

EFFECT OF THE MAXIM HARDSHIP BEGETS FACILITY ON JUDICIAL PROCESS DURING CONFLICTS

By:

Dr. Laminu Bukar**
Muhammad Shettima*
Muhammad Jidda Muhammad*

1. INTRODUCTION

In the Name of Allah, the Beneficent, the Merciful. The purpose of this work is to examine legal facilities available in judicial proceedings in Islamic law in times of conflict. These facilities make it possible to ease strict injunctions for proceedings and proof of right in situations where following strict rules may not be foreseeable. These facilities shall be discussed based on the provisions of the maxim Hardship begets facility (*al-Mashaqqah tajlib al-Taisir*). Legal maxims (*Al-Qawā'id Al-Fiqhiyyah*) are crucial in Islamic law (*fiqh*) as they encapsulate perceptions and precepts that can abet to figure out the factual essence of the Islamic Law in details. It is a handy tool for researchers who need to expand their grasp and understanding of content and objective of the *shari'ah*. More importantly, they ease to arrive at the opposite ruling where there is no direct text available on a particular matter.

The paper will start by elaborating the concept of maxim and its scope in Islamic law. It will also outline the judicial relevance of the maxims in Islam. The scope of hardship that attracts legal facility shall also be discussed in brief. The paper shall cover instances of appointment of judges, appearance of parties as well as witnesses in time of conflict will discuss circumstances in which a community that is cut off from the central authority due to conflict and the process through which they can appoint a judge to adjudicate over their disputes.

2. CONCEPT OF MAXIMS

The word *al-Qawa'id* is a plural of *qā'idah*, a derivative of *qa'ada* and literally has the meanings of fixation, consistency and being well established. *Qa'ida* on the other hand means base, and *Qawa'id* means a foundation of a building.

Technically, it is a general rule applicable to all its related particulars. Sadrush Sharī'ah (d. 747H) defined *Qawā'id* as general propositions.¹ Examples are *Qa'ida Nahwiyyah* (Rule of Grammar), *Qā'idah Mantiqiyya* (Rule of Logic), *Qa'ida Usūliyya* (Rule of Jurisprudence), etc.

Fiqhiyya (lit. of law) is the adjective of *Qā'idah* (maxim); a derivative of *fiqh* (law) which literally means understanding. *Fiqh* is a term that came to denote Muslim jurists' detailed study of practical aspect of the Divine ordainments. Imam Shafi'i (d. 204H/819AD) defined it as the knowledge of the practical injunctions of *Shari'ah* acquired from its detailed evidences.²

* Lecturer, Department of Sharia Law, University of Maiduguri, Nigeria

** Lecturer, Department of Sharia and Civil Law, Mohammed Colege of Legal and Islamic Studies, Maiduguri, Borno State.

¹ Al-Taftazāni, S. M., *Sharh Al-Talwīh 'alā Al-Taudīh li Matn Al-Tanqīh fī Usūl Al-Fiqh*, vol. 1, (Egypt: Dār Al-Kutub Al-Arabiyya, 1327H), p. 20.

² Al-Subkī, T. A., *Al-Muhalla fī Sharhil Jawāmi'*, vol. 1, (Beirut: Dār Ihyā' Al-Kutub Al-Arabiyyah n.d.), p. 32, Al-Zuhaili, W. *Al-Fiqh Al-Islami wa Adillatuhu*, vol. 1, (Beirut: Dār Al-Fikr, 1985), p. 16.

The terminology, i.e. *Al-Qawā'id al-Fiqhiyya*, referred herein as Legal Maxims has several definitions which basically revolves around two positions. The often quoted definition of the legal maxims is that "it is a general rule which applies to all of its related particulars."³ As this is an extension of the technical meaning of the term *Qā'ida* in other discipline to the *Qā'ida* in law (*fiqh*), this definition has failed to encapsulate the concept of legal maxims and thus not reflective of its essence.

