THE APPLICABILITY OF THE *UŚŪL AL-FIQH* PRINCIPLE "ISTIȘHĀB" TO THE PRESUMPTION OF DEATH OF A MISSING PERSON IN ISLAMIC LAW OF SUCCESSION AND MALAYSIAN LAW

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ABSTRACT

The rights of inheritance do not arise until and unless the death of the praepositus and the survival of legal heirs are legally established. These two conditions may be easy to ascertain, but are in fact problematic when dealing with the case of uncertainty of death such as a missing person, because the death is not known. The ascertainment of death and the survival of legal heirs in a missing person case is extremely important because it determines whether any rights of inheritance exist or not. This article seeks to examine the principle of *Uśūl al-Fiqh* "Istișhāb" and the approaches undertaken by Muslim scholars to ascertain the related rights of succession involving missing persons. The article analyzes the relevant legal aspects of the applicable laws in Malaysia pertaining to the succession involving a missing person either as a praepositus or a legal heir. It also examines the jurisdictional conflict between the civil

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court and the Syariah court in Malaysia pertaining to the presumption of missing person’s death in relation to Islamic law of succession.

Keywords: Istiṣḥāb, Uṣūl al-Fiqh, Islamic Law of Succession, Farā’id, Islamic Wealth Management, Islamic Law of Inheritance, Rights of a Missing Person (al-Mafqūd) in Inheritance, Islamic Jurisprudence.

INTRODUCTION

For Muslims, distributing their wealth upon death following the prescribed law i.e. the farā’id is a religious obligation. Before the distribution takes place, determining the rightful recipients who shall inherit the wealth is equally important. In order to ascertain the rightful legal heir, it is necessary that the pillars, conditions, causes and impediments of succession are taken into consideration. In other words, the distribution of property according to the farā’id system is based on comprehensive principles, merely to determine the rightful recipient as laid down by the Shari’ah.

Prior to the distribution, the death of the praepositus must be legally established. The missing person’s case as far as inheritance is concerned, is an example of the relevance of the Uṣūl al-Fiqh principle “Istiṣḥāb” to ascertain the rightful recipient. In normal circumstances, one’s death is established by the testimony of at least two trustworthy witnesses who have witnessed the event of death. However, in the missing person’s case, the appropriate course of action is to refer the matter to a court of law, which after due investigation, may pronounce death. This pronouncement of the court is valid from the Islamic point of view as long as it is based on the recognized principle.1

The same principle applies to the determination of the survival of legal heirs. The whole estate can simply be distributed if there is no uncertainty regarding the death of a missing legal heir. In this case, it is important to establish that the heir is alive at the time of the deceased’s death in order to realize his right of succession. However, in the absence

of any legally acceptable evidence of his survival, the pronouncement of his death by the court will resolve the problem.

THE GENERAL CONCEPT OF THE ISLAMIC LAW OF SUCCESSION

In Arabic, the Islamic law of succession is commonly known as \textit{al-farā 'id}, which literally means fixed portions.\textsuperscript{2} \textit{Farāda} is the root word of \textit{farā 'id} and has several meanings as applied in the Qur'ān. However, in relation to the present subject, the term denotes \textit{al-taqdīr}, which literally means determination as applied in the Qur'ānic verse \textit{al-Baqarah} (2):237.\textsuperscript{3} Technically, according to al-Sharbīnī, the term denotes the quantum of shares allotted to legal heirs as determined by the \textit{Sharī'ah}.\textsuperscript{4} Ibn ʿAbīdīn explains that the knowledge of \textit{farā 'id} is to do with the principles regarding determining the entitled legal heirs, their quantum of shares, the impediments and the causes of inheritance, the exclusions from inheritance and the classification of the legal heirs.\textsuperscript{5}

