



**AN EXPOSITORY STUDY ON THE INHERITANCE RIGHTS OF
MISSING PERSONS (MAFQUD) UNDER ISLAMIC LAW IN
NIGERIA: IMPLICATIONS FOR THE DISTRIBUTION OF
ESTATE AMONG HEIRS**

By

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Abstract

A person is said to be missing where he disappears and his whereabouts is not known and is not certain whether he is dead or alive, such a person is called a missing person (mafqud) under Islamic Law of Inheritance. The general rule is that since he is known to be alive but only disappeared, he must be taken as still alive and existing until the contrary is proved. The property of such a person must not be shared among his heirs and are to be reserved until his true situation is known, or substantial time had elapsed that there is strong assumption that is dead or there is judicial pronouncement to that effect. Thus, inheritance of a missing person (mafqud) lies on the arguments forwarded by each school of Islamic jurisprudence or jurists, because there is no provision from the Noble Qur'an and Sunnah. The methodology adopted in this research is qualitative research. It is the objective of this work to trace the history in order to identify what constitute inheritance of a missing person (mafqud), look into the provision of the Qur'an and Sunnah and see how the heirs are categorized, analyze what will be the position if a missing person returns after he is judicially pronounced dead and look into different arguments provided by different Islamic schools of thought in respect to inheritance of a missing person (mafqud). It is also the conclusion of this work that the property of missing person must not be shared among his heirs and are to be reserved until his true situation is known, or substantial time had elapsed that there is strong assumption that is dead or there is judicial pronouncement to that effect.

Keywords: *Inheritance, Rights, Missing Person, Islamic Law, Estate, Heirs*

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1.0 INTRODUCTION

The ultimate owner of all properties is *Allah* (Q3:180). This becomes very clear to one when one breathes one's last i.e. when one is dead. Death is definitely inevitable. Every person shall taste it.¹ The *Qur'an* says: "Every soul shall have a taste of death"² After one's death, the real Owner (i.e. *Allah*) takes control of one's property and this is shared among one's heirs based on the divinely-fixed shares as contained in the Holy *Qur'an*.³ The *Islamic* law of inheritance is one of the important areas of *Islamic* Jurisprudence. There had been terms, rules and regulations, customs etc. as how a property of one person passes to another after the formers demise.⁴ Thus, the term inheritance may be expressed to mean the science of the systematic jurisprudential reasoning and mathematical calculus involved in the determination of the exact share(s) of each legal heir(s) in the property left by one or more praepositus.⁵ Inheritance laws and succession are known to be closely related and strongly indicative of the society's normative system, social structure and principles of family organization.⁶

The underline principle of the law of inheritance in *Islam* is a composite regulation as to who inherits and who is to be inherited, as well as what shares go to their heirs. *Islam* like all other cultures and religion recognizes that death of a person brings about transfer of most of his rights and obligations to his survivors.⁷ The transmissible rights include all dependent rights such as debts, right to compensation etc. and such rights as may relate to transmissible obligations those, which are capable of being satisfied out of the deceased's estate. Thus, what can be inherited is the remainder of the estate after the payments of funeral expenses, discharge of debts and obligations, and settlement of wills.⁸

¹ National Open University of Nigeria (NOUN), *Al-Mirath: Islamic Law of Succession* (2013) <www.nou.edu.ng> 5 accessed 10 January 2024

² *Al-Imran* (Chapter 3) verse 185 translated by Yusuf Ali

³ National Open University of Nigeria (NOUN), *Al-Mirath: Islamic Law of Succession* (2013) <www.nou.edu.ng> 5 accessed 10 January 2024

⁴ Imam A. A., *Mirath: Law of Succession and Inheritance*, available at www.Islamicforum.org accessed 10 January 2025

⁵ YA Sheriff and E E Okoh *Succession Under Islamic Law* (Malthouse Press Limited 2011) 1

⁶ Imam A. A., *Mirath: Law of Succession and Inheritance*, available at www.Islamicforum.org accessed 10 January 2025

⁷ *Ibid*

⁸ *Ibid*



Generally, under *Islamic* Law of Inheritance, it is said that the deceased person must die and the heir (s) must survive him before he/she will be entitled to inherit him. A person is said to be missing where he disappears and his whereabouts is not known and is not certain whether he is dead or alive, such a person is called a missing person (*mafqud*) under Islamic Law of Inheritance.⁹

