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Talfīq as A Method for Legal Solutions in Contemporary Islamic Law

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Abstract

Talfīq, or the combination of various opinions of jurisprudence *madhhab*, is frequently used to arrive at solutions in Islamic law. It was used extensively in the *tajdīd* era, the early 20th century AD, namely through the Islamic law reforms in family and personal matters in most Muslim countries. The concept is controversial and not universally accepted by ulama. Most classical ulama opposed it, although most contemporary ulama believe that *talfīq* is acceptable as a method for legal solutions. This research investigated the reasons or factors for this disagreement by analyzing the related views of such ulama. The qualitative research used a literature review from classical and contemporary books about *talfīq*. This research concluded that although the classical ulama appeared to be grounded firmly in their opposition to the practice of *talfīq*, subsequent development of Islamic law showed practical consideration made inroads in accepting *talfīq* as a method for legal solution. This acceptance is made by putting conditions and controls on how and when *talfīq* can be used to solve modern Muslim legal problems. This modification ensures the traditionalists that the danger of *talfīq*, as previously envisaged, would be avoided.

Abstrak

Talfīq atau gabungan berbagai pendapat mazhab fikih merupakan metode yang sering digunakan untuk mencari solusi dalam hukum Islam. Hal ini digunakan secara luas pada zaman *tajdīd*, yaitu awal abad XX Masehi, melalui reformasi hukum Islam dalam masalah hukum privat dan keluarga di sebagian besar negara Muslim. Konsepnya kontroversial dan tidak disetujui secara universal oleh para sarjana. Mayoritas ulama Islam klasik telah menentangnya meskipun sebagian besar ulama kontemporer berpandangan bahwa *talfīq* dapat diterima sebagai metode penyelesaian hukum. Penelitian ini bertujuan untuk menyelidiki alasan atau faktor ketidaksepakatan ini dengan melihat sampel dari pandangan terkait dari para ulama tersebut. Penelitian ini merupakan penelitian kualitatif dengan menggunakan tinjauan pustaka. Data diperoleh dari buku-buku klasik dan kontemporer yang menulis tentang *talfīq*. Penelitian ini menyimpulkan bahwa meskipun para ulama klasik pada mulanya tampak berpijak kuat pada penentangan mereka terhadap praktik *talfīq*, perkembangan hukum Islam selanjutnya menunjukkan pertimbangan praktis yang membuat terobosan dalam menerima *talfīq* sebagai metode penyelesaian hukum. Penerimaan ini dilakukan dengan meletakkan kondisi dan kontrol tentang bagaimana dan kapan *talfīq* dapat digunakan dalam memberikan solusi atas masalah hukum Islam modern. Modifikasi ini memastikan kaum tradisionalis menghindari bahaya *talfīq* seperti yang dibayangkan sebelumnya.

Keyword:
talfīq; *uṣūl al-fiqh*; source of law; legal; *taqlīd*

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Introduction

After the era of the Prophet (PBUH), legal problems and issues have increased considerably with the expansion of *Muslim* territories and conversion to Islam from many races and religions. One way or another, the laws have evolved and changed accordingly to accommodate these developments. Primarily, this is done through independent reasoning, or *ijtihād*, by qualified ulama, who extrapolated or analogized from the texts of the Quran, hadith, and decisions or views of the early generations of Islam. The laws are further explained and elaborated with the emergence of law or jurisprudence *madhhab* (pattern of thought). By the second century of *Hijrah*, this *madhhab* of law became exclusive to four *madhhab*s, namely: Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī.

In contrast to the early Islamic legal ulama (*fuqahā*), they had meticulously explained the laws and imbued them with the systematic formulation of legal theory or jurisprudence (*uṣūl al-fiqh*). These laws are considered the true expression of the sharia (religious law). With the decline of Muslim intellects at the beginning of the fourth century of *Hijrah*, the views of the past masters of these madhhabs of law were declared doctrinaire or dogmatic of which their followers must abide and follow in fulfilling their religious duties and responsibilities concerning their everyday life (Mustafa, 1998). This is the beginning of *taqlīd* or imitation (or replication) of the views of the past masters. The imposition of *taqlīd* had also arisen from many other factors, but the decline in independent reasoning was the most notable. Nonetheless, occasionally, ulama emerged with high repute and intellectual qualities, and it modified or adjusted the laws so that daily business and affairs, social and personal, could run smoothly and uninterrupted (Krawietz, 2002).