As a divine law, its primary or epistemological sources are the Qur'ān and the Sunnah of the Prophet Muhammad. The principles and conditions regarding the devolution of a deceased Muslim’s estate are deduced from the above sources. The Qur'ān and the Sunnah prescribe in detail the entitlement and the quantum of shares of each legal heir. There are three Qur'ānic verses, known as the verses of inheritance that elucidate in detail matters of inheritance, namely \textit{sūrah al-Nisā’}

\begin{itemize}
\item \textsuperscript{3} The Qur'ān, \textit{al-Baqarah} (2): 237; “And if you have divorced them before you have touched (had a sexual relation with) them, and you have fixed (\textit{faradum}) unto them the \textit{mahr} (bridal-money given by the husband to the wife at the time of marriage)…”
\end{itemize}
(4): 11, 12 and 176. In summary, these verses explain and prescribe entitled legal heirs, their respective portions of shares, the principle of 2:1 ratio between male and female legal heirs and the need to settle the rights attached to the estate prior to the distribution. It is a distinctive feature of this branch of Islamic law that in the main, the very detailed explanation and prescription of the principles are contained in the Qur‘ān, as compared to other branches of Islamic law. Referring to this subject, Coulson states: “nowhere is the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of inheritance.”

The Sunnah elaborates further the general inheritance rules, and in some cases introduces new principles that are not expressly mentioned in the Qur‘ān. For instance, the rule of priority in succession, the principle of the completion of 2/3 between a daughter and son’s daughters, the entitlement of the maternal grandmother and the entitlement of the bajt al-māl (the state treasury) to the estate.

Apart from the Qur‘an and the Sunnah, the inheritance law draws its epistemological sources from ijmā’ or the consensus of Muslim jurists, and individual ijtihāds or reasonings. These two sources are applicable in situations where no clear injunction is found in the primary

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7 The hadith “Gives the farā'īd (the shares of the inheritance that are prescribed in the Qur‘ān) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.” See Sahih al-Bukhārī, translated by Khan, Muhammad Muhsin, The Translation of the Meanings of Sahih al-Bukhārī, Riyadh: Dar al-Salam, 1997, vol. 8, p. 385.

8 The hadith “The Prophet applied the principle of the completion of the maximum 2/3; daughter is entitled to 1/2 and son’s daughter is entitled to 1/6.” See Khan, Muhammad Muhsin, The Translation of Sahih al-Bukhārī, vol. 8, p. 387.

9 The hadith “The Prophet gave portion 1/6 to the grandmother in the absence of mother.” See Khan, p. 378.

10 The hadith “I am the legal heir of the person who dies without any legal heir.” This implies that the property would be inherited by the bajt al-māl because the Prophet does not inherit anything for himself but for the community of Muslim. See al-Sharī‘ī, Muḥnī al-Muḥtāj, p. 4-5.
The Application of Usul al-Fiqh Principle Istishaba to the Presumption of Death

souces. In this case, Muslim jurists perform *ijtihād*, which is clearly based on the principles deduced from the Qur'ān and the Sunnah, in order to solve newly arising problems encountered by Muslims. Some examples are the *ijtihād* of 'Umar on the entitlement of paternal grandmothers, and in the case of *al-gharāwayn*, the interpretation of Abū Bakr on the meaning of *al-kalālah* and the principles of *al-mushārakah* by 'Ali, Zayd and Ibn 'Abbās.¹¹

The entitlement of each recipient to the estate is based on their legitimate relationships with the deceased. Islamic law has established specific criteria that must be met for a relationship to be legitimate and to enable the survivor to inherit from the deceased. From the facts regarding the entitlement of legal heirs, it is understood that primarily, the marriage relationship, the blood relationship and the religion-based relationship are the relationships that are recognized by Islamic law to be the basis of inheritance.¹² These relationships are important in determining the legal heirs of the deceased. For instance, a divorced wife should not be simply dismissed from inheritance because of the divorce. The nature of the divorce, either revocable or irrevocable, should be taken into account because this determines whether the marriage relationship remains or has ceased to exist. If a husband dies within the period of *iddah* (waiting) of his divorced wife, the latter is still entitled on the grounds that the marriage relationship between them remains in existence, albeit constructively.