From the foregoing, we can say that a "legal maxim is a general proposition of law that applies to most of its related particulars."⁴

3. JUDICIAL RELEVANCE OF UNIVERSAL MAXIMS

The four schools of Islamic Jurisprudence are in agreement over the five of the Universal Maxims that they clasp within themselves the entire quintessence of the Islamic *Shari'ah*. They are depicted to be universal maxims for being all-inclusive and applicable to the entire range of *fiqh* without any specification,⁵ whereas the rest of the maxims are just elucidations of these five:

1. "Matters are (judged) by their intents" (*Al-Umūru bi-maqāsidihā*)⁶ Where killing is intentional, there shall be a *qisās* (retribution) or toughened *diyyah* on the offender which is 100 camels half of them pregnant. Where the killing is by mistake there shall be no *qisās* but a *diyyah* which is 100 camels or 1000 gold coins.
2. "No harming and no counter-harming" (*Lā darara wa lā dirara*).⁷ Majority of jurists have held that it is appropriate for marriage to be dissolved due to lack of maintenance.⁸
3. "Custom is Authoritative" (*Al-'Ādatu Muhakkamah*).⁹ The default position concerning seeking the post of judgeship in Islam is prohibition. This is based on the saying of the Prophet, peace be upon him as narrated by Anas bin Malik, "whoever that sought the post of judgeship through intercessors, shall be left to his own devices; and whoever that is compelled to take it, Allah will send him an angel as a guide."¹⁰ Nevertheless, contemporary customs have dictated that no person is appointed to any post without applying for it. As a result there shall be no fault for one who feels that he is qualified for the post and has the ability to successfully carryout its demands.
4. "Certainty is not be overruled by doubt" (*Al-Yaqīnu la yazūlu bish-shakki*). A missing person whose death is not confirmed will be presumed alive. Thus all

³ Kamali, M. H., *Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law*, (UK, The Association of Muslim Lawyers 2010), p. 1. Retrieved on 28th February, 2015 from www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf.

⁴ Particulars (*juz' iyyāt*) are the injunctions that apply to particular cases as provided in the detail of the law. Therefore, what is true to the general proposition is also true to the particular and this provision is also extended to most of the particulars that are related to it. (Al-Bāhusain, Y.A., *Al-Qawā'id Al-Fiqhiyyah: al-Mabādi'*, (Riyadh, Maktabat al-Rushd 1418H/1998), p. 26.

⁵ Kamali, Op. Cit.

⁶ Al-Sarkhasi, A. M., *Al-Mabsūt fil Fiqh al-Hanafi*, vol. 6, (Beirut: Dar al-Ma'rifa, 1406AH), p. 59.

⁷ Al-Borno. M. S., *Al-Wajiz fi Iyādh al-Qawā'id al-Fiqhi al-Kulliyah*, Vol. 8, (Beirut: Mu'assasatur Risala, 1424/2003) p. 251.

⁸ Al-Dasūqī, M. A., *Al-Hāshiyah Alā Al-Sharh Al-Kabīr*, vol. 2, (Beirut: Dār Al-Fikr: n.d.), p. 518-519; Ibn Qudāmah, A. A., *Al-Mughnī fi Al-Fiqh Sharh Mukhtasar Al-Kharqī*, vol. 7, (Egypt: Dār Al-Sahābah li Al-Turāth 1993) p. 573; Al-Sharbīnī, M. A., *Mughn al-Muhtāj ilā Ma'rifati Ma'ānī Alfāz Al-Minhāj* vol. 3, (Egypt: Dar Al-Fikr n.d.), p. 442.

⁹ Al-Subkī, T. A., Op. Cit pp. 50-54.

¹⁰ Tirmidhī, M.I.S., *Al-Sunan*, vol. 3, (Dār Ihyā Al-Turāth Al-Arabī: n.d.), p. 605; Al-Manāwī declared it as defective Hadith in *Faiḍ Al-Qadīr* because one of its narrators is unknown and another as weak.

legal injunctions applicable to a living people also apply to him. So his estates will not be inherited and his marriage remains valid. The reason is because his life was certain when he went missing and his death before the legally stated time of the death of his age mates is attained. Thus he falls under the maxim "Certainty is not overruled by doubt."¹¹