The adjustment was innovative yet accommodative to the *madhhab's* theoretical formulation and contemporary development and demand. This had worked harmoniously for the pre-modern Muslim society in the past (or known by some writers as classical Islam). The decline of Muslim political control and the dominance and colonialization of Muslim lands by Western powers, including the introduction of modernization, had made the traditional modulation of law no longer viable under the doctrine of *taqlīd.* Many modern ulama, such as *Muḥammad ʿAbduh* and *al-Daḥlawī*, have been critical of the use of *taqlīd,* calling for its replacement with the use of *ijtihād* (Wan Hassan et al., 2020). Despite this pressure to reform both the legal theory and law, the idea of *taqlīd* remained strong among ulama and the Muslim public. Only this time did it agree that the law should develop and address the needs of contemporary society. This is simply because new issues had arisen in the law fields, particularly family relations, financial transactions, and commerce, and most notably in public law, such as politics, governance, and criminal justice, where no satisfactory answer from the past madhhabs could be identified. Some solutions to these issues, primarily in the area of public law and commerce, have been answered through the introduction of Western laws. On the other hand, Islamic laws still apply to personal laws, and many internal changes have happened (Kamali, 2007).

Methods used in the previous periods of pre-modern Islam, such as *siyāsah*, *maṣlaḥah*, *ḍarūrah*, and *ḥiyal*, were used again actively. Additionally, a so-called *ijtihād tanzīlī* was and is still widely used to provide solutions to legal problems, and it is achieved through comparative analysis of and liberal analogies to the view of the past masters and the traditional manuals. The term *ijtihād tanzīlī* (R. Saputra et. al., 2022) must not be confused with suggesting the abandonment of *taqlīd* since it was only an attempt to find solutions to the new problems not explicitly covered and directly by the texts of the Quran and Hadith or discussed in the manuals of the *madhhab* or no *fatwā* was issued by any ulama of the past, using the theoretical formulation of the established *madhhab* (Saputra et al., 2022). Thus, instead of following the past view on the subject, which is not possible because of the non-availability of such an answer in the first place, a solution should then be sought afresh but using the methods established and

recognized by the past masters. At the same time, some of the answers can be found outside of one's legal *madhhab*. While a follower of a particular *madhhab* should strictly follow the view of his *madhhab*, it is unanimously permissible to cross to another *madhhab* without any blame whatsoever (Wan Hassan et al., 2020).

Many of the answers that one madhhab cannot provide are available in another. Since the doctrine of *taqlīd* has nothing to say about using the view of another ulama or even *madhhab* of law, borrowing the view from another *madhhab* seemed permissible as it could provide an answer not found in one's *madhhab*. This is the beginning of what is to be known as *talfīq* or sometime *takhayyur*. (Rana, 2017)This technique is beneficial to the *muftī* or lawyer reformer in the later colonial and post-colonial periods for Muslim countries where modifications to the classical law could be further made by combining the views of two *madhhab*s or more. Some writers describe this technique as cut and paste. Hence, it is likely to raise concerns about the traditional *madhhab* since, in some instances, the combination of the views of the *madhhab* produced answers or solutions not recognized by the traditional law. Traditional ulama saw this as a kind of legal funfair and felt the technique if permitted would disrupt the stability and consistency of the traditional law (al-Safārinī, 1998, al-Shātibī, 1997).

Nonetheless, as mentioned earlier, the use of *talfīq* was recognized by some ulama as permissible as it would provide the answers or solutions needed without abandoning the principle of *taqlīd.* This is indeed an accommodation that would help the ulama particularly during the early day of Islamic law reform in the late period of the Ottoman Empire and early independence of Muslim states in the Middle East from the colonial powers to formulate laws that were suitable to the challenges and dynamics of modern lives. As shown elsewhere, the modern project of the early Islamic reformers was not entirely successful due to the emergence of the traditional revivalist ulama *madhhab* who saw that the reform envisaged by these reformers was too radical. These reforms were seen as mostly coming from the ruling elite, largely influenced by western modernization and progress. In contrast to the past, the traditional ulama began to realize the usefulness of the *talfīq* and therefore worked to make its application more acceptable to the traditional law (Abdullah Alwi Hassan, 2007, Mohammad Hashim Kamali, 2007; Ruzman Md. Noor, 2008). Within this context, this article attempts to analyze the factors and arguments held by the ulama for and against the acceptance of *talfīq* in the modern development of Islamic law. For discussion, the views of some ulama in the 7th to the 13th century Hijri (600H-1299H) or 13th to the 19th century A.D (1203 C.E. to 1882 C.E.). In the 7th century, Hijri (from 600H to 599H) marked the emergence of discussions on *talfīq*. On the other hand, contemporary ulama covered those opinions that prospered in the beginning of the 14th century Hijri (1300H-1399H) or the late 19th century A.D., including those that subsist to this day (Bāqir Amīn al-Ward, 1986).

