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Mafqūd and Fasakh in the Writings of Muslim Jurists and Provisions of Malaysian Federal Territory Islamic Family Law: The Case of MH 370 Missing Plane

Mek Wok Mahmud* and Siti Zulaikha binti Mokhtar**

ABSTRACT: In Islam, there are various forms of dissolution of marriages that are permitted to avoid the greater evil which may result from their continuance. Wives are granted the right to dissolve a marriage in order to protect their rights, particularly in the case missing husbands, either alive or dead. This is known as *mafqūd*, or missing person. Therefore, the objective of this study is to discuss the concept of *fasakh* and *mafqūd* in accordance with the views of Muslim jurists and the provisions of Islamic family law in Malaysia. This paper also aims to analyse both those views in the context of the MH 370 incident. This study uses the qualitative method, by collecting data obtained by means of information gathering within the resources of the library and authoritative websites. From the study, it is shown that the wife can apply for divorce on the basis of *fasakh* when it is difficult to prove the status of a missing husband. In other words, rulings applicable to *fasakh* can be activated in the case of *mafqūd*. Further discussions are expected to find the best period of presumption of death, since it is based on *ijtihad* or the discretion of lawmakers.

Keywords: *fasakh*, *mafqūd*, Islamic family law, MH 370

Abstrak: Dalam Islam, terdapat pelbagai bentuk pembubaran perkahwinan yang dibenarkan untuk mengelakkan keruntuhan rumahtangga yang lebih besar

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akibat daripada penerusan perkahwinan tersebut. Berkenaan dengan pihak isteri, mereka diberikan hak untuk membubar perkahwinan mereka bagi melindungi mereka terutamanya dalam kes kehilangan suami yang tidak dapat dikesan, samaada masih hidup ataupun telah meninggal dunia, dan hal ini dinamakan *mafqud* (orang hilang). Oleh itu, objektif kajian ini adalah untuk menerangkan konsep *fasakh* dan *mafqud* mengikut pandangan-pandangan ahli fahaman Islam terhadap peruntukan Undang-undang Keluarga Islam di Malaysia. Kertas kerja ini turut bertujuan untuk menganalisis kedua-dua pandangan iaitu daripada ahli fahaman Islam dan daripada peruntukan terhadap isu-isu *mafqud* dan *fasakh* akibat daripada insiden MH370. Kajian ini melibatkan kaedah kualitatif, yang mana data diperolehi melalui maklumat yang dikumpul daripada sumber-sumber di perpustakaan dan di laman web yang berwibawa. Dari kajian ini, dapatlah dilihat bahawa pihak isteri boleh memohon perceraian berdasarkan *fasakh* apabila ia adalah sukar untuk mengesahkan kedudukan suami yang telah hilang. Dalam kata lain, peraturan yang diguna pakai dalam *fasakh* dapat diaktifkan semula untuk kes *mafqud*. Perbincangan selanjutnya dijangka akan dapat menentukan masa yang paling baik dalam anggapan kematian, kerana ia berdasarkan *ijtihad* atau kebijaksanaan para penggubal undang-undang.

Kata Kunci: *Fasakh*, *Mafqud*, Undang-undang Keluarga Islam, MH 370.

BACKGROUND

In Islam, marriage is an important institution that is emphasised greatly in the Qur'ān and Sunnah. It can be considered as a contract between two equal (compatible) partners (Mohd, A. et al., 2015). There are several places that mentions the word *nikāh*, which means marriage, in the Qur'ān, such as in *Surah al-Baqarah* verse 221, 230, and 232, *Surah al-Nisa'* verse 3, 22, and 25, *Surah an-Nur* verse 3, 32, and 33, and *Surah al-Ahzab* verse 49 (Hayatullah Laluddin et. al., 2014). The rights and duties of both the husband and the wife have been stated in the Sharī'ah law. It imposes a duty on the husband to maintain his wife as soon as the marriage contract is ratified. This duty continues until the contract of marriage ends, either through death or separation (Azizah and Badruddin, 2010).