5. "Hardship begets facility" (*Al-Mashaqqatu tajlibu Al-Taisir*).¹² Example of its judicial application can be seen in the following case: However, to safeguard public interest or due to necessity at times, the above rule has several exceptions according to Malikis. Example of safeguarding public interest is admitting the claim of a trustee (*amīn*) on the damage of consignment. This is despite the presumption of absence of damage as it is incidental attribute (*ārid*). The claim is admitted so that honest people will not desist from keeping properties in trust which will be against public interest.¹³ Example of exception due to necessity is admitting the statement of usurper who claims that the usurped property is damaged with his oath. He will be regarded as the defendant else he will be in danger of long imprisonment.¹⁴

This is a great maxim upon which Muslim scholars are unanimous regarding its position in Islamic jurisprudence. It is one of the principles upon which the shape of Islamic *fiqh* and its (*usūl*) jurisprudence are founded. Besides, whoever that investigates this great religion in its sources and auxiliary injunctions will clearly notice that character both in legislations regarding relationship between individuals and their Creator and between themselves.¹⁵

Historically speaking, the legal content of the *qa'idah* was one of the major criteria of employing *istihsan* (juristic preference), the principle that permits exceptions to strict *qiyās jaliy* (obvious legal analogy) in favour of *qiyas khafiy* (hidden legal analogy).¹⁶

Mashaqqah (hardship) is defined as "the difficulty that is unusual".¹⁷ Jurists have classified *mashaqqah* in terms of the person's endurance into two categories, namely usual and unusual. The former refers to the hardship one may experience while performing the religious duties. This is not deemed significant in the eyes of the law, and subsequently requires no facilitation, because such hardship is unavoidable even in one's daily life. So, the difficulties one finds in making *wudu* or *ghusl* in cold weather, or one faces when getting up early for *subh* (dawn) prayer, or when fasting during long and hot days; all of these and similar situations carry no weight by which an omission or reduction of the duty might be facilitated.¹⁸ This is perhaps because this kind of hardship is within one's strength and ability and leads to rewards in the afterlife, since the *taklif* of obligations (i.e. their fulfilment) requires this kind of

¹¹ Al-Sadlān, S. , *Al-Qawā'id Al-Fiqhiyyah Al-Kubrā, wa mā tafarra'a anhā*, (Riyadh: Dar Bilansiyyah, 1417AH), p. 106

¹² Al-'Izz. A., *Qawā'id Al-Ahkām fī Masālih al-An'ām*, vol. 2, (Beirut: Dar al-Kutub al-Ilmiyya, n.d.) p. 2-14; Al-Subki, T. A. Op. Cit Pp. 48-49; Al-Zarqa, A. Op. Cit p. 105.

¹³ Al-Maliki, M. H., *Tahdhīb Al-Furūq*, vol. 4, (Egypt: Isā Al-Halabī, 1346AH). p. 122

¹⁴ Al-Ya'murī, I. M., *Tabṣirat Al-Hukkām fī Uṣūl Al-Aqḍiyah wa Manāhij Al-Ahkām*, vol. 1, (Egypt: Mustafa Al-Bābī Al-Halabī, n.d.) p. 126.

¹⁵ As-Sadlān S. Op. Cit p. 216.

¹⁶ Al-Bahusayn, Y. *Al-Furuq Al-Fiqhiyyah Wal-Usulliyah*, 1st ed. (Riyadh: Maktabat al-Rushd, 2006) p. 318.

¹⁷ Al-Sadlan S. Op. Cit p. 219. Shubayr, M. *Al-Qawa'id Al-Kulliyah wa al-Dawabit al-Fiqhiyyah*, 2nd ed. (Amman: Dar al-Nafa'is 2007) p. 188

¹⁸ Al- Suyuti, J. A. Op. Cit pp. 77-80.

difficulty.¹⁹ Unusual *mashaqqah*, on the other hand, is what is meant in the definition above, and is the subject of the *qa'idah*²⁰ and the *mashaqqah* (hardship) which the married woman whose husband was either killed or whose whereabouts are not known can fall under this category of hardship and it has to be eliminated.