Method

The research was qualitative and used a literature review. The references used are some books written by classical ulama about *talfīq*. The concept of *talfīq* used as a reference in this article is *al-Ḥilwanī*'s opinion. Some contemporary books that study *talfīq*, whether they agree or reject it, were also used as references in this research.

The Concept of *Talfīq*

A combination of views from two or more different *madhhab*s could take many forms, as will be discussed below. This naturally has led to disagreement among the ulama on its definition. But this is not unusual in the Islamic legal tradition, especially in *uṣūl al-fiqh*, whereby ulama gave more than one definition of talfīq. Nonetheless, the one given by al-Ḥilwanī (d.1944), an ulama from Egypt, appears to describe the meaning of *talfīq* since it covers most of the aspects discussed by the ulama and restricts matters that are not that related

or significant. The definition given by the author is "combining two opinions from two different *madhhab*s of jurisprudence that produce a result in a matter of law not recognized by either *madhhab*s, or by retaining or using both opinions of the two different *madhhab*s at the end of which produces a rule not recognized by either *madhhab*" (al-Ḥilwanī, 1905).

This definition states that *talfīq* is a combined opinion between two *madhhab*s of jurisprudence. Thus, hypothetically, any combination within the same *madhhab* of jurisprudence is not *talfīq* although it would bring the same result, should these views differ. The second condition is that the combined opinion deals with the same problem with different rulings among the *madhhab*s of law. If it deals with two different problems, it falls under *taqlīd* or *takhayyur*. Nonetheless, this is not strictly the case, as shown below, whereby talfīq could also include two problems that are closely interconnected. Therefore, as further explained by *al-Ḥilwanī*, the precise requirement here is that *talfīq* only applies when it produces a combination of laws not recognized by any *madhhab* of jurisprudence. If the combination of opinions produces a result that already exists or is known in any *madhhab* of jurisprudence, then it does not come under the discussion of *talfīq*. According to the above definition, the underlining features that make a particular solution be considered as *talfīq* is that it produces a new answer unknown to either *madhhab* of law and whether such a solution emanates from the same or two different problems.

Two illustrations are offered in explaining the above definition. The first example is in the case of the same problem is the ruling of *wuḍū'* (ablution) whereby there are more than one view on how to do certain bodily actions in order to have a valid *wuḍū'*. Similarly, certain actions can invalidate the *wuḍū'*. *Talfīq* is achieved by combining performing *wuḍū'* and actions that invalidate it according to the most relaxed views, thus producing a new answer or solution. This kind of *talfīq* in the case of *wuḍū'* is adopted by Malaysian pilgrims while performing *ḥajj* in Mecca by observing rules of making *wuḍū'* according to *Shāfi'ī madhhab* but practicing the view from *Ḥanafī madhhab* in actions that will invalidate the *wuḍū'* which more relaxed than the *Shāfi'ī madhhab*. Thus the use of *talfīq* to the pilgrims in this case of *wuḍū'* is very much needed since it helps to overcome the problem to perform a new *wuḍū'* among Malaysian pilgrims during the rituals of *ḥajj* which can be burdensome to them.

The second example is the combination of opinions on two different problems with a strong connection between them that allows the issues to be considered as one. The question here arises on the status of a *ṣalāt* or prayer of *Shāfi'ī*s adherent following the rule of a *wuḍū'* from *Ḥanafī madhhab*. In a strict observance of the *Shāfi'ī madhhab*, the *ṣalāt* is tainted. Nonetheless, if the result of *talfīq* in the *wuḍū'* is considered good and valid, then the prayer performed by a *Shāfi'ī*s using such a *wuḍū'* should also be the same. It means that the effect of *talfīq* in the first problem (*wuḍū'*) applies similarly to the second problem (*ṣalāt*) (Razzaq & Farooq, 2019).

Another example is marriage and divorce, which is effective only when the marriage contract is legally valid. Thus, in a strict observance of the *madhhab*, the divorce of a *Shāfi'ī*'s spouses has no effect if the marriage is concluded according to Ḥanafī or Mālikī rites which some of its particulars are different, especially on the requirement of guardian or witness. Therefore, if *talfīq* were to be allowed, then a divorce of a Shāfi'ī's' spouse whose marriage was solemnized according to Ḥanafī or Mālikī rites is effective. This is the scenario where a new solution is created and hence considered as *talfīq* as according to the definition given by Ḥilwanī as above (al-Ruwayti', 2013).