A situation when the issue concerning the rights of the wife arises is when the husband is missing, known as *mafqud*, and there is no certainty whether he is still alive or he is dead. A good example for such a situation can be drawn from the missing Malaysia Airlines Flight MH 370 incident, which has caused global headlines and controversy since

8 March 2014. It departed from Kuala Lumpur and was expected to land in Beijing. The flight was carrying 227 passengers (including 2 infants) and 12 crew members. There were a number of Muslims passengers and crew members on the flight, who possessed properties and had their own families. Many issues had arisen from the MH370 tragedy, one of them being the status of the spouses of the victims, including the wives, which is this paper's concern (Bernama, 2015).

In Malaysia, the experience with *mafqūd* has occurred before, when dealing with the tragedy of *al-Muassim* tunnel in Mecca during the *hajj* pilgrimage season in 1990. In this tragedy, 19 Malaysian pilgrims were presumed dead. However, the presumption of death cannot be made without a specific period of time, during which the search for the missing persons take place. The Muslim jurists and the Shari'ah law have set a certain period of time before the presumption of death can be confirmed (Mohd Kamarul Khaidzir & Mohamad Sabri, 2014). This article specifically touches on the rights of the wife in the case of MH 370 when the husband is declared as *mafqūd*. The missing of a husband clearly denies the rights of wife, including, among other things, her maintenance.

MAFQŪD

In Arabic, the word *mafqūd* literally means disappeared. According to al-Zuhayli, a missing person or known as *al-mafqūd*, is a person who has been missing or disappeared from the area where he lives for a certain period of time. In addition, his life and death is unknown (Al-Zuhayli, 1996). In *al-Fiqhul Manhaji*, *mafqūd* means the person who is missing from his place of origin for a long time. There is no news about the person, and no one knows whether he is alive or dead (Al-Khin et al., 2005)

1) Mafqūd according to the views of Muslim Jurists

Hanafite jurists said that *mafqūd* is those whose life or death status are not known (Ibnu Humam, n.d). Malikite jurists explained *mafqūd* as the one who is missing from the family. The family feels the loss of that person and have no news of his whereabouts (al-Kasynawi, n.d). Shafi'ite and Hanbalite jurists stated the meaning of *mafqūd* literally. In the book of *al-'Umm*, Shafi'ite jurists described the meaning of *mafqūd* as someone who is missing without news (Al-Khin et al., 2005).

If the event that life or death cannot be proven, referring to the argument that human life cannot continue indefinitely, Muslim scholars take into consideration the life span of a man in order to determine his death. On this basis, determining the life span of a man is significant because a judicial decree of his death could be obtained when his life span has passed (Mohamad Asmadi, 2010). Thus, Muslim scholars differ in determining the life span of a man, because the life span itself depends on the natural surroundings of the area in which the person lives.

Accordingly, Abu Hanifah considered that the life span of the people of his time could reach 120 years (al-Zuhayli, 1996). Therefore, if a *mafqūd* was lost when his age was 40 years old, the beneficiaries must wait 80 years to establish his presumption of death. Malikite jurists stated that the duration is 70 years. The argument is from a hadith which Prophet Muhammad said that the common life-span of my *ummah* is between 60 and 70 (Al-Zuhayli, 1996). In addition, al-Zuhayli believes that the reasonable human life span nowadays is 90 years. This period may also be too long and impractical to be implemented, especially in the urgent matter of the distribution of the *mafqūd*'s properties (Al-Zuhayli, 1996).

Shafi'ite jurists described the life span of a man as 90 years, which is the age limit for those who had grown up with him in his region. However, the valid opinion is not based on the certain number of times, but relied on the evidence if there is any proof relating to the death of a *mafqūd* (Al-Bakri, 2015). Shafi'ite jurists apply *istishāb*, that means the missing person is deemed alive and his property would not be distributed unless and until the evidence of his death is found (As-Shafi'i, 1973).

In the absence of such evidence and after the lapse of a length of time which would give rise to a strong belief that no one of the missing person's age would be alive, the ruler is allowed to perform *ijtihad* (independent reasoning) and accordingly issue a decree of the *mafqūd*'s death (Al-Sharbini, 1958). In other word, the matter is decided by the *ijtihad* of the Ruler, and any duration of time as a life span to presume the death of the missing person is not stipulated (Al-Hasri, 1972).