Thus, the general rule is that since he is known to be alive but only disappeared, he must be taken as still alive and existing until the contrary is proved. For this Islamic Jurists have ruled among other things, that the property of such a person must not be shared among his heirs and are to be reserved until his true situation is known, or substantial time had elapsed that there is strong assumption that is dead or there is judicial pronouncement to that effect.¹⁰ The judicial pronouncement may be based on evidence of reliable witnesses, otherwise known as death in fact (*maut al-haqiq*) or based on inference by taking into account the length of time of his disappearance, this is known as death in law (*maut al-hukumi*).¹¹

However, a missing person may either be one to be inherited (*mawarithu*) or the one to inherit (*Warithu*). There is no provision from the Holy *Qur'an* and the *Sunnah* as to the status of a missing person inheritance, but it lies on the arguments forwarded by each school of *Islamic* Jurisprudence or jurists with respect to inheritance of a missing person (*mafqud*), though there is problem with respect to their arguments on the time span to declare the death of a missing person because they are not unanimous in their views. It will not be feasible for the *Muslim* world if these arguments can go on without careful regard in applying them. A country like Nigeria needs to have a specific period before a missing person can be declared dead.

Also, there is problem with the research work itself. This topic i.e. “An Expository Study on the Inheritance Rights of Missing Persons (*Mafqud*) under Islamic Law in Nigeria: Implications for the Distribution of Estate among Heirs” because it is a vital topic that concerns every aspect of the distribution of estate of a Muslim, particularly where there is distribution of the estate involving missing person (*mafqud*), e.g. how to recognize his family, where he got married after he left home or disappears etc.

Furthermore, the concept of inheritance or succession in *Islam* is rooted in the transient nature of man's life. Man's transient nature itself is underscored by two

⁹ As-Sobouni A, *Al-Mawarith fi Al Shariat al Islamiyyah* (Dar al-Sabouni, 2002) 174

¹⁰ Ibid

¹¹ S. Sabiq, *Fiqh as-Sunnah* (Dar al Fikr, Beirut, 1997) 322



verses of the holy *Quran* namely: “Every soul shall taste death and then unto us is the returned”¹² and “...Truly! To Allah we belong and truly, to him we shall return”¹³

The implication of the above verses is that man's sojourn on earth is for a limited period. Then come at the appointed time to die. During the short span of his life, whatever he acquires in the world is left behind except his good deeds which will go with him. The property and the belongings that he leaves behind goes to his successors. *Islam* being a complete way of life, the Holy *Quran* contains rules for the disposal of such property and belongings. Some specific provisions in the Holy *Quran* and *Sunnah* of the Holy Prophet Muhammad (PBUH) forming the origin of the concept, principles and science of inheritance are as follow:

“It is prescribed for you when death approaches any of you if he leaves wealth that he makes a bequest to parents and next of kin, according to reasonable manners.”

Allah commands you as regards your Children's (inheritance); to the male, a portion equal to that of two females; if (there are) women (only daughters), two or more, their share is two third of the inheritance; if only one (daughter), her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sister), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debt. You know not which of them, whether your parents or your children are nearest to you in benefit; (those share) are ordained by Allah. And Allah is Ever All Knower, All wise.¹⁴

Also, the Hadith of the Prophet (S.A.W) narrated by *Jabir bin Abdullahi*: “Once I fell ill. The Prophet (S.A.W) and Abu Bakr came walking to pay me a visit and found me unconscious. The Prophet (S.A.W) performed ablution and then poured the remaining water on me, and I came to my senses to see the Prophet. I said, "O Allah's Messenger (S.A.W)! What shall I do with my property? How shall I dispose of (distribute) my property?" He did not reply till the Verse of inheritance was revealed.”¹⁵

¹² (Quran 29: (Chapter 2) verse 57 translated by Sheikh Sudais

¹³ Al-Baqarah (Chapter 2) verse 156 translated by Sheikh Sudais

¹⁴ Al-Nisa' (Chapter 4) verse 11 translated by Sheikh Sudais

¹⁵ Sahih al-Bukhari Vol. 7, Book 70, Hadith 554<<https://quranx.com/hadith/Bukhari/USC-MSA/Volume-7/Book-70/Hadith-554/>> 20 January 2025