The theme of *Al-Mashaqqah Tajlib Al-Taisir* (Hardship Begets Facility) is the relieve of difficulty concerning religious obligations. It is applied subject to *Shari'ah* stipulated excuses that attract special consideration. The maxim means difficulty is a cause of easing, necessitating relieve of adverse condition. So whenever a Muslim is faced with a situation in which execution of provisions of the law subjects him to unusual hardship, the provision will be suspended in his favour until that difficult or hardship ceases. An example is an ill person who cannot pray standing will be allowed to pray seated.²¹

The principle of *raf al-haraj* (removal of hardship) was reflected in law in this universal *qa'idah*. It indicates that if any implementation of the law causes hardship to an individual, then there are alternatives one can do instead in order to overcome this hardship and difficulties.²² Being derived from several *nuṣūṣ* from the *Qur'an* and the *Sunnah*, the importance of this *qa'idah* is found in its being the origin of all the *rukhas* (concessions) that have been granted to people, who experience situations where they cannot perform the religious duties in their complete and original forms and shapes.²³

4. BASIS OF THE QĀ'IDAH:

Imam Al-Shatibi asserts that legal proof regarding lifting of hardship upon people in Islam has reached the level of recurrence (*tawātur*) thus absolute.²⁴ Some of the Qur'anic texts providing facility in cases of hardship are as follows: "*Allah intends every facility for you; He does not want to put to difficulties.*"²⁵ In this verse, Allah has negated all difficulties in the injunctions of the religion. The verse is generally applicable according to jurists.²⁶ In another verse, Allah the Most High says, "... and (Allah) has imposed no difficulties on you in religion."²⁷ According to jurists, this verse is absolute in dismissing all forms of difficulty in the obligations of the religion. It applies in all circumstances; and not only in the context of the cause of its revelation.²⁸ In yet another provision, Allah, Ta'ālah says, "*Allah doth wish to lighten your (difficulties): For man was created Weak (in flesh).*"²⁹ He has also provided, "*On no soul doth Allah Place a burden greater than it can bear.*"³⁰

¹⁹ Al-Shatibi A., *al-Muwafaqat*, (Beirut, Dar Al-Fikr al-Arabi, 1992) p. 122.

²⁰ Al-Suyuti, J. A. Op. Cit pp. 80-81

²¹ Ibid p. 55

²² Al-Borno, M. S. *al-wajiz Fi Idah al-Qawa'id al-fiqhiyyah*, 4th ed. (Beirut: Mu'assasat al-Risalah, 1996), p. 218. Al-Nadwi, A. Op. Cit p. 302.

²³ Al-Suyuti, J. A. *Al-Ashbahu Wal-Naza'ir*, 1st ed. (Beirut: Darul Kutub Al-Ilmiyah, 1983) p.77.

²⁴ Ibid p. 231

²⁵ See Qur'an Chapter 2 verse 185 Quranic translation we used Ali. Y. A. *Holy Quran Text and Commentary*, 3rd ed. (U.S.A.: Amana Co. 1938 and Lebanon: Darl Elfikr Beirut, 1989).

²⁶ Al-Bāhusain, Ya'qub bin AbdulWahhab, *Qā'idat al-Mashaqqatu tajlib al-Taisir*, (Maktabat al-Rushd 1424H), p. 208.

²⁷ Qur'an Chapter 22 verse 78

²⁸ Al-Bāhusain, Op. Cit., p. 208.

²⁹ Qur'an Chapter 4 verse 28

³⁰ Qur'an Chapter 2 verse 286.

In other words, the *Sharī'ah* does not oblige that which is unbearable upon man; but all its injunctions recognise the situation one finds it self and adapt to the particular circumstance.³¹

The Prophet peace be upon him was also reported to have said: Religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way.”³²

In another Hadith transmitted by Bukhar, the Prophet, peace be upon him said: “Make things easy for people, and do not make things difficult for them; and give them glad tidings and do not repel them.”³³

Similarly, Aisha, the mother of believers was reported to have said: “Whenever the Messenger of Allah, peace be upon him was given the choice of one of two matters, he would choose the easier of the two, as long as it was not sinful to do so.”³⁴

In addition, the Prophet, peace be upon him has also said that: “Allah has set aside upon my nation their mistake, forgetfulness and what they are coerced into.”³⁵

All these authorities confirm that the basis of the maxim that creation of difficulties is neither an objective nor intention of the *Shari'ah*.