2) *Mafqud according to the provisions of Malaysian Family Law*

In Malaysian Civil law, based on section 108 of the Malaysian Evidence Act (Act 56), a person is presumed dead if he is not heard for 7 years

by those who would naturally have heard from him if he had been alive. This provision was applied by the Malaysian High Court in the case of Ridzwan bin Ibrahim. The court granted the application by the applicant, Ridzwan bin Ibrahim to declare that Sheikh Mohamed bin Sheikh Ali is presumed dead. The latter was believed to have died in 1973 in Hijaz based on the general statement of his death. An affidavit also disclosed the fact that after he left Malaysia around 1957, he had not returned. And since then, neither the applicant nor his cousin, who are considered as those who would naturally have heard of him if he had been alive, received any information regarding Sheikh Mohamed's life or death (Mohamad Asmadi bin Abdullah, 2010).

However, apart from section 108 of the Malaysian Evidence Act, the Syariah Court Evidence enactment of states, which is specifically legislated for the purpose of dealing with matters of Islamic law, also provides similar provision. The example is section 80 of the Syariah Court Evidence (Federal Territories) Act 1997, which provides that:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

This provision is reinforced by section 53 (1) of the Islamic family law (Federal Territories) Act 1984 (Act 303) which states that:

If the husband of any woman has died, or is believed to have died, or has not been heard of for a period of four years or more, and the circumstances are such that he ought, for the purpose of enabling the woman to remarry, to be presumed in accordance with *Hukum Syarak* to be dead, the Court may, on the application of the woman and after such inquiry as may be proper, issue in the prescribed form a certificate of presumption of death of the husband and the Court may on the application of the woman make an order for the dissolution of marriage or *fasakh* as provided for under section 52.

Syariah courts have the power to declare the presumption of death under section 53 (1) of Act 303, which applies specifically to the case “for the purpose of enabling the woman to remarry” only. Meanwhile, section 53 (3) of Act 303 later explains that the *mafqud*'s wife was not entitled to remarry without a certificate issued under section 53 (1):

In the circumstances mentioned in subsection (1), a woman shall not be entitled to remarry in the absence of a certificate issued under subsection (1), notwithstanding that the High Court may have given leave to presume the death of the husband.

It is understood that the distinction between the provisions of civil law and Sharī'ah law is only the waiting period to form the presumption that the *mafqud* is already dead. According to the civil law, there have to be a wait of seven years before inheritance, while according to Sharī'ah law, four years is required to establish a presumption of death.

According to Sharī'ah law, the four-year period is taken from earlier views of early jurists when they discussed on the status of the *mafqud*. For example, Malikite jurists stipulated that a judge can separate a wife from her missing husband if her husband was gone without news after four years (al-Zuhayli, 1996). It is based on the decision carried out by Caliph Umar al-Khattab, who decided as such in the case of a missing husband during his time.

There was one case reported in the Syariah court on the issue of presumption of death. In the case of '*In the matter of the presumption of death of Talib Saari; ex p Kelthom Mohd Amin (Talib Saari)*', the Terengganu Syariah High Court received an application from Mrs Kelthom Mohd Amin to declare that her husband, Talib bin Saari has died. According to the facts of the case, the applicant claimed that she was married to the *mafqud* in 1967. In 1972, the *mafqud* left the matrimonial home to work as a cook at Hospital Kuala Terengganu. Talib bin Saari was decided have been dead according to the passing of a prolonged period of time from his date of birth, and within which it is possible that his peers had died. The judge concluded that if the *mafqud* was still alive in 2004, he was already 73 or 74 years old, and usually a person at such age has died (Mohamed Hadi, 2014).