It appears that Ḥilwanī's definition excludes the selection of opinions between *madhhab*s of law from different problems or issues known as *takhayyur* as *talfīq*. *Ḥilwanī* seems to consider this as a part of *taqlīd*. It is essentially following the ruling of another *madhhab* of law in a particular problem while remaining in one's *madhhab* law. This ruling is different between the *madhhab*s. An example of this is the adaption of the view from *Ḥanbalī madhhab* on the

question of presumption of death of a missing person. Through the application of this view, a Shāfi'ī's wife is able to petition a divorce or the heirs to apply for a death certificate to be used in estate administration papers within four years of her husband's or their father's disappearance instead of waiting for a much longer period under Shāfi'ī law. Although it is under *taqlīd* by virtue of following the ruling of an established traditional *madhhab*, some *'ulamā's* recognize *takhayyur* as also a kind of *talfīq*. This is because although *takhayyur* has not directly produced new ruling unknown before, it ultimately has the same effect of *talfīq*, that is, to find the solution of a particular problem by combining views from different *madhhab*s of law or *madhhab* or even between ulama. From this angle, the definition of Ḥilwanī can be improved.

As pointed out earlier in the example of *wuḍū'*, the result of *talfīq* is producing a more relaxed or flexible solution to the problem. Because of its flexibility and inclination to have a more moderate and accommodative solution, some ulama views the real intention of its use with suspicion. This is particularly true when the technique was later used liberally and occasionally to achieve suspicious ends that could be considered illegal or impermissible. The use of *talfīq* liberally is later known as *tattabu' al-rukhṣah* or following the easiest, which is prohibited by most of the ulama who view this as a kind of jest to the sharia law (al-Subkī, 2004; al-Zarkashī, 1992). Even a positive and innocent *talfīq* is not universally accepted by ulama. The following headings attempt to analyze justifications and reasons for the Islamic ulama from groups that prohibit talfīq and the others that allow it.

Arguments Against the Implementation of *Talfīq*

Over time, several justifications have been formulated by ulama who view *talfīq* with apprehension. Although the simple reason for its rejection in the legal methodology of the law was for the liberal use of the views from the *madhhab*, which could sometimes be arbitrary, the main argument against *talfīq* revolves around the question of the possibility of making the rule of Sharia devoid from its objective or purpose. Social and intellectual environment during the time of the past ulama also contributed to the rejection of *talfīq* as a solution tool to legal problem. Beginning at the 4th Century of Hijrah, under the doctrine of closing the door of *ijtihād*, believers are expected to be identified as following one of the four recognized orthodox *madhhab*s of law. This is also very true to an ulama and institutions to which the ulama *is* attached, like a mosque, courts of law, learning centers, etc., and this observance is systemically cascaded down to the general public. Consequently, under the rule of *taqlīd* agreed by most of the ulama that a Muslim must follow a recognized *madhhab* in any of the four "orthodox" *madhhab*s of law, would become pointless and no longer relevant if *talfīq* was to be allowed (al-Qarāfī, 1995, al-Subkī, 2004, Ibn Imām al-Kamīliyyah, 2002).

Another main opposition to the idea of *talfīq* is that it produces a novel view unknown to any of the established madhhabs of law, which was unsettling to this group of ulama since, as they argued, it can become a means to circumvent a ruling based on *ijmā'* (consensus). The majority of the past ulama were basically alarmed by the fact that *talfīq* would lead to a revocation of a law held by *ijmā*.' This protest also warned that talfīq would pass a law unrecognized by or not be associated with any *madhhab* of law. If allowed, the consequence can be quite devastated to rule of law that had been delicately formulated and reasoned by ulama based on the sound and established legal methodology. But the strongest dejection was probably rested on the fact that the application of *talfīq* could be exercised by a *muqallid* (uneducated or uninformed followers). Suppose a muqallid was free to establish a new law by attempting talfīq. In that case, he has put himself at par with a *mujtahid* (person capable of independent reasoning) (al-Ghazali, n.d.). Such a situation is outrageous in the minds of the past ulama because a *muqallid* does not meet the conditions already set of the principles of jurisprudence to offer solutions in legal matter. It is quite hard to appreciate this reason, since

a *muqallid* would probably have no idea what are the laws all about even in his own *madhhab*, let alone to combine views from other *madhhab* (al-Subkī, 2004, al-Syawsyawī, 2004).

Through course of time a more lenient practice of *talfīq* known as *tattabu' al-rukhṣah* (choosing a legal solution with inclination to the most expedience) was introduced and this caused a further reason for the ulama in this group to reject *talfīq*. Needless to say, because the technique is considered too relaxed and complaisant, it was rejected by majority of ulama including the contemporary ulama who had supported *talfīq*. Some ulama even went so far as to describe the practitioners of *tattabu' al-rukhṣah* as being misled or deviated (al-Maradawī, 2000; Ibn al-Najjār, 1993). What that is important to note here taking from this point was that the permissibility of *talfīq* albeit conforming to its rigorous conditions, would still provide a possibility to the practise of *tattabu' al-rukhṣah* or even probability of promoting it in the future. Because of this apprehension, *talfīq* must not be allowed to avoid the danger of *tattabu' al-rukhṣah* from occurring under the sadd al-dharā'i principle (blocking the evil means).