Generally, the law of inheritance may be described as the transfer of all the assets of the deceased person to the legal heirs along with any transferable rights as well. Also, inheritance is basically the transfer of status to the living person from the deceased with respect to the specific estate/property objects. The rights which can be transferred comprises of such rights as property, debts and other rights from which the legal heirs can receive compensation on behalf of the deceased person. Irrespective of their specific faith, generally in *Muslim* societies, inheritance rules concerning an individual's property upon death are derived from religious sources. The principles of inheritance in *Qur'an* and *Hadith* cater a wide range of beneficiaries and outline how to divide the estate among the heirs under various scenarios after the death of a person. It deals with two main issues:

- i. To provide a system for the distribution of property among heirs, in order to avoid fight.
- ii. To establish a system based upon justice and avoid concentration of wealth in a single entity.¹⁶

The laws of succession are divided into two groups: testamentary and intestate. Majority of the modern systems of succession are based on the individual's freedom to decide the future of devolution his estate upon his death. This is known as testamentary systems of succession. The case in which there is compulsory imposition of succession rules by requiring that on the death of a person his property be transmitted in a foreseeable way to those entitled to it is known as the intestate succession system.¹⁷

The problem of this work is that there is no law in Nigeria which regulate or govern the inheritance of a missing. There is a need for a codified law in Nigeria to govern the inheritance of missing persons. This law should address key aspects such as the time span for declaring someone missing, the judicial pronouncement of death or return, the methods of proof required (including evidence and witnesses), and the management of the property or entitlements of missing individuals.

2.0 MEANING AND NATURE OF ISLAMIC LAW OF INHERITANCE

In *Islamic* jurisprudence, there are two words used for the law of succession, they are *Al-Mirath* and *Al-Faridh*. The latter is more frequently used by the *Muslim* Jurists than the former. *Al-Mirath* is derived from the verb *Waratha* which means to inherit anything. Another literal meaning of the word *Mirath* is that, it connotes

¹⁶ Muhammad Zubair; SadiaKhattak; Hidayat-ur-Rehman; and Muhammad Aqeel Khan 'The Laws of Inheritance in Islam' available at <www.textroad.com>accessed 10 January 2025

¹⁷ Ibid



the handing over of a thing from one person to another.¹⁸ And the word *Faridh* is plural of *Al-Fridha* which is derived from the verb *Faradha* which literally mean a fixed share.¹⁹

In the legal terminology, Inheritance is basically the transfer of the deceased person property to the living person along with any other transferable rights.²⁰ Also, it is knowledge about some rules of *Shariah* which guides us who will inherit and who will not and what shares will go to the heirs from the property of the deceased.²¹ Scholar have defined inheritance in their own ways. According to *Abdur Rahim*, inheritance is the transfer of the rights and obligations from the deceased person to his/her heirs.²² Salako T. A²³ asserts that inheritance is the transference of status from the dead to the living person with respect to specific property objects. Coulson's defined inheritance to mean the distribution of estate of the deceased's person among the heirs after the payment of funeral expenses, debts and valid bequest.²⁴

It is from the way in which it revolves this fundamental question that the *Islamic* law of succession derives its most distinctive characteristics. The purpose of *Islamic* inheritance system is material provision for surviving dependants and relatives, for the family group bound to the deceased by the mutual ties and responsibility which stem from blood relationship. The manner in which this provision is to be made is prescribed by the law in rigid and uncompromising terms. Relative are marshaled into a strict and comprehensive order of priorities and amount, or quantum of their entitlement is meticulously defined. "Legal heir" in the *Islamic* context is a term which is properly applied only to those relatives upon whom property devolves after the deceased of its owner by operation of law; and it's the rights of legal heirs which are the keynote of the whole system of succession, they are fundamentally infeasible.²⁵

However, the power of the deceased to dispose of his property by will (*Wasiyyah*) is recognized under the Islamic Law but is basically restricted to one-third of his

¹⁸ Salah-Udeen H.A. Lakhvi, *Al-Mirath Justice of Islam in the Rule of Inheritance*, 2013, 16

¹⁹ Al-Mujeed Fi Lugatul -l- Arabiyat Musirat, Darelmachreq, 1086

²⁰ Salah-Udeen H.A. Lakhvi, *Al-Mirath Justice of Islam in the Rule of Inheritance*, 2013, 16