An issue was raised here on whether the judge of the Syariah High Court is likely to have overlooked section 80 of the Syariah Court Evidence Enactment (Terengganu) 2001 (Act 6/2001), which has a provision which is similar with section 80 of Act 561 Syariah Court Evidence (Federal Territories). If the provision of section 80 applies, the judge will decide that 32 years have passed since the *mafqud* disappeared, and this period is over four years as prescribed by section

80. This means that 10 years have passed since the loss of the *mafqud* (Mohamed Hadi, 2014).

Even though the court's decision for the case of Talib Saari did not result in a big impact because the *mafqud* was also declared dead, the grounds of judgment should be made according to the provisions of the existing law. Therefore, it is more accurate and better if the presumption of death is determined by the provisions of the Syariah law, which refers to a period of four years as enshrined in the acts/enactments of Syariah Court Evidence for every state.

FASAKH

In Islam, the power to divorce is with the husband. However, to preserve the rights of women and to deter harm upon her, Islamic law allows women to apply for divorce, known as *fasakh*, through a *qādi* or a judge with certain conditions (Nur Juwariyah, 2011).

1) Fasakh according to the views of Muslim Jurists

Ibn Manzur in *Lisan al-Arab* defined *fasakh* as cancel (*naqada*) or dissolve (*faraqqa*) (Ibn Manzur, 1994). If the word *fasakh* is attributed to *nikāh* (marriage), it means the termination or dissolution of a marriage on reasons that prevent the continuity of the marriage (Khallaf, 1990). Divorce by way of *fasakh* is not clearly stated in the Qur'ān, but the principle can be seen in *Surah al-Baqarah*, verse 231, and *al-Nisa'* verse 35.

Scholars have different opinions on this issue. Matters that allow *fasakh* are different from one school of jurisprudence to another. According to Hanafite jurists, a wife can apply to dissolve her marriage through *fasakh* only when she can prove to the court that her husband is incapable of consummating the marriage because he has one of the three stated diseases, which are: sexual impotence penis decapitation and the disconnection of the two testicles. This means that in the Hanafite school of jurisprudence, a wife may not request *fasakh* for other than the stated reasons, even if the husband has vitiligo or leprosy (Raihanah, n.d).

Apart from the reasons above, the inability of the husband to pay for maintenance (*nafkah*), going missing, or being imprisoned are also accepted by Shafi'ite, Maliki and Hanbalite schools of jurisprudence as reasons for claiming *fasakh*. However, Maliki and Hanbalite jurists

have added one more reason to apply for *fasakh*, which is occurrence of harm in the marriage. Here, harm refers to five items which are harmful to the religion, self, race, wealth, and ‘*aqal* (dignity) (Al-Syatibi, n.d). This situation occurs when there is conflict in the marriage. Therefore, al-Siba’ie mentioned that the dissolution of marriage is because of disagreement as *al-tafriq li al-syiqaq* (Al-Siba’ie, 1962). This means that, in the case of abuse and maltreatment to the wife, the situation can be a reason for dissolution of marriage by *fasakh*. With such provisions by Malikite jurists, problems of abuse that occur in today’s society can be solved.

In addition, if a wife chooses to be patient and waits until the news of her husband is confirmed, then she is entitled to seek maintenance from the estate of her husband and stay in their home during the period of waiting. Shafi’ite jurists said in *al-Umm* that when the judge asked the *mafqūd*’s wife to wait for 4 years, she therefore deserves to get maintenance, as well as in ‘*iddah* (waiting period before she can remarry). The case is different when the wife is married to someone else, which consequently disqualifies here from getting maintenance from her missing husband (Al-Shafi’e, 1973).

2) *Fasakh according to the Provisions of Malaysian Family Law*

“*Fasakh*” as stated in the Islamic Family Law Act (Federal Territories) 1984 means the annulment of a marriage by reason of any circumstance permitted by Islamic Law in accordance with section 52. Section 2 of the Islamic Family Law Act (Federal Territories) 1984 provides for what is meant as “*dharar syarie*”, which means causing harm to the wife based on what is normally recognized by Islamic Law such as aspects of religion, life, body, mind, moral or property. These matters can be seen in Section 52 of the Islamic Family Law 1984, which has outlined the reasons to dissolve a marriage through *fasakh*.