5. CAUSES ATTRACTING LEGAL FACILITY:

Jurists have deduced causes that attract legal facilities under the following: Travelling (*safar*),³⁶ sickness,³⁷ coercion,³⁸ forgetfulness,³⁹ ignorance,⁴⁰ natural diminution,⁴¹ hardship or necessitated prevalence.⁴²

This last cause of hardship or necessitated prevalence seems to adequately encompass legal facilities for life in commotion and insurgencies that is bedevilling communities living under armed conflicts. It is for this reason that this paper aims to look at certain features of Islamic judicial process which creates facilities or easements to facilitate administration of justice during these difficult times. Reading through works of fiqh, one can easily discover many particulars of fiqh that extensively discussed issues of easement due to difficulty.

³¹ Al-Bāhusain, ibid, p. 211.

³² Bukhari, Hadith No. 39, vol. 1, p. 74.

³³ Bukhari, Hadith No. 69, vol. 1, p. 97.

³⁴ Bukhari, Hadith No. 5960, vol. 4, p. 462.

³⁵ Al-Hakim, *Mustadrak* as narrated by Ibn Abbas vol. 2, p. 198

³⁶ For instance, a traveller is allowed to suspend fasting during the month of *Ramaḍān* until his return. (See: Qur'an Chapter 2 verse 184).

³⁷ Permissibility to delay fasting of Ramadan due to sickness, as provided in the verse: “(Fasting) for a fixed number of days; but if any of you is ill, or on a journey, the prescribed number (Should be made up) from days later” Qur'an 2:184

³⁸ There is legal facility regarding prohibited conducts that do not violate the right of another such as apostasy. It is lawful for coerced individual to say word of disbelief whilst his heart is serene with faith.

³⁹ If one has sexual intercourse with his wife during the day in the month of Ramadan forgetfully, he will not be doing *Kaḥfāra* and his fasting will be untouched (Al-Luhaji p. 38). It should however be noted that “forgetfulness does not drop the obligatory” as a Malikiyya maxim “*Al-Aslu allā yasqut al wujūbu binnisyān*”.

⁴⁰ Conduct of a Judge or agent who is not aware that he is relived from his functions remains valid until knowledge thereof.

⁴¹ Minority and insanity attract many legal facilities as it is hard for some legal obligation to be executed by them.

⁴² As-Sadlān, S. Op. Cit p. 138.

6. CIRCUMSTANCES CREATING LEGAL FACILITY IN JUDICIAL PROCEEDINGS

The following applications of the *Qā'idah* can be noticed from the works of classical jurists that causes a shift from the default injunction to an easier one in order not to create extreme hardship or result in rights being violated.

a. Where the Community is cut from the Central Authority

Conflicts can cause communities to be separated from the central authority as we can see today. A question raises itself as where a particular community cannot reached the central authorities for the resolution of their conflicts, can they appoint one person among them to adjudicate between them and the rulings of such a person has a binding force?

Hanafis have opined that in such condition, it is mandatory upon the people to select a leader who shall appoint a judge or adjudicate by himself.⁴³ According to the Malikis, in the absence of the ruler or where it is impossible to reach him, the community leaders and its scholars should unite and appoint the most qualified person among them. Their appointment shall be regarded as done on behalf of the ruler base on the rule of necessity.⁴⁴

The opinion among the Hanbalis is not much different from that of Malikis.⁴⁵ Shafi'is on their part only consider such appointment valid in the absence of the Ruler for a long time and with no possible time limit of his absence; and where no judge could be found in a near-by town; and there is a unanimous agreement by all leaders of the community on the chosen person. Where the community divides into two, with one part agreeing and the other disagreeing, the judge will only have authority over the part accepting his judgeship. Where all those conditions are met, the appointment is valid and his ruling is binding upon them all.⁴⁶