Based on the above arguments, the traditional ulama believed that talfīq should not be allowed to avoid danger and violation of religious rules. It was shown that *talfīq* had been used to attain ulterior motives prohibited by the religious law, such as fornication and consumption of alcohol. Through mixing various views of the ulama in the conditions of valid marriage, in particular requirements of the guardian and witness in the marriage, a marriage can be consummated without the fear of committing a sexual violation of *zinā* (fornication or adultery). Similarly, violation of consumption of alcoholic drinks can be avoided by mixing the views of the Ḥanafīs and the Shāfi'ī's. However, to many ulama, this view is total contempt and frivolous to religious law and cannot be considered *talfīq*. Lastly, the logical consequence of mixing different views of the ulama is the materialization of two or more opposing views. Although difference of views and rulings in matters of law is not a flaw in Islamic law, the creation of views originating from *talfīq* is viewed differently as it is a combination of views based on different legal methods or arguments (al-Bannānī, n.d., al-Safārinī, 1998).

Reasoning from the theological perspective was also offered to augment their argument against talfīq further. Under the title of truth or *ḥaqq*, the question was asked whether there is one truth or multiple truths in the law of God or sharia.? If we were to accept multiple truths, it would mean a prohibition or obligation has little consequence or effect on a believer. Another argument availed by the opposition is the claim that legalizing *talfīq* will lead to the permissibility of prohibitions such as adultery, alcoholic consumption, etc. The argument finds its basis in the principles of the jurisprudence of blocking or preventing means that could lead to something unlawful or *sadd al-dharā'i'*. Both of these arguments have been easily dismissed since *talfīq* is a matter of *ijtihād* whereby multiple views are allowed as a sign mercy from God, and it has been held unanimously that *talfīq* must not be used to allow something that is prohibited either by texts or consensus. Both of the arguments against *talfīq,* as presented above, is considered as outside the scope of discussion or *khārij 'an maḥal al-nizā'* and it is therefore, should be dismissed (al- Safārinī, 1998).

Arguments for the Implementation of *Talfīq*

As in any other new or innovative initiatives, proponents of *talfīq* based their arguments by referring to the texts of the Quran (al-Baqarah: 185, al-Nisā': 28, al-Hajj: 78) and Hadith (al-Haitāmī, 1994) on the general principles of the law that observance of particulars of the law must not inflict difficulties or harshness on the believers (*'adam al-ḥaraj* or *mashaqqah*) and that the sharia law has always promoted the idea of easiness (*yusr*). Similarly, the general principle of the law is that obligation and prohibition in the law must be based from a clear textual provision to the effect. There is none in the text that prohibits the practice of *talfīq*. In fact, the view of a jurist is not binding to any Muslim and a believer can either choose to accept it or otherwise (al-'Anzī, 1999, al-Bānī, 1997, al-Mayman, 2008; al-Zuhaylī, 1986). The

proponents also substantiate their support by stating that *talfīq* is the result of *taqlīd* (Abdul Rahman Haji Abdullah, 1998). Furthermore, the idea of *taqlīd* to a *mdhhab* has somehow been modified to the notion that the public has no *madhhab* in the sense that they only follow the *madhhab* of a *Muftī* who then will decide which views of the ulama that they should follow in answering their problems. Therefore, if a *muftī* should decide to practice *talfīq* then it is the duty of the public to follow his *fatwā* which is based on *talfīq*. In addition to this di, sallowing *talfīq* would make many of the rituals and rites practiced by the public become bad and therefore deny the principle of easiness as promoted by the sharia. The example of Malaysia's pilgrims during *ḥajj* as shown above is a good show case whereby strict observance to the *Shāfi'ī*s *madhhab* would indeed ruin their rituals because the impracticality of full observance of such view of the *madhhab* to which they adhered (al-'Ātibī, 2009; Maszlee Malik, 2005).