²¹ Ibid

²² Muhammad Zubair; Sadia Khattak; Hidayat-ur-Rehman; and Muhammad Aqeel Khan 'The Laws of Inheritance in Islam' available at <www.textroad.com> accessed 10 January 2025

²³ Salako T. A., Bhasah Abubakar and Mikail Ibrahim 'The Value of Islamic Inheritance in Consolidation of the Family Financial Stability' <www.lorsjournals.org> accessed 21 January 2025

²⁴ N J Coulson, *Succession in the Muslim Family* (Cambridge University Press, 1971) 40

²⁵ N J Coulson, *Succession in the Muslim Family* (Cambridge University Press, 1971) 40



net assets. Only where the legal heirs are prepared voluntarily forgo their rights will testamentary disposition in excess of this limit be operative.²⁶ Thus, Oniye²⁷ defined Wasiyyah (Islamic Will) to mean a limited gratuitous conferment of right of property by a Muslim while alive, in form of either cash, claim of debt, profit or any other benefit to some other person(s) which takes effect after the death of the donor. While a Will under the Conventional Law has been described to mean a disposition or declaration by which the person making it (the testator) provides for the distribution or administration of property after his death. It is effective on the death and is therefore revocable by him up until death.²⁸

Accordingly, the transmission of property by way of bequest, or in accordance of the wishes of the deceased, is of secondary importance, and the central core of the system of succession is formed by the compulsory rules of inheritance designed for the material benefit of the family group.²⁹ Unlike under the conventional Law where the testator has the liberty to dispose of his property in the way he likes and no one can modify the will.³⁰ This approach stands in sharp contrast with that of English law, for instance: under the comparatively recent and limited terms of the Inheritance (Family Provisions) Act, 1938, that the court may vary or override the will of the deceased in order to make reasonable provision for the maintenance of family dependants. “Intestate” may be used as a term of convenience to describe the *Islamic* law of inheritance, but it should certainly not carry with it any notion of a necessary recourse to a scheme of succession invoked only because the deceased has failed in his duty personally to arrange the devolution of his property. In *Islamic* legal philosophy the rules of inheritance propound the ideal way for the deceased to fulfill his duty to his surviving family.³¹

3.0 THE ESSENTIALS AND CONDITIONS OF INHERITANCE

These are the most important elements of inheritance, if any one of them is missing in a given case, and then there is no inheritance. They are three thus:³²

²⁶ Ibid

²⁷ MAOniye, *Will under Islamic Law* (Kewudamilola Publishing Centre 2010) 2

²⁸ CJ Osborn *Concise Law Dictionary* (12edn Mick Woodley, Sweet & Maxwell) 455

²⁹ N J Coulson, *Succession in the Muslim Family* (Cambridge University Press, 1971) 40

³⁰ T.O.G. Animashaun and A.B Oyeneyin, *Law of Succession, Wills and Probate in Nigeria* (MIJ Professional Publishers Limited 2002) 28

³¹ T.O.G. Animashaun and A.B Oyeneyin, *Law of Succession, Wills and Probate in Nigeria* (MIJ Professional Publishers Limited 2002) 28

³² Salah-Udeen H.A. Lakhvi, *Al-Mirath Justice of Islam in the Rule of Inheritance*, 2013, 16



- a. *Al-Muwarrith* - The Deceased Person
- b. *Al-Warithu* - The Heir
- c. *Al-Mauruth/Al-Tarika* - The Estate/ Property

AL-MUWARRITH (THE DECEASED PERSON): is the person who dies leaving behind an estate and/or other rights to be inherited by those entitled who survived him.

AL-WARITHU (THE HEIR): is the person entitled to inherit the estate left behind by a person he is related to either through blood relationship (*nasab*), marriage (*nikah*) or clientage (*wala*); and

AL-MAURUTH/AL-TARIKA (THE ESTATE/PROPERTY): this is whatever property or right left behind by a deceased. The property could be real or personal and includes the deceased movable or immovable property, whether self-acquired or ancestral, i.e. inherited by him. It includes all rights and liabilities such as *diya* (compensation), any property accrued to him after his death, debts, etc. However Hanafi School is of the view that for a property to be regarded as *tarika*, it must be free from any encumbrances. Thus, a mortgaged property cannot be considered a *tarika* if its value is equal to the loan collected.³³ The estate, whether real or personal, must be shared among the heirs irrespective of their genders; and there is also no regard to quantum. This position is regulated by Q4:7 which provide: “From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, a determinate share.”³⁴