A woman married in accordance with *Hukum Syarak* shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on any of the grounds stated in the act, which can be grouped into four main aspects: due to the disgrace and defect of the husband, the husband’s imprisonment or missing, *dharar* (harm) onto the wife and the husband’s failure to provide maintenance. These four aspects are said to be included in the definition by al-Shatibiy as physical, mental and emotional abuse (Raihanah, n.d).

Regarding section 52(1) (a), a wife can apply for *fasakh* when her husband's whereabouts had not been known for a period of more than one year. The timing of one year is just like the opinion of Imam Malik, although there is another opinion which says three years. Imam Ahmad set the limit to be after six months. This is because six months is the limit of the patience of an abandoned wife, as described in the dialogue between 'Umar and Hafsa, the Mother of the Believers (Sabiq, 1980).

When her husband is missing, the wife's situation in the marriage is similar to being suspended. At the same time, the wife needs a husband to protect and meet the needs of her daily life. The confusion regarding her status deprives her of her rights and makes it difficult for her to move on to take another husband, in the case that she would like to. To determine a husband who has disappeared without news as a dead person, the wife must wait for a period of four years. It is an *ijtihad* of the past scholars and it has been codified as statute law. It is a more reasonable period, shorter than the period of seven years provided for in the Evidence Act 1950 of the Civil Law.

However, the missing person can be considered dead by the judge after it is proven by evidence lawfully. The person may still be declared to be dead even though the waiting period has not yet been fulfilled. If there is no concrete evidence, it is dealt with the reasonable waiting period that the person has died. Then, on the expiry of that period and any valid evidence still not found, the judge can declare the *mafqud* as dead (Musa Awang, 2014). If a wife does not apply a presumption of death but wishes to apply for divorce, the wife may apply for *fasakh* under section 52 of the Islamic Family Law 1984. She can use any one or more of the following grounds:

- (a) that the whereabouts of the husband have not been known for a period of more than one year;
- (b) that the husband has neglected or failed to provide for her maintenance for a period of three months;
- (d) that the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year.

The order of *fasakh* that is issued by the court would have implications to the marriage, matrimonial property claim, and maintenance for *'iddah*

as well, but not against the division of the inheritance or husband's bequest.

CURRENT ISSUE: THE MH 370 INCIDENT

The National Fatwa Council ruled that in the case of Malaysia Airlines (MAS) Flight MH370, which ended in the vast ocean thus making the its wreckage and the bodies of those on board very difficult to find, since the views of experts establish that the survival of mankind to live is remote, this case can be categorized as an out rightly *mafqud* situation. In this case, there is strong probability that they have died. Regarding to the period of presumption of death for verifying the status of *mafqud*, there are no clear verses from the Qur'an and Sunnah in determining the certain period on a regular basis. Most opinions are derived from the opinions of the companions of Prophet Muhammad, and those opinions are not in the form of consensus or agreement because there is a dispute among companions and *tabi'en*. There are also significant differences in terms of *uruf* and time that should be taken into account in determining the period of *al-mafqud* because it affects the next decision of jurisprudence (JAKIM, 2014).

The National Fatwa Council's chairman, Abdul Shukor Husin said that the decision is based on the fact that the power to determine the search operation is in the hands of the Government of Malaysia and that the government, through the Department of Civil Aviation (DCA), has announced that they were satisfied with the operation and declared that the disappearance of the aircraft was an accident and that all on board were presumed dead. The council's declaration meant that according to Syariah Law and Court, Muslim victims are now considered legally dead, a decision which Abdul Shukor said was important to allow their family members to manage the matters of property distribution and the waiting period for their wives to remarry (JAKIM, 2014).

However, according to Musa Awang, the president of the Syariah Lawyers Association of Malaysia, the status of marriage of Malaysia Airlines (MAS) flight MH370 victims who were married under Muslim law has not been dissolved, though the government had officially declared everyone on board have perished. Only the court may issue the Presumption of Death order. Musa said that a spouse may apply for dissolution of marriage if the partner has disappeared for more than a

year. In the case of MH370 victims, they may apply for the presumption of death declaration (Bernama, 2015).