Contemporary ulama regarded arguments for rejecting *talfīq* as one-sided by just analyzing the negative aspects of talfīq without considering many of its benefits. This style of argument is not tenable and fair. Although there are indeed some concerns about the use of *talfīq*, one cannot deny the positive aspects of *talfīq*. Facing with current needs and demands for legal solution according to Islamic sharia in modern times, contemporary ulama argued that *talfīq* could provide a method by which problems can be answered expeditiously without resorting to free reasoning or *ijtihād* which was and is still apprehensible to many, traditional Islamic ulama of modern era. In fact, *talfīq* perpetuates the practice of *taqlīd* to one of the four recognized *madhhab* albeit in a different and cosmetic or lip service fashion. Moreover, the subject matters which come under *talfīq* are issues concerning to *ijtihād* and *ikhtilāf,* which are subject to changes and revisions based on the needs and demands of the people, society, place and time.

The most significant example brought forth by contemporary ulama to prove the applicability of *talfīq* is the process of codifying laws that had lately taken place in most Muslim countries. The laws of a particular country were practically based on the foundation of the majority adherence of a particular *madhhab* (*madhhab*s of jurisprudence). However, certain instances proved that the codified laws were the result of not only one, but combined opinions taken from multiple *madhhab*s, as a response to meet the rising needs and issues. Examples are codification of laws on *waṣiyyah wājibah* (obligatory bequest) and *waqf*. Currently, the *waṣiyyah wājibah* has been adopted in family law in several countries, namely Egypt, Syria, Tunisia, Morocco, Iraq, Kuwait, Jordan, Pakistan and Indonesia. In the former, opinion from the *Ẓāhirī madhhab* was adopted to create a will through the provision of the law made by a grandfather to his grandchild of whom his or her father predeceased the grandfather. On the latter, the opinion of the *Ḥanafī madhhab* was taken to provide for the substitution of *waqf* property or for the provision of *waqf* other that landed property. However, most of this adaptation is not *talfīq* in its technical sense that they are not combinations of different views creating a new view unknown or unrecognized to the *madhhab*s of law. However, rather than the implementation of a view of a different madhhab to the populace of another madhhab, which is aptly known as the selection of opinions from madhhab or takhayyur, as shown above, Nonetheless, it can still be classified as *talfīq* looking at the general perspective of choosing views from different madhhab to find a solution to a legal problem. *Takhayyur* is part of the freedom the ulama allows believers to choose any of the four *madhhab*s of law. Despite the insistence on observance of a *madhhab*, the *'ulamā's* were also careful not to encourage fanaticism by allowing the choice of switching to another *madhhab*. Permission to choose *madhhab* is allowed on the understanding that rulings and laws under each *madhhab* are based on the acceptable established legal methodologies (al-Muhayrī, 1997, Hallaq, 2004).

The Use of Sharia

The principle of sadd dharī'ah by the past ulama in prohibiting talfīq is the clear instance of looking *talfīq* at its negative aspect. In contrast to this approach the contemporary ulama seek to support the use of *talfīq* to positive aspect of Sharī'ah though the well-known principle of leniency and facility or *yusr*. This is the main principle of Sharī'ah which has been used by the early legal reformers of Islamic law to introduce codifications of Islamic law in Muslim countries, particularly in the middle east. References were sought according to the number of verses in the Quran and Hadith that advocated leniency and facility, partly to remove the plights and harms that may befall the believers. This is in addition to the peril and vulnerability of using or following to a single *madhhab* or view which can result in rigidity and impracticality of religious teaching and eventually would bring distress and hardship to Muslims both individually and socially. It also conflicted with the principle that any difference of opinions among the ulama was a mercy or blessing to the society. Through these differences, Muslims can choose to pick any of these opinions that are suitable and appropriate to their place and time (Ahmad Hidayat Buang & M. Cholis Nafis, 2012, al-Zuhaylī, 1986).

An example of the current *talfīq* is the payment of *zakāt fiṭrah* in Indonesia. The majority of Indonesian people adhere to the *Shāfi'ī' Madhhab*. In the *Shāfi'ī' Madhhab*, *zakāt al-fiṭr* must be paid with 2.5 kg of food, paid no later than before the 'Id al-Fitr prayer. Meanwhile, in the *Ḥanafī Madhhab*, *zakāt al-fiṭr* may be paid as much as 3.8 kg of food or its equivalent (money). The time for paying *zakāt al-fiṭr* can be any time. The Religion Ministry of Indonesia Republic stipulated that the *zakāt al-fiṭr* is 2.5 kg, can be paid with food or money, and is paid no later than the Eid al-Fitr prayer. This means that *talfīq* has been carried out between the *Shāfi'ī' madhhab* and the *Ḥanafī madhhab*. This *talfīq* based on the principle of leniency and facility or *yusr*, because paying with money is more practical and recipients of *zakāt al-fiṭr* (*mustaḥiq*) do not necessarily need rice or food.