There are three conditions that must be satisfied for the property of a deceased person to devolve to a potential heir, and are as follows:

I. The person to be inherited (*al-muwarrith*) must have died either in fact (*maut al-haqiqi*) or in law (*maut al-hukumi*). A person is said to have died in law when he is declared so by a judge based on circumstantial evidence. Therefore, a missing person will not have his property shared among his potential heirs until there is a judicial declaration of his death after lapse of time stipulated by law. The general rule is that since the missing person was alive when he disappeared, he is deemed to be alive until the contrary is proved, or the stipulated period lapsed. Before this, his property must be kept intact until he returns.

³³ M A Gurin, *An Introduction to Islamic Law of Succession* (Tamaza Publishing Company, Kano-Zaria 1998) 14

³⁴ An-Nisa' (Chapter 4) verse 7 translated by Yusuf Ali



ii. The potential heir (*al-warith*) must have survived the person to be inherited. In other words, the potential heir must have been alive at the time of the death of *muwarrith*. If the *warith* is dead he lacks the legal capacity to inherit the estate of the *muwarrith*. Therefore, where two potential heirs die in a circumstance in which it is difficult to ascertain who died first; neither of them will inherit from each other, according to the majority view comparing *Hanafi*, *Maliki* and *Shafi'i* School. *Hambali* School however is of the opinion that in such simultaneous death both the heirs would inherit from the other.³⁵

iii. There must be a clearly defined relationship between the *muwarrith* and the heir. It is not enough for a person to claim he is related to a certain person. The deceased must be related to the heir either through blood relationship or marriage. Even then, in blood relationship there is a degree of priority as some may exclude others either partially or totally. It is therefore not enough for a person to claim that he is a brother of a deceased. He must go further to define the nature of the relationship. That is, whether he is a full, consanguine or uterine brother. The significance of doing this is that it will make it easy to know whether he is inheriting as a Quranic or agnatic heir, and whether he excludes others or is excluded by some other.

If the claimant is relying on marital relation, it must be ascertained whether there is a legally recognized marriage. The subsistence of the marriage is also a relevant factor such that a divorcee may not be entitled to inherit depending on the nature of the divorce. The consensus of the *Sunni* jurists is that a divorcee in a revocable divorce (*talaq-raj'i*) will be entitled to inheritance while observing the waiting period (*iddah*). However, she loses the right to inherit where there is an irrevocable divorce (*talaq-al-ba'in*).

A revocably divorced Christian or Jewish wife who accepts Islam while observing *iddah* is entitled to inherit her *Muslim* husband if he dies during the same period.³⁶

The death of the testator must be actually and clearly established, either by real death or by the decree of a court.³⁷ Also, the heir (s) must survive him before he/she will be entitled to inherit him. A person is said to be missing where he disappears and his whereabouts are not known and it is not certain whether he is dead

³⁵ Hussein, A. *The Islamic Law of Succession*, Darusalam International Publications Ltd, London, 2005, p. 345

³⁶ *Ibid*, p. 376

³⁷ M A Gurin, *An Introduction to Islamic Law of Succession* (Tamaza Publishing Company, Kano-Zaria 1998) 14



or alive, such a person is called a missing person (*mafqud*) under *Islamic* Law of Inheritance. Thus, the general rule is that since he is known to be alive but only disappeared, he must be taken as still alive and existing until the contrary is proved. For this *Islamic* Jurists have ruled among other things, that the property of such a person must not be shared among his heirs and are to be reserved until his true situation is known, or substantial time had elapsed that there is strong assumption that is dead or there is judicial pronouncement to that effect.³⁸ The judicial pronouncement may be based on evidence of reliable witnesses, otherwise known as death in fact (*maut al-hqiq*) or based on inference by taking into account the length of time of his disappearance, this is known as death in law (*maut al-hukumi*).³⁹

The *Arabic* word *Mafqud* is derived from the word *Faqada* which literally means “missing”,⁴⁰ it appears in the Holy *Qur'an* 27:20 which states that; “*He inspected the birds, and said: What is the matter that I see not the hoopoe? Or is he among the absentees*”⁴¹ In the legal parlance, the (technical) meaning of the term *Mafqud* is a missing person whose where about is uncertain. It is also extending to situations where it is unknown whether the person is alive or dead.⁴² On the definition of a *Mafqud*, *Wahbak Al-Zuhayly* described *Mafqud* “as a person who has been absent from his place of abode for a long period of time that information on his whereabouts or whether is dead or alive is unknown.”⁴³