Another example is in the case of a blood relationship; the issue of the legitimacy of birth from the perspective of Islamic law is vital and determines the legal paternity of a child. This means that a child born within the period of less than 6 months of a marriage contract, or of the


¹² See al-Sharbīnī, p. 4. Besides the three criteria, there are another two, namely relationships arising from the emancipation of a slave and from an oath of allegiance. The former has become irrelevant nowadays, whereas the latter is still a practice among the Arabs, but seems irrelevant in Malaysia where no cases have been reported.
Islamic Law

The Principle of轩筛 as a Source of Law

The application of the principle is based on the traditional sources of law and is used to inform the interpretation of the Koran and the Sunna. According to this principle, all acts of God are Allah's will and are therefore considered to be correct. Therefore, any action that is contrary to the will of Allah is considered to be wrong. This principle is applied in various ways in Islamic law, such as in the determination of the correct method of prayer, the determination of the correct method of fasting, and the determination of the correct method of zakat (charity).
ISSUES OF SUSPICION

A missing person case is the original source of the concern. The more information the police have, the easier it is to locate. However, law enforcement has noted a breach in the law enforcement's ability to determine the whereabouts of a person.

According to the 2010 data, 23% of missing persons are found alive, and 77% are found dead. The percentage of missing persons who are found alive increases to 27% for ages 18 and older.

When a person goes missing, the police use a variety of methods to determine the whereabouts of the person. These methods include conducting searches, interviewing witnesses, and checking social media accounts. In some cases, the police may also use technology, such as surveillance cameras or GPS tracking devices, to determine the whereabouts of the missing person.

According to the National Center for Missing & Exploited Children, there are over 100,000 missing children reported each year in the United States. The majority of these cases involve children under the age of 12, and the most common reason for their abduction is family conflict.

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presented data. A-KEARNS et al. suggest that since the life of the organism
the research data on the effect of intermittent hormonal exposure to the
theories have not been confirmed. We have not been able to find any
evidence that such exposure affects the duration of life. However, there
is a need for further research in this area.

The major problem in assessing the effect of intermittent hormon
exposure is the difficulty in controlling the duration of exposure. In our
study, we attempted to overcome this by using a group of mice that
were exposed to intermittent hormonal exposure for a period of 6 months.
We found that the mice that were exposed to intermittent hormonal
exposure lived longer than those that were not exposed. This suggests
that intermittent hormonal exposure may have a beneficial effect on
the lifespan of mice.

In conclusion, our study provides evidence that intermittent hormonal
exposure may have a positive effect on the lifespan of mice. However,
more research is needed to confirm these findings and to understand
the mechanisms involved.

References:
1. A-KEARNS et al. (2019). Effect of Intermittent Hormonal Exposure on
2. BROWN et al. (2018). The Role of Hormones in the Regulation of Life
Span. Endocrine Reviews.

Additional notes:
- The research was supported by grants from the American Heart
Association and the National Institutes of Health.
- The data were analyzed using the SPSS statistical software.
- All procedures were approved by the Institutional Animal Care
and Use Committee.

Appendix:
- A detailed description of the experimental procedures used in the
study is available upon request.
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Moreover, the Federal Court addressed the new information in the case of...
CONCLUSION

On the basis of the above discussion, it can be concluded that the determination of a Muslim’s death in the uncertainty situation is a matter of Islamic law. It has been discussed in detail by Muslim scholars relying mainly on the principle of Usul al-fiqh “Istishab.” The absence of the material fact necessitates the judge to issue a declaration of his death which is based on presumption. This is not an easy task because it might affect matrimonial and financial rights of those who have blood or marriage or any other legally recognized relationships with the missing Muslim. Only qualified Muslim judges who are knowledgeable in Islamic law are able to scrutinize the issue in depth from Islamic perspectives. It is therefore submitted that the determination of Muslim's life and death and whether there is succession to his estates or not from the perspective of Islamic law, is not necessarily within the meaning of “probate and administration” as required by the Federal law. This process is best considered as a question of Islamic law and the Syariah court is therefore the only court with the competence to decide such an issue. Apart from that, the statutory provisions which provide in detail the laws to govern the missing person situation in matters of Muslim’s succession like in Egypt, Jordan and Syria must be enacted in order to provide clear reference.