The effect of the above principle is evident when it comes to general Muslim public in the sense that they can practice *taqlīd* as required but with choices or benefits of the view of different *madhhab*. For the contemporary ulama, both the concept of *talfīq* and *taqlīd are intertwined, with the former being* also a part of the latter. More importantly, there is no direct evidence from the primary sources of the sharia that directly or clearly prohibit *talfīq* (Ghazala Ghalib Khan, 2013:141–66, Abdul Razzaq, 2019).

Analysis of the Opposing Views

Despite the disagreements on accepting *talfīq* as a method for solving the legal problems, both sides agree that *talfīq* must not contradict the clear rules of the sharia law. As shown above, the opponents viewed the use of *talfīq* and its flexibility can be abused for intention undesirous to the sharia law. This is especially so when its flexibility is left to the public to choose, which may lead to frivolousness in observing the law. The ulama believed it was natural that the public and the political authority would opt for an easier and more lenient opinion of the law. This contradicts the rule that choosing a view in the sharia law must always be based on the most correct decision based on the clear proof of the texts and reasoning. Attention must always be given to the majority opinion or jumhūr when choosing the view since it is accepted that the majority's view carries more weight than the view of the minority and even less an isolated view of a jurist.

This concern for such a misadventure is on the justification that behind of all seemingly strict and harsh laws, there are wisdoms and goodness for the benefit and interest of a Muslim be it individually or communally both in this world and the hereafter. In other words, the law sometimes needs to be strict and harsh, in order to protect its higher objectives and the interest of the many. Despite this, it is agreeable to all that flexibility is always one of the important traits in Islamic law. If *talfīq* was accepted as part of this principle of legal flexibility, it needs

some sort of conditions or controls to avoid being misused or abused. These controls are to safeguard from the habit of excessive promotions of leniency in selecting the view of the *madhhab* which would undermine the wisdom behind purposes of the laws (*maqāṣid al-sharī'ah*) and the intended obligations (*taklīf*) required by the law.

It is accepted that *talfīq* operates under the doctrine of *taqlīd*. Whilst the idea of *taqlīd* suggests rigidity, *talfīq* offers flexibility to choose within this rigidity. Hence, the underlying question is whether all believers are qualified to choose whichever view of a ulama or *madhhab* of laws suit their needs? With all the technicalities and sophistication of the advanced science of law and its methodology in the sharia, it would require a talent and mastery of such knowledge to seek answer by themselves. The shorter route for a layman is to be an informed *muqallid;* a follower with some appreciation of the law without having trouble studying and analyze the law's proofs to arrive at an answer. As such, a *muqallid* with no or limited training in the science of the law may not be able to practice talfīq because they might violate some provisions of the sharia. A *mujtahid* or a ulama, on the other hand, with knowledge and skills in the particularization of the laws, is allowed to practice *talfīq* since they are able to provide proof and evidence on the selection of the views and thus avoid using *talfīq* arbitrarily.

As a general rule under the doctrine of *taqlīd*, a believer must adhere to a particular *madhhab* or *madhhab* from any of the four recognized *madhhab*s. Only in case of difficulties or distress then a person is allowed to seek reference to other *madhhab*s for solution. But then that person must abide by all the conditions and terms of that *madhhab*. This rule is nothing new as changing or switching of *madhhab* is allowed by all ulama, including that of the opponents of *talfīq*. Again, if the answer from other *madhhab*s of law is still unable to provide a satisfactory solution where the answer from the *madhhab* resulted in extraordinary rigidness or an occurrence of emergency to the general public that requires an urgent solution, only then it is allowed to practice *talfīq* within the permitted limitations. This is to suggest that *talfīq* is allowed only as a last resort and to be exercised only by a person competent in the sharia. Permission to practice *talfīq* in this situation is to avoid unnecessary burdens to Muslims in observing the laws sanctioned in the sharia. Therefore, it is common to find that *talfīq* in modern times is frequently employed by experts in the sharia in drafting laws relating to family relations, economic and political issues, as well as other novel issues from any fields of law that demand critical attention.

The opponents and proponents of *talfīq* have their merits and justifications in supporting their views. Specifically, the above discussion identifies at least three reasons for rejecting the practice of *talfīq* in the legal methodology of Islamic law namely; (1) the revocation of the rule based on consensus, (2) the frequent use of *tatabbu' al-rukhṣah* and (3) inconsistencies in the sharia rules based on the established legal methodologies. The application of talfīq is indeed highly necessary when the ulama have no choice, but to adopt it as a technique or method of legal solution, the negative aspects of *talfīq* deliberated by past ulama must be taken care for prior to its use to the general public. It is therefore important to address the danger or risk that *talfīq* will pose to the general fabric of Islamic law *vis-a-vis* its benefits or advantages by putting certain safeguards or limitations on its use.

