

A Comparative Analysis of the Missing (*Mafqud*) Husband Regulations in Indonesia and Malaysia: A Study to Reform the Regulation That Meets Legal Certainty in Indonesia

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Abstract:

This article aims to resolve legal issues regarding missing (*mafqud*) husbands in Indonesia and to provide input for revising these laws to better provide protection to wives whose husbands are missing in keeping with the principle of legal certainty. There are two circumstances when the husband leaves the house, the first is the husband leaves his house without his wife's permission but his whereabouts are still known, this condition is called absent husband or *ghaib* husband. The second circumstance is the husband leaves the house with the wife's permission, but his whereabouts and life and death are unknown, which is often called the missing husband or *mafqud* husband. The differences in the circumstances of the husband's departure from home require different verdicts in the dissolution of marriages. The regulation of the missing (*mafqud*) husband in Indonesia has not been differentiated from the regulation of absent (*ghaib*) husband so there is no regulation that regulates the death determination for the missing (*mafqud*) husband to dissolve the marriage in Indonesia. This article is a normative juridical study using a statute and comparative approaches. The results of this article indicate the need to legislate for missing (*mafqud*) husbands that provide legal certainty for women. The regulation of missing (*mafqud*) husbands in Indonesia that can provide legal certainty for women is to set a minimum limit of four years for a husband to leave the home to be determined his death as



stipulated in section 53 of the 1984 Islamic Family Act (Federal Territory) 1984.

Keywords: dissolution of marriage; missing (*mafqud*) husband; legal certainty.

Introduction

Divorce is one of the things that is allowed in Islam. Islam recognizes divorce at the instance of a wife who pays redemption (*khuluk*) i.e., the wife pays redemption (*'iwadh*) to the husband so the husband will divorce the wife. Some of the factors that the wife can carry out the divorce (*khuluk*) include the husband being missing or imprisoned, or the husband having leprosy.¹ In Indonesia, divorce at the instance of a wife who pays redemption (*khuluk*) is more commonly known by the term lawsuit divorce (*cerai gugat*). Women are allowed to file lawsuit divorce (*cerai gugat*) for some reasons, such as one of the apostate couples, one of the spouses got a disability so could not run obligations well. These reasons are the same as the reasons to file a repudiation divorce (*cerai talak*).² Some phenomena can make spouses divorce without having to pronounce the divorce from the husband, one of the phenomena is the loss of the husband or better known as missing husband's term. This article aims to resolve legal issues regarding missing (*mafqud*) husbands in Indonesia and to provide input for revising these laws to better provide protection to wives whose husbands are missing in keeping with the principle of legal certainty.

In Indonesia, article 38 of Law on Marriage No. 1 Year 1974 states "a marriage can be dissolved because of: A. Death; B. Divorce and C. By Court Decision." The reasons that allow file for divorce to the Court if the husband or wife leaves the house are stated in article 19 (b) of Government Regulation no. 9 of 1975 which states "One of the parties left the other party for 2 (two) consecutive years without the permission of another party and without a valid reason or for other reasons outside his abilities." This article has multiple interpretations because it can be interpreted as a husband who just go from his house with bad intentions (absent husband) or it can be interpreted as a husband who left the house with the wife's permission but because of some things, his news, life, and death are not known (missing husband). These articles do not provide justice for women because these articles do not differentiate between missing (*mafqud*) and absent (*ghaib*) husbands, because it is possible for her husband to leave with the wife's permission but for some reason, his existence cannot be known. The need to differentiate between missing (*mafqud*) and absent (*ghaib*) husbands is the dissolution of marriage for missing (*mafqud*) husband case by determining the death of the husband because of the suspicion that the husband had an accident on his way. As a result, the husband's whereabouts are unknown, and the wife can not get any news about his life and death so it was necessary to determine his presumption of death by the court to provide certainty and justice for the wife whose husband is missing. Because these articles do not differentiate between missing (*mafqud*) and absent (*ghaib*) husbands, judges usually only grant a divorce from the wife without determining the presumption of death of the