the applicant obtains strong evidence after the decision that he could not demonstrate before the decision. , if the opponent commits fraud that affects the decision, if the judge decides more than the public prosecutor requests, if the judge's decisions contradict one another, if the verdict is *Giyaby* the litigant is not present at the trial, or if the judge rules against someone who is not properly represented at the trial a situation.

The reasoning above demonstrates that positive law and *fiqh murafa'at* Saudi Arabia have parallels regarding the reasons for filing a reconsideration application, such as the emergence of fresh evidence that cannot be demonstrated throughout the judicial procedure. Positive law addresses it in terms of the novum or novel situation, but *fiqh murafa'at* indicates that the applicant acquires compelling proof that he was unable to provide prior to the judgment. In essence, the two are identical. Similarly, the cause for the judges' error in the two statutes became the reason for submitting reconsideration.

There are distinctions in the reconsideration justifications that may be presented in *murafa'at fiqh* in the event of the *giyabi* verdict. A *giyabi* decision is one that is made against a person who is unaware that the decision was made against him for whatever reason, or one that is made during a trial that was not attended by the litigating party. In *murafa'at fiqh*, an application for reconsideration may be accepted if the judge renders a ruling without the litigating party or his legal counsel present, unless the person who is not present at the trial is known to have received an official summons to the trial, but he is not present at the trial. Positive law does not rely on the *giyabi* decision to justify the filing of reconsideration. However, positive law provides that resistance efforts (*verzet*) are authorized if the defendant is not present in court and has not protested to *verstek's* ruling.

Positive law distinguishes the procedures and justifications for reconsideration applications in criminal and civil matters, whereas *murafa'at fiqh* does not.

Article 268 paragraphs 3 of the Criminal Procedure Code, Law No. 3 of 2009 on reconsideration, Article 66 paragraph 1 of the Supreme Court Law, and Article 24 paragraph 2 of the Law on Judge Power. However, Antasari Azhar's application for judicial review was allowed by the Constitutional Court in Decision Number 34/PUU-IX/2013, which stated that Article 268 paragraph (3) of the Criminal Procedure Code is in conflict with the 1945 Constitution and is therefore unenforceable. This means that several reconsideration applications may be submitted.

According to the researcher, the Constitutional Court's ruling promotes justice and protects human rights because the reconsideration petition seeks to establish justice and material truth while also protecting the convict's interests. Justice cannot be confined by time constraints, and a novum cannot be discovered after the reconsideration is decided. Consideration of reconsideration as a heroic act must be framed within the context of seeking justice.<sup>34</sup>

Additionally, Saudi Arabia's *murafa'at fiqh* prohibits the submission of reconsideration more than once. This is congruent with the author's

---

<sup>34</sup> Chakim.

understanding of the principle of justice, which is recognized as the main principle in Islamic law. While this is not stated expressly in Sharia's *murafa'at fiqh*, the author believes that based on the Islamic principle of justice, the reconsideration petition can be granted more frequently. However, the parties participating in proving the case must be aware of their respective responsibilities and roles at each level to avoid submitting reconsiderations repeatedly.

According to Article 268 paragraph (1) of the Criminal Procedure Code and Article 66 paragraph (2) of Law No. 14 of 1985 regulating the Supreme Court, a reconsideration application cannot be used to delay the execution of a decision. This is in accordance with Saudi Arabia's *fiqh murafa'at*, which also states that reconsideration does not recognize executions. According to the authors, while the majority of reconsideration-related instances can stymie execution, the precepts of Article 286 paragraph (1) can be used in a case-by-case basis. Suspension of execution is not expressly prohibited by law if implemented on a case-by-case basis. Islamic law likewise adheres to the notion of invalidation of penalty due to doubt. The Prophet stated in a hadith

ادروءوا الحدود بالشبهات

“Avoid a Muslim *hudud* penalty as a result of *syubhat* (doubt)”.

A reconsideration request is made in response to a doubt or apprehension that could delay the execution of a punishment. Additionally, Islamic law is based on the notion that freeing the guilty is preferable to punishing the innocent. As a result, the rules of Article 286 paragraph (1) and Saudi Arabia's *fiqh murafa'at* prohibiting postponement of judgments cannot be applied universally.