One of the auxiliaries of Hardship Begets Facility is *Al-Ḍarūrāt Tubīh Al-Mahzūrāt* (Necessities render prohibited things permissible).⁴⁷ *Al-Ḍarura* (necessity) is defined as extreme need, difficulty and hardship that one cannot withstand against. Whether it threatens life, organ, dignity, psychic, or wealth, it is the condition that endangers a person or exposes one to grievous harm. As a result, it allows the commission of otherwise prohibited act or suspension of an obligatory conduct to prevent the probable harm within the stipulation of *Shari'ah*.⁴⁸ Thus, appointment of a judge is the responsibility of the Ruler and not the citizens but necessity has justified their appointment and made it valid.

b. Presence of Parties in Court

Presence of parties in Court is an essential element for justice to be done for all the parties involved. This is the reason why the Prophet, peace be upon him said to Sayyidunā Ali, "Whenever two men came to you seeking adjudication, do not rule in favour of one until you hear from the other, only then you will know how to adjudicate".⁴⁹

Where the defendant is residing outside the Court's area of jurisdiction and due to insecurity cannot attend the specific Court he is summoned to, jurists have held

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid p. 140.

⁴⁶ Ibid

⁴⁷ Al-Suyuti's Op. Cit p. 84, Az-Zarqā's Op. Cit p. 131, Al-Zuhaili, A. Op. Cit p. 276.

⁴⁸ As-Sadlān S. Op. Cit pp. 249-250

⁴⁹ Jāmi' Al-Tirmidhī, vol. 2, p. 395. Tirmidhi states that the Hadith is Hasan (sound). Albāni said too it is Hasan. Sahīj Al-Jāmi' Al-Saghīr, vol 1, p. 178.

that resort is to be made to Judge's Correspondence to Judge (*Kitābat Al-Qāḍī ilā Al-Qāḍī*). The majority of Muslim Jurists maintain that a judge can rule against the defendant in his absence and send a correspondence to a Court under whose jurisdiction the defendant resides. The correspondence shall contain the judgement against the defendant. The effect of such judgement shall be executed by the receiving Judge or, in case of defendant's denial, listen and record his defence and argument. These arguments shall then be sent back to the trial Judge to look at it again.⁵⁰

Hanafis on their part are of the opinion that the trial judge should send a correspondence to the judge in whose jurisdiction the defendant resides, detailing the cause and evidence presented against the defendant. The receiving judge will look at the correspondence and continue the case from thereon. This is based on the Hanafi principle that bars a Judge from ruling against an absent person.⁵¹

On the other hand, where the defendant deliberately declines to appear before the Court, the Area Court Edict of Northern Nigeria provides that "when a Civil cause is called on for hearing or at any adjournment of such hearing if the plaintiff appears and the defendant does not appear, the Court may, on due proof of service of the process and upon being satisfied that the time between the date of service and the date of hearing was sufficient for the defendant to have appeared had he wished so to do, proceed to the hearing and determination of the cause on the part of the plaintiff only, and the judgement thereon shall be as valid as if both parties had appeared."⁵²

The above provision appears to be in agreement with the position taken by majority of jurists that where the defendant deliberately refuses to appear before a Court and after all efforts to compel him to appear in the Court has failed, the Judge can still go ahead and decide on the case.

However, in pecuniary matters, beside the evidence presented by the plaintiff, the judge will only rule against the defendant after the plaintiff had taken an oath of *istithāq* (confirmation of entitlement). Where the cause is a debt in *dhimmah*,⁵³ the plaintiff will swear that he has not received his debt, or part of it, nor has he absolve the defendant of the indebtedness or part of it. Where the cause is on a landed or movable property, the plaintiff will swear that his ownership still subsists and that he has not transferred it by any means.⁵⁴

c. Where Witnesses cannot Come and Testify in Court Due to Insecurity:

Al-Shahādah 'alā Al-Shahādah which literally means testimony over a testimony is a situation where, due to inability of the original witness, a delegated witness can testify. There may be situations where due to necessity of death, sickness, travelling or any other legal excuse, an original witness will not be able to give his testimony before the Court. The original witness can testify to two credible witnesses who have fulfilled all legal requirements of a witness and to request them to bear his testimony and deliver it before a Judge. In a nut shell, the original witness is delegating two secondary witnesses to testify on his behalf. Jurists are in agreement over the validity of this sort of testimony in the event of the original witness's inability to testify.⁵⁵

⁵⁰ As-Sadlān S. Op. Cit p. 114.

