

THE LEGAL IMPACTS OF MISSING PERSONS

A comparative study between Islamic jurisprudence & Egyptian law

By

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INTRODUCTION:

A missing person is a person who has disappeared for no known reason. It is someone whom nothing is known about him, He is someone whose whereabouts are unknown, and whose life or death cannot be determined.

Many questions may arise concerning the security of transactions with the missing person's estate, such as the disposition of his land, the right to proceed with insurance policies on his life and his pensions, the right to a cause of action, the necessity of providing for his dependents, the marital status of his spouse, the devolution of succession rights that would pass to him, the release of property from a life tenancy, the requirement of his consent to certain transactions, the merchantability of land titles from his estate, and claims of inheritance from him.

Most countries have a set period of time in which an individual is presumed to be dead if there is no evidence of the contrary. However, if the missing individual is the owner of a significant estate, the court may delay ordering the issuance of a death certificate if there has been no real effort to locate the missing person.

In most common law jurisdictions, a missing person cannot be declared legally dead before seven years. This time frame may be reduced in certain cases, such as deaths in major battles or mass disasters such as the September 11, 2001 attacks. In the United Kingdom a missing person may be declared legally dead after seven years from disappearing without explanation, unless other convincing evidence of the person's death can be shown. Elsewhere, the wait is even longer. An absent person is presumed to have died if: **1-** he has been missing from his home or usual residence for a period of seven years; **2-** such absence has been continuous and without explanation; **3-** persons most likely to hear from him have heard nothing; and **4-** he cannot be located by diligent search and inquiry.

In this article we will try to answer some questions related to Islamic jurisprudence and Egyptian laws, such as: How long can a person be missing before being declared legally dead? When is a missing person presumed dead? What happens when someone "legally dead" shows up alive?

Before answering these questions, it is important to mention that, Article (32) of the Egyptian civil code (ECC)^I provides that missing persons are subject to provisions contained in special laws; in the absence of such special laws, Islamic law will be applied.

MISSING PERSONS IN ISLAMIC LAW:

Islamic law is known as the "Shari'a", which is based on the Qur'an and the Sunnah, and those who ascribe to different interpretations of the law can often be found attending the same mosques. The four major Sunni schools of law are as follows:

Hanafi School (founded by Abu Hanifa – died 767): He was born circa 702 in Kufa, Iraq. Muslims of Bangladesh, Pakistan, India, Afghanistan, Central Asia, Iraq, Turkey, Jordan, Lebanon, Syria and Palestine follow this school.

Maliki School (founded by Malik ibn Anas – died 795): He developed his ideas in Medina, where he allegedly knew one of the last surviving companions of the Prophet. His doctrine is recorded in the Muwatta which has been adopted by most Muslims of Africa except in Lower Egypt, Zanzibar and South Africa. The Maliki legal school is the branch of Sunni that dominates most of the Muslim areas of Africa, except Egypt and the Horn of Africa.

Shafi'i School (founded by Muhammad ibn Idris ash-Shafi'i – died 820): He was considered a moderate in most areas. He taught in Iraq and then in Egypt. Muslims in Lower Egypt, Indonesia, Malaysia, Somalia and Yemen follow this school. Al-Shafi'i placed great emphasis on the Sunnah of the Prophet, as embodied in the Hadith, as a source of the Shari'a.

Hanbali School (founded by Ahmad bin Hanbal – died 855): He was born in Baghdad. He learned extensively from al-Shafi'i. Despite persecution, he held to the doctrine that the Qur'an was uncreated. This school of law is followed primarily in the Arabian Peninsula.

These four schools are somewhat different from each other in regards to the duration that a missing person (*El-mafqud*) is declared legally dead:

The Hanafi School provides that we have to wait as long as the missing person may be considered alive on the basis of a usual life-span. Abu Hanifah says that (90) years (or 70 years according to an alternative ruling) must elapse, starting from the date of birth of the missing person, before he can be declared dead. This would mean that his wife and his heirs must wait that long^{II}.

The Maliki school fixed seven years (some says 4 years) starting from the date of his disappearance, regardless of the circumstances surrounding the disappearance. This would mean that the wife of the missing person shall wait for (4) years and then observe an `Iddah of four months and ten days, after which she may remarry.

The Shafi'i and Hanbali Schools say that that if the person has been missing in difficult circumstances (such as in a battle, shipwreck, earthquake, flood, etc.), the judge will order a four-year waiting period for his wife and his heirs from the time the issue was brought to him, his wife can then go to court and seek permission to dissolve the marriage, however if the person has been missing in normal circumstances (travel to work or to study abroad), the judge must wait not less than four years, from the date of disappearance, before declaring him legally dead.