Article 68 of Law No. 14 of 1985 concerning the Supreme Court of the Republic of Indonesia confirms that plaintiffs and attorneys with specific powers to file a reconsideration are also able to request for judicial review. Additionally, the laws of Saudi Arabia's *fiqh murafa'at* indicate that the party allowed submitting reconsideration must be the one litigating or representing him and cannot be another. Explicitly applying the rules of the two laws creates a dilemma when litigants do not seek reconsideration yet the judge's decision contains an error. However, positive law provides that an appeal may be lodged in the interests of the law if the judge's ruling is erroneous. The attorney general may only appeal to the Supreme Court via the District Court in which the matter was resolved. Cassation for the sake of the law must not be detrimental to the parties concerned (defendant and public prosecutor). In Islamic criminal law, if a judge makes an error in his judgment, the *qadhi* or his staff has the authority to evaluate all judicial decisions made under their auspices and to annul those deemed erroneous. Other persons, particularly in situations pertaining to the judiciary. According to Allah's Messenger (PBUH):

لَا ضَرَرَ وَلَا ضِرَارَ

“Avoid engaging in risky behavior or causing harm to others.”

The next column compares the similarities and differences between Indonesia's positive law and Saudi Arabia's fiqhi murafa'at regarding reconsideration submissions:

**Table. 1** Indonesia's positive law and Saudi Arabia's *Fiqh Murafa'at*

N o.	Issue	Indonesian Positive Law	<i>Fiqh Murafa'at</i> Practiced in Arab Saudi
1.	Motive for requesting a reconsideration	There is a Novum, a court conflict, and a serious error on the part of the judge.	the applicant obtains strong evidence that he cannot show before the decision, the decision is based on fake documents, false statements, the judge's decision is contradictory, the verdict is Giyaby
2.	Limit on the number of Applications for reconsideration	Numerous instances have been decided based on Constitutional Court rulings.	One time
3.	The impact of reconsideration on decision implementation	Reconsideration cannot delay verdict's execution.	reconsideration can't delay execution of verdict
4.	Parties eligible to submit a reconsideration	litigants, and legal counsel	litigants or those who represent them

## Conclusion

The primary goal of conducting a judicial review is to achieve or ensure legal justice and justice for judges in their judgments. The majority of madhhab scholars agree on the permissibility of annulling a judge's decision if it contains an error; this is documented in the books of various schools of thought, including al Bahr al-Raiq, al-Mughni, al-Bayan fi Imam al-Shafi'i school, *al-Khulashab al-Fiqhiyyah ala Mazhab al-Sadah al-Malikiyyah*, *Asna al-Mathalib*. There are parallels between positive law and *murafa'at fiqh* in terms of the justifications for seeking judicial review. In positive law, a reconsideration application is made when there is a Novum, a court conflict, or a genuine mistake or error by the judge, whereas in *murafa'at fiqh*, a reconsideration application is made when the



decision is based on fake letters or false information, there is strong evidence that cannot be shown prior to the decision, or there is an error in the judge's decision. However, there are distinctions between the two in terms of *giyaby* choices. In *murafa'at fiqh*, the *giyaby* judgment may serve as the basis for the reconsideration application, whereas positive law does not need the *giyabi* case to serve as the basis for the reconsideration application, but regulates the *verstek* decision. Another parallel between positive law and Saudi *murafa'at fiqh* is found in the reconsideration application regulations, which prohibit the suspension of judgments. These laws, the researchers assert, cannot be generalized. The reconsideration application may become suspect or questionable, which may result in the execution being postponed.

## References

- 'Abd al-Karim Zaydan, *Nizam Al Qada' Fi Al Syariaat Al Islamiyah* (Amman: Maktabah al Batsair, 1989)
- Abdelaal, Mohamed A, 'Taqlid v. Ijtihad: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence', *J. Juris*, 14 (2012), 151
- Abdul, Manan, 'Penerapan Hukum Acara Perdata Di Lingkungan Peradilan Agama' (Kencana, Jakarta, 2006)
- Ad-Dardir, Imam Ahmad, 'Hasyiah Ad-Dasuqiala as-Syarh Al Kabir' (Isa Al babi Al Halbi, 2015)
- Al-Ansari, A, 'Asna Al-Matalib Fi Sharh Rawdhul'Talib', Beirut: DarulKitab Al-Islami, 2013
- Al-Syafi'i, Abdullah Muhammad Idris, *Al-Umm* (Dar al-Kotob al-Ilmiyah, 2002)
- Basuni, muhammad syarif, *Al Wasaiq Al Wauliyah Al Mu'niya Bi Huquq Al Insan* (Kairo: Dar Syuruq, 2003)
- Chakim, M Lutfi, 'Mewujudkan Keadilan Melalui Upaya Hukum Peninjauan Kembali Pasca Putusan Mahkamah Konstitusi', *Jurnal Konstitusi*, 12.2 (2016), 328–52
- Gumbira, Seno Wibowo, 'Problematika Peninjauan Kembali Dalam Sistem Peradilan Pidana Pasca Putusan Mahkamah Konstitusi Dan Pasca SEMA RI No. 7 Tahun 2014 (Suatu Analisa Yuridis Dan Asas-Asas Dalam Hukum Peradilan Pidana)', *Jurnal Hukum & Pembangunan*, 46.1 (2016), 106–19
- Gunarto, Marcus Priyo, 'Mengembalikan Pelaksanaan Peninjauan Kembali Sesuai Asas Hukum', 2004
- , 'Mengembalikan Pelaksanaan Peninjauan Kembali Sesuai Asas Hukum', *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*,