⁵¹ *Badā'i' Al-Sanā'i'*, vol 8, p. 3917-3918

⁵² Order 9 (3) (1) of the Area Court Edict of Northern Nigeria 1968.

⁵³ *Dhimmah* is an Arabic word which means obligation and to some extent is related to one's honour. If something is in one's *dhimmah* it means that the person with whom it is entrusted is responsible for protecting it.

⁵⁴ Zaidān, A. Op. Cit p. 151.

⁵⁵ Id. p. 238.

Shafi'is and Hanbalis are of the opinion that it is conditional that the inability of the original witness to testify must subsist up to the time of judgement. Whenever he has the ability to testify before judgement is passed, direct testimony must be sought and reliance on the delegated testimony must be set aside.⁵⁶ Hanafis and Hanbalis are of the opinion that *Shahādah alā al-Shahādah* can only be admitted in rights that cannot be dropped due to *Shubhah*. Thus, it is inadmissible in *hudūd* and *qisās* punishments.⁵⁷ Imam Malik, Abu Thaur and one of two statements attributed to Shafi'ī have opined that the subject matter of delegated testimony can be anything from pecuniary to penal matters.⁵⁸

As we have stated above, the original witness must be unable to testify either due to death, absence, sickness, detention, fear, etc. This is an opinion held by Hanbalis, Malikis, Abu Hanīfah and Shafi'ī.⁵⁹ From the causes mentioned above, we can see the clear effect of the *Qā'idah Al-Mashaqqah Tajlib Al-Taisir* in conflicts where in many situations persons living in distant lands or cannot come to the Court for fear of their lives or arrest of unjust authorities. In such situation, concerned parties or witnesses can delegate others to state their claims subject to the conditions agreed upon by the jurists.

6. CONCLUSION

Conclusively, having relied on the provisions of the *Qur'an* and *Sunnah* and several jurisprudential arguments, the maxim "Hardship begets Facility" is no doubt the most important maxims as it embodies easements in several matters man can face in his daily life.

This particulars discussed in this paper is not however exhaustive. Rather there are vast areas of *fiqh* under which the maxim can apply. This is just a glimpse showing the relevance of maxim in contemporary *ijtihad* and reducing general principles of Islamic law to particular application which the society is in dire need to know about. As a result, more extensive works are needed on this maxim in particular and the genre of *qawā'id* in general. In addition, it is essential for our judges, Lawyers, Law students and as well as other judicial officers to be aware of the effect and implications of this maxim while administering justice.

FINDINGS

The following findings have been observed in this work:

1. Maxims are very important in the Islamic fiqh.
2. Universal maxims of Islamic law represent the entirety of its jurisprudence and therefore, have relevant applications in judicial proceedings.
3. Based on the maxim hardship begets facility, a community cut from a central authority can appoint its own judge in order to resolve their disputes based on Islamic law.
4. The maxim has also implied that where a party to litigation cannot be present in the Court, measures such as Kitāb al-Qāḍī ilā al-Qāḍī (judges correspondent to another judge).
5. Where witnesses cannot be available in Courts due to inability or necessity, resort can be made to delegated testimony or even hearsay testimony. Both

⁵⁶ Ibid.

⁵⁷ Ibid

⁵⁸ Ibid .

⁵⁹ Id. p. 240.

these can be traced to the maxim *al-Mashaqqa tajlib al-taisir* (Hardship begets facility).

RECOMMENDATIONS

1. Muslim scholars should guide our judges, legislators and even litigants to recognise principles that ease difficulties when making their claims before the Shari'ah Courts.
2. Judges should take note of the circumstance and difficult situation in which people may find themselves in and device appropriate avenues through which rights can be claimed and proved in line with rules of necessity in Islamic law.
3. The laws governing procedure in Shari'ah Court should be amended to reflect these rules of necessity as embodied by the maxim Hardship begets facility.