To counteract the first negative aspect of *talfīq* that will result in the abandonment of rules based on consensus, *talfīq* is used as a last resort in the process of finding solutions. *Talfīq* is only permitted when solutions cannot be found or there are impediments in using the madhhab's views for acute hardship or *ḍarūrah*. Careful consideration and specific parameters need to be identified to establish events that come under the definition of *ḍarūrah*. In this respect, events that affect the society's basic needs or endanger the life and security or property of the states and public can be considered *ḍarūrah*. Of course, there is some degree of subjectivity on these matters among ulama, but the help or assistance of scientists and experts in the various field can be sought to determine the graveness of the events. By doing this, the

concern that *talfīq* will erode the established view of law based on consensus can be avoided, making talfīq far from falling victim to satisfying an individual's whims and selfish desires.

The use of *tatabbu' al-rukhṣah* appears to discard the established view in the *madhhab*, but its application is supported by sharia principle of easiness or *yusr*. The supporters of *tatabbu' al-rukhṣah* view this support as better than and more reliable than the one that was argued for by the traditional ulama. Although established and the majority rules as embodied in the view of the *madhhab* take precedent to the weak or rejected, the flexibility of the sharia always exist in allowing the use of isolated or weak views of the *madhhab* if there is a need or necessities for adopting such a view. Needless to say *tatabbu' al-rukhṣah* is applied cautiously and for a limited scope of application or specific group of people (al-'Ātibī, 2009, al-Maradawī, 2000).

Lastly, in order to avoid the law being inconsistent, the resultant of the law using *talfīq* most part of it is consiered as exception to the rule and to be used as a last resort. Conditions that *talfīq* is to be used in this fashion would be expected to reduce the resistance against using *talfīq* in legal solution. Further condition attached is the exercise of *talfīq* should be limited to qualified individuals. This is to avoid the use of *talfīq* for personal interest and desire. It also ensures *talfīq* is exercised for a valid reason using a correct methodology. This is similar to conditions of a *mujtahid* for all the intents and purposes. For further protection and to guarantee a proper and accurate usage of *talfīq*, it is suggested rulings based on *talfīq* can only be issued by a Mufti or persons or committee appointed by the authority to deal with issuing fatwa to the public (Jamaludin, 2016).

Conclusion

The emergence of *madhhab* in the tradition of Islamic law with the requirements of taqlid in the later period provides an opportunity to ulama to formulate *talfīq* as a technique for legal solution. In terms of chronological order, *talfīq* comes later than *taqlīd* as *al-qawā'id al-fiqhiyyah* comes later than *uṣūl al-fiqh* and *fiqh*. Indeed, *al-qawā'id al-fiqhiyyah* used the wealth of *uṣūl al-fiqh* and *fiqh* in formulating the maxims of the law to apply to the detailed problems of the law. Interestingly, the exercise or effort to devise *al-qawā'id al-fiqhiyyah* was usually cross *madhhab* as in *uṣūl al-fiqh*. Similarly, albeit controversially, *talfīq* has used the wealth of the *fiqh* cross *madhhab* by mixing and combining all the views. The protest of *talfīq* was simply because it has no stable or accepted legal methodologies as it was in *al-qawā'id al-fiqhiyyah.*

Ulama realized this predicament, and from time to time, conditions or controls have been imposed to ensure that *talfīq* is used in its proper purpose and context. Because of this, the concerns about the past of ulama, as elaborated above, have been largely dealt with by later jurists. It is safe to say that ulama have generally accepted the practice of talfīq except perhaps the extreme version of *talfīq* as shown above in the case of revocation of consensus and *tatabbu' al-rukhṣah.* To reduce resistance and scepticism, use of *talfīq* can only be made in the events of high emergencies and necessities exercised by qualified individuals. But this must be used always as a last resort and as an exception to the general rule. Lastly, in final analysis of the discussion is that *talfīq* is perhaps the precursor to *ijtihād,* which was banned by the doctrine of *taqlīd* in traditional law. This is because in one way or another, the result of *talfīq* produces a new view unknown to *madhhab* either in contrast to *ijmā'* or employing isolated views rejected by *madhhab*. Unfortunately, the use of *ijtihād* is still elusive today, although the call for it was made a century ago by modern reformers such as Abduh, Iqbal, Muhammad Asad and others. Many reasons have been attributed to this impasse, but this is not within the scope of this article to analyze. Instead of *ijtihād*, the current ulama of Islamic law seem to prefer and actively propagate the idea of *maqāṣid al-sharī'ah* and *maṣlaḥah.* These two sources or

approaches, including *talfīq*, are actively used in the modern application of Islamic law, particularly in *fatwā* and legislation.

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