21.3 (2009), 462–76

Hadrawi, Abd, 'Visi Fiqih Jinayah Islam Tentang Rechterlijk Dwaling Dalam Hukum Pidana Positif' (IAIN Sunan Ampel Surabaya, 1988)

Hakim, Dedi Rahman, 'Prinsip Kepastian Hukum dalam Pembatasan Upaya Hukum Peninjauan Kembali', *Fairness and Justice: Jurnal Ilmiah Ilmu Hukum*, 16.1 (2018), 31–49

Halim, Yoeffanca, and Hardy Salim, 'Keabsahan Putusan Pengadilan Yang Belum Inkraht Sebagai Novum Dalam Pengajuan Peninjauan Kembali', *Jurnal Suara Hukum*, 2.1 (2020), 86–104

Imrani, Al, *Al Bayan Fi Mazhab Imam Al Syafi'i (Dar al Minhaj li Attibaah wa al Tauzi)*

Kasani, Abu Bakr al, 'Badai'al-Shanai'fi Tartib Al-Syarai', Beirut: Dar Al-Kutub Al-Ilmiah, t. Th

Liba, Muhammad, 'Al Tha'n Bi Iltimas Padah Al Nadhr Fi Nidham Al Murafaat Al Syariah Al Saudi', *Egyptia Journal*, 35.1 (2020), 998-1–73

Lindsay, Steven J, 'Timing Judicial Review of Agency Interpretations in Chevron's Shadow', *Yale LJ*, 127 (2017), 2448

Loreta Capeheart, Dragan Milovanovic, *Social Justice, Theories, Issues and Movement* (Rutgers University Press, 2007)

Lucy, William, 'Access to Justice and the Rule of Law', *Oxford Journal of Legal Studies*, 40.2 (2020), 377–402

'Mahakim Al Isti'naf Al Idariyyah', Wikipedia

Meirison, Meirison, Desmadi Saharuddin, and Rosdialena Rosdialena, 'Takhrij Fikih Dan Permasalahan Kontemporer', *Al-Istinbath: Jurnal Hukum Islam*, 5.1 (2020), 51–70

bin Nujaim, Zainuddin, *Al-Bahru Ar-Raiq Syarah Kanzu Ad-Daqaiq* (Beirut: Dar al-Marifah, tt)

Rustanto, 'Analisis Pengajuan Peninjauan Kembali Putusan Pengadilan Yang Telah Memperoleh Kekuatan Hukum Tetap Oleh Jaksa Dalam Praktik Peradilan Pidana Di Indonesia', Tesis, 2011, 6

Selznick, Philip, *Law, Society, and Industrial Justice* (Quid Pro Books, 2020), xxx

Soedirjo, *Peninjauan Kembali Dalam Perkara Pidana* (Jakarta: CV. Akademika Pressindo, 1986)

Soeparman, Parman, *Pengaturan Hak Mengajukan Upaya Hukum Peninjauan Kembali Dalam Perkara Pidana Bagi Korban Kejahatan* (Refika

- Aditama, 2007)
- Tahir, Hadari Djenawi, Bab Tentang Herziening Didalam Kitab Undang-Undang Hukum Acara Pidana (Alumni, 1982)
- Tatuhas, Pricylia Eunike, 'Alasan Mengajukan Permohonan Peninjauan Kembali Dalam Praktek Pradilan Pidana', *Lex Crimen*, 8.9 (2020)
- Yahya, Harahap M, 'Pembahasan Permasalahan Dan Penerapan KUHAP, Pemeriksaan Sidang Pengadilan, Banding, Kasasi Dan Peninjauan Kembali' (Sinar Grafika, Jakarta, 2005)
- Yilmaz, Ihsan, 'Ijtihad and Tajdid by Conduct', MH Yavuz, & J. Esposito, *Turkish Islam and the Secular State: The Gèulen Movement*. Syracuse University Press, 2003

**This page belongs to the Al-Istinbath: Jurnal Hukum Islam**