4.0 CONDITIONS TO BE SATISFY BY A CLAIMANT OF INHERITANCE OF A MISSING PERSON

Under the *Islamic* Law of Inheritance, any person claiming ownership of a property in the possession of another and alleged that it is part of the estate he has inherited, that person must established certain conditions before he can be succeeded. The court ruled in *Jatau v. Mailafiya*⁴⁴ that on what a party claiming the property of a *Mafqud* (a missing person) must establish to succeed. The court stated as follow:

“Whoever claims ownership in fee simple of a property in the possession of another and alleged that it is part of the estate he has inherited, the person in possession shall not be asked to explain how he came about it until the claimant has established the death of his deceased predecessor from whom he claims to

³⁸ As-Sobouni A, *Al-Mawarith fi Al-Shariat al-Islamiyyah* (Dar al-Sabouni, 2002) 174

³⁹ Sabiq, S. “*Fiqh as-Sunnah Dar al Fikr*” Beirut, 1997, vol.3 p. 322

⁴⁰ Al-Mujeed Fi Lugatul -l- Arabiyat Musirat op. cit., p. 1103

⁴¹ An-Naml (Chapter 27) verse 20 translated by Mohsin Khan

⁴² *Jatau v. Mailafiya* (2013) 1SCLR P.123

⁴³ Wahbak Al-Zuhayly, “*Al-Islami Wa-Adillatuh*” vol. 5 p. 784

⁴⁴ (2013) 1SCLR P.123



have inherited the estate and Proves also how he becomes an heir of the said deceased predecessor in respect of the said estate.”

The court also ruled in *Hamza v. Yusuf*⁴⁵ that the *Islamic* law of inheritance has made pre-distribution conditions to be satisfied by a claimant of inheritance be an estate can be distributed. These are:

- (a) That the death of the praepositus has occurred de facto (in fact or in reality) or de jure (by virtue of law);
- (b) That the claimant is a bona fide legal heir to the praepositus, through establishment of affinity of each legal heir to the praepositus;
- (c) That the praepositus left behind existing estate over which he had exclusive ownership, free of any encumbrances;
- (d) Whether the praepositus owed any debt; and
- (e) Whether the praepositus made a will.⁴⁶

The right of inheriting of *Mafqud* would arise only on the day he has been judicially proved and established dead by a decree of a Court of competent jurisdiction.⁴⁷ The Supreme Court has laid down two ways of establishing the death of a *Jatau v. Mailafiya*,⁴⁸ where it held that, there are two ways of establishing the death of a *Mafqud*, namely:

- (a) By production of a decree of death issued by a court; and
- (b) By giving evidence which will eventually lead to the issuance of the said decree of death.

Jurists are not unanimous as to the time span that must elapse before a Missing Person is declared dead for the purpose of inheritance. According to *Hanafis* the yardstick to be used in determining whether to declare a Missing Person dead is to observe whether any of his peers who resemble him in body and healthy condition are still alive. If none of them is alive; he too will be declared dead. They put the age to be 90 years.⁴⁹ This view is shared by some *Shafi'i* scholars while others held the view that it is not appropriate to peg or fix a period when a Missing Person can be declared dead but each case is to be treated on its merit according to the discretion of the judicial authority. Maliki School puts it at 70 years relying on a hadith that says: “the life span of my community is 60 or 70 years.” Finally, the *Hambali* School holds that, the determinant is the thin to

⁴⁵ (2007) 46 WRN 137

⁴⁶ *Yibo Yari v. Mikaila* (1986) 5 NWLR (46) 1064

⁴⁷ Yusuf Abdulrashid & Sheriff E.E Okoh *Succession under Islamic Law* Malthouse Press Limited, Lagos, 2011 p. 94

⁴⁸ *Jatau v. Mailafiya* (supra)

⁴⁹ As-Sobouni A, *Al-Mawarith fi Al-Shariat al-Islamiyyah* (Dar al-Sabouni, 2002) 174



circumstance existing at the time of his disappearance. If he disappears during a fatal epidemic, earthquake, volcanic eruption or during hostilities like during the state of war or civil strife, a period of four years is fixed within to enquire and look for him. The *Malik is* however only allows one year from the date of disappearance.⁵⁰ If nothing positive is heard about him after searches and enquiries then his property may be shared as inheritance.

The same goes for when he disappears during the calamity like where a ship capsized or a plane clashed with him, or is washed away by heavy flood and no traces of him are found. In these circumstances, the logical inference that can reasonably be made is that he must have died. On the other hand, if the disappearance is during peace time like where he went on a business trip and is never heard of. The *Hambalis* offers two opinions:

- (a) Action with regard to his estate must be suspended till after 90 years, or
- (b) The matter be referred to the judge for determination.⁵¹

Muhammad Aliyu Sabouni considers the second opinion of the *Hambali* School which advocates referral of the matter to the judicial authority as the most acceptable view because of its plausibility. He argues that a one-size-fit-all principle may not be appropriate as there are environmental and other factors that make people different.⁵² It appears that, the Nigerian Courts have the option of exercising a lot of *Ijtihad* in circumstances like this in determining the life state of a missing person; the court ruled in the case of *Garba v. Abdu*⁵³ that:

“A judge in his decision should use a common famous opinion of the consensus of scholars usually referred to as Ijma and not the single opinion of a scholar.”

Majority of Scholars from the *Maliki*, *Shafi'i* and *Hambali* theorists agreed that the wife or wives of a *Mafqud* has the liberty to observe the Iddah of death of her missing husband on the expiration of four years from the date of his disappearance.⁵⁴

Mere claim of entitlement to inherit a *Mafqud* decreed dead is not enough to entitle the claimant to succeed the missing person as under Islamic law oath is usually administered for the authentication of the veracity of such claim. The

⁵⁰ M AGurin, *An Introduction to Islamic Law of Succession* (Tamaza Publishing Company, Kano-Zaria 1998) 14

⁵¹ As-Sobouni A, *Al-Mawarith fi Al Shariat al Islamiyyah* (Dar al-Sabouni, 2002) 174

⁵² Ibid

⁵³ (2002)FWLR (94) CA

⁵⁴ YA Sheriff and E EOkoh *Succession Under Islamic Law* (Malthouse Press Limited 2011) 1



purpose of the oath is to ensure the protection of the property of the missing person.⁵⁵ In this regard the court ruled in the case of *Jatau v. Mailafiya*⁵⁶ that: “An oath proffered to a claimant over a deceased person's property in protection of such property since the deceased will not be available to dispute and rebut the claim. It is also proffered where the claim involves the property of a missing person or a minor.”

5.0 DEALING WITH THE PROPERTY OR ENTITLEMENT OF A MISSING PERSON

Missing person may either be the one to be inherited (*mawrithu*) or the one to inherit (*warithu*).

i. Missing Person as Mawrithu

In the case of a missing person who is to be inherited, his property is not to be shared among his heirs and is to be kept until his non-existence is ascertained or he is declared dead by judicial authority. Such that when he returns, he takes the property, otherwise the property is shared among his surviving heirs. Jurists differ as to who shall be entitled to inherit a missing person. According to *Malikis* and *Hanafis* the inheritance takes retrospective effect from the date of his disappearance.⁵⁷ Thus, anybody entitled to inherit the missing person at the time of his disappearance whether he is now alive or dead shall have his entitlement. In the case of the dead heir his entitlement goes to his heirs. But according to *Shafi'i* and *Hambali*, only those heirs who are alive at the time when he is declared dead would share his property.⁵⁸ Therefore, whoever dies before the confirmation or pronouncement will not inherit him.

Similarly, an heir who, for difference of religion, would not have inherited Mr. „A” now accepts Islam after the confirmation or judicial pronouncement of Mr. A”s death will not be entitled to inheritance as his action comes late in time.⁵⁹

ii. Missing Person as Warithu

Under this heading, a missing person inherits either as:

- a. Absolute heir; or
- b. A co-heir along with others.

In the first instance, i.e. where he is the only heir or has absolutely excluded all other heirs, the estate is to be reserved as whole until his situation is known. If he returns, he takes the estate; and if declared dead, the estate goes to the other heirs. For Mr. “A” dies and survived by a missing son. The estate is to be kept intact. If

⁵⁵ Ibid, p. 95

⁵⁶ *Jatau v. Mailafiya* (Supra)

⁵⁷ Gurin, op. cit., p. 15

⁵⁸ Ibid

⁵⁹ Sabiq, S., op. cit., p. 323



he returns, he takes it otherwise it goes to the *Muslim* public treasury. Similarly, where Mr. “A” dies and survived by a missing son and maternal sisters. The estate must be kept intact; since if the missing person was around, he would have absolute excluded the full, paternal or maternal sisters of his father Mr. “A”. However, if he is declared dead then the maternal sisters take the estate.⁶⁰

On (b) i.e. where the missing person shares along with others or only diminishes the shares of other heirs. Those of them whose shares remain constant receive their own full shares, while those whose shares may change will be given their minimum entitlement. For instance, Mr. “A” dies and is survived by his wife, father, mother, daughter and a missing son. In case of this nature, a two-tier distribution method is adopted:

- i. The missing person is deemed to be alive and the estate is then shared as such; and
- ii. He is deemed as dead as the estate is shared as such.

The end result will be that the wife and the mother get their full shares while the daughter and the father will get their minimum shares while the highest share is kept pending the return or otherwise of the missing son. Where the missing son is deemed alive; hence estate is shared thus:

Father - 1/6, Mother - 1/6, Wife - 1/8, Missing son and daughter – residue

The original base will be 24, father 1/6 of 24=4; mother 1/6 of 24=4; wife 1/8 of 24=3 while the missing son and daughter get 13 (24-11=13) and to share it in ratio 2:1.

To properly ascertain the respective shares of each heir for the purposes of this two-tier formula, the original base will be multiplied by the ratio, i.e. $24 \times 3 = 72$, as follows:

Father 1/6 of 72=12; Mother 1/6 of 72=12; Wife 1/8 of 72=9; Missing son and Daughter = residue (72-33=39). Thus, 39 portions will be divided into 3; the missing son gets 2/3 of 39=26 while the daughter gets 1/3 of 39=13.

However, where the missing son is deemed as dead, and hence the estate is shared thus:

Father 1/6, Mother 1/6, Wife 1/8 and Daughter 1/2

The base will be 24, father 1/6 of 24=4; mother 1/6 of 24=4; wife 1/8 of 24 and daughter get 1/2 =12 leaving a residue of 1, which shall go to the father.

⁶⁰ Az-Zuhalli, A D, Al-Fiqh al-Islami wa Adillatuhu, Dar al Fikr, Syria, vol. 10, p. 525



As observed from the above, shares of mother and wife in both ties remain the same, so they are to receive their total shares without waiting for return or otherwise of the missing son. On the other hand, father and daughter will receive their minimum shares as their entitlements vary depending on the outcome of the missing person's situation. Hence, they get their entitlements as per step one.

6.0 WHAT WILL BE THE POSITION IF A MISSING PERSON RETURNS AFTER HE IS JUDICIALLY PRONOUNCED DEAD?

The Missing person who otherwise returned only to discover that his property has been share upon a judicial pronouncement that he is dead will unable to re-claim his property that has been spent by his heirs but will be entitled to any leftover in their position.⁶¹

In conclusion, as has been stated above, before the distribution of the estate of a deceased person can share among his/her heirs, the death of deceased person must be actually and clearly established, either by real death or by the decree of a court. Also, the heir (s) must survive him before he/she will be entitled to inherit him. Nevertheless, a situation may arise where person is said to be missing where he disappears and his whereabouts is unknown and no one is sure whether such person is still alive or not, such a person is called a missing person (*mafqud*) under *Islamic* law of Inheritance. Thus, the general rule is that since he is known to be alive but only disappeared, he must be taken as still alive and existing until the contrary is proved. Inheritance of a missing person (*mafqud*) lies on the arguments forwarded by each school of Islamic Jurisprudence or jurists, because there is no provision from the Holy *Qur'an* and the *Sunnah* with respect to inheritance of a missing person (*mafqud*). For this *Islamic* Jurists have ruled among other things, that the property of such a person must not be shared among his heirs and are to be reserved until his true situation is known, or substantial time had elapsed that there is strong assumption that is dead or there is judicial pronouncement to that effect. Thus, no one can claim a right of inheritance over the property of his/her deceased relations, unless he/she established that they are related with the deceased person either by blood, through marriage or clientage and he acquire that right to inherit through those grounds.

⁶¹ Sabiq, S., op. cit., p. 323