Concerning the wife whose missing husband returns back after having been declared dead, the Maliki school says that if the missing person returns before his wife remarries, she will be considered still married to the him (first husband), but if he returns after she remarries, she will remain the wife of the second husband. It will be an obligation 'wajib', however, for the second husband to pay a dowry to the first husband. According to Ahmad bin Hanbal; if the second husband has not consummated the marriage, this case she is considered married to the first; but if he has, the choice lies with the first husband: he may either reclaim her from the second husband and give him the dowry or allow her to remain with him by taking the dowry^{III}.

In addition, if a heir was missing before the death of the deceased and it is not possible to determine whether the missing person is alive or dead, all four schools provide that his inheritance should be held in trust so that he may receive his share when he is found or returns. If he does not return, and the time limit for waiting terminates and the designated Muslim ruler declares this person as dead in accordance with the rules set by Shariá, then the share held in trust for the missing person will be distributed among the heirs of the deceased. It must be noted that it will not be distributed among the heirs of the missing person; only the property of the missing person will be distributed among his heirs.

MISSING PERSONS IN EGYPTIAN LAW:

In order to determine when a missing person is presumed dead, the new Egyptian Missing Persons Law no. 2 of 2006^{IV}, amending some provisions of Act no. 25 of 1929 concerning certain personal status provisions, differentiates between four cases:

- 1- If a person misses during a battle or a military operation, the Ministry of Defence issues a decree declaring the missing person legally dead after one year from the date of his disappearance, and after exhausting all possible means to determine if he is still alive.
- 2- Those who are lost in plane crashes or shipwrecks are considered legally dead after fifteen days from the date they first went missing. The Prime Minister issues a decree declaring them legally dead; after sufficient investigations are carried out to ensure that these people have most probably perished.

- 3- If a missing person has disappeared in other difficult circumstances, (such as earthquakes, floods, torrent, etc...), the judge announces the missing persons legally dead after the elapse of four years from the date of disappearance.
- 4- A missing person, on the other hand, who disappeared under normal circumstances (such as: travel to work or study abroad), is declared dead after at least four years from the date of disappearance.

Unquestionably, the disappearance of persons leads to various impacts that divided into three phases, as follows:

First phase- Before declaring the missing person legally dead: During this phase, missing persons are considered alive, so their money is not divided among his inheritors and he should be responsible for the expenses of his wife and children. He is also not considered separated from his wife.

Second phase- After declaring the missing person legally dead: During this phase missing persons are considered legally dead, so their money is divided among the inheritors, and his wife becomes a widow from the date of the judgment, and she can marry after four months and ten days (out of respect to Islamic principles).

Third phase- If the missing person shows up alive: In this case the Egyptian law provides that the missing person regains his legal capacity and has the right to reclaim the remaining portion of his estate which was divided among the heirs, but if they have consumed the money, they do not need to compensate the missing person because they have dispensed it in a legal manner.

As for his wife, she is obliged – by means of Islamic principles – to return back to him if she has not remarried, but if she has remarried to a new husband, the missing person loses his rights as a husband. He can't order her to resume the marital relationship with him, except if he returns before the consummation of the second marriage (as Maliki School said), or if he proves to the competent court that his wife has been married to someone who knew that he was still alive before marrying her.

¹ *The Egyptian legal system was built on the combination of Islamic (Shari'a) law and Napoleonic Code, which was first introduced during Napoleon Bonaparte's occupation of Egypt and the subsequent education and training of Egyptian jurists in France. The Egyptian Civil Code was applied in 1949. The prime author of the 1949 code was Abdel-Razzak Al-Sanhuri, who received assistance from Dean Edouard Lambert of the University of Lille. Perhaps due to Lambert's influence, the 1949 code followed the French civil law model. The code focus on the regulation of business and commerce, principles of civil liability, pecuniary rights, and does not include any provisions regarding family law .Hossam El-Ahwany & Hassan Reda: "An introduction to the study of law – for Business students", Cairo 2001, p. 8.*

ⁱⁱ "The sheer length of this period may well be seen to be in conflict with the terms of article (130) in the constitution 2004". **Ndjma Yassari**: "The Shari'a in the constitutions of Afghanistan, Iran and Egypt – Implications for private law", Max-planck-institut, p. 32.

ⁱⁱⁱ *Al-Mughni*, vol. 7, p. 86, and *Rahmat Al- 'ummah*, p. 326.

^{iv} "As a consequence of the tragic incident of the sinking of the ferry "El Salam 98", hundreds of victims remain amongst the missing."El Salam 98", carrying around 1,300, sank in the red sea overnight on a trip from Saudi Arabia to Egypt on February 3, 2006. As a direct result thereof, Law no. 2 for the year 2006 was promulgated and introduced amendments related to the legal standing for missing persons". **Motaz El Mahdy**: "El Salam 98 – The legal standing of a missing person under Egyptian Law", *The Advocate*, May 2006, issue n. 7, p.4.