Here, a small dispute can be seen between *fatwa* and the law, but Abdul Shukor said that the verification should be made as soon as possible as Islam enjoins that its followers do not prolong the mourn of the loss of their loved ones. Moreover, other matters related to the marital status, division of inheritance, marriage of children and other things must be settled effectively (Hashnan, 2014). In the end, for any matters relating to individuals who are presumed to have died, next of kin must abide by the ruling that has been issued by the court.

ANALYSIS

It is an obligation for us to refer to the court to confirm the death of the missing person, as we live based on the laws. The power to determine and decide whether a *mafqūd* is alive or dead lies in the hands of the court based on evidence, investigation, or the expiry of the waiting period.

In the Islamic Family Law (Federal Territories) Act 1984 (Act 303), the cases of *mafqūd* can be referred to section 53 (1) of the act. It stated that Syariah courts have the power to declare the presumption of death under section 53 (1) of Act 303, which applies only for the purpose of enabling the wife to remarry. The *mafqūd*'s wife is not entitled to remarry without a certificate issued under section 53 (1). According to Syariah law, four years is required to establish a presumption of death, but is not *qati'e* (authenticated). Even if it is used without seeing the benefit of different individuals, it is likely to cause harm to the families of the *mafqūd*, especially the wife and children. For example, if a four-year period applied regularly, the fate of the wife would definitely loaded at least in four years.

The significant difference between the opinions of the schools of jurisprudence and legal provisions is regarding the period to declare the presumption of death for *mafqūd*. However, the different views about the period among the scholars indicate that it is a matter of *ijtihādiah*, i.e. a matter of simply finding a position by adopting the legal maxim of *fiqh* that 'certainty is not removed by doubt' (*al-yaqīnu la yuzālu bi al-syaq*). Furthermore, during times of those scholars, they may have found it a little difficult to determine *mafqūd*, because of the differences in

technology and development, compared with today. We may reasonably assume that the facilities which make it easier for searching for missing persons today would cause those scholars to change their opinions. This is because technological equipment allows expectations to *ghalabatu al-zan* (predominance of conjecture), that should be taken into account (al-Bakri, 2015).

If a wife intends to apply for dissolution of marriage, she may apply for *fasakh*. Section 52 of the Islamic Family Law Act (Federal Territories) 1984 has outlined the reasons to dissolve a marriage through *fasakh*, including, for instance, the disappearance of the partner more than a year, or the husband has neglected or failed to provide for maintenance for a period of three months, or the husband has failed to perform - without reasonable cause – his marital obligations for a period of one year. These reasons are also accepted by Malikite, Shafi'ite and Hanbalite jurists as grounds for claiming *fasakh*. But in Hanafite school of jurisprudence, a wife cannot apply for *fasakh* unless she can prove to the court that her husband is suffering from disgrace and defect.

With respect to the opinions of the schools of jurisprudence and existing law, inevitably they should meet the five basic human needs which are covered by the *Maqāṣid al-Sharī'ah* (objectives of the *Sharī'ah*) that keep religion, life, intellect, property and lineage. At the same time, it is important to create the rules according to the needs of times.

CONCLUSION

In conclusion, the difference is very significant between the provisions in civil law and Syariah law, in terms of the period of time to confirm presumption of death. Civil law provides seven years, whereas the period in Syariah law is only four years. Malaysia tends to adopt the view of Shafi'ite school of jurisprudence. The Act has been carefully enacted by taking into account of the suffering that a wife goes through when her husband is missing, affecting the protection to her life protection and the family's financial aspect. Based on the analysis in this paper, it can be concluded that two basic facts must be proven to decide the presumption of death. They are, first, that the person must not have been heard for four years, and second, that he must not have been heard during that time by those who would normally have heard from him. In the case of MH 370, it is the right of the wife to claim for *fasakh* in the case of a

missing husband, if his disappearance causes harm to her. However, if she is willing to wait for him, then no dissolution shall be granted. Since the period is based on *ijtihad*, or the discretion of the lawmakers, then there is still room to consider what would be the best period of time that determines *mafqud*, in order to avoid harm and attain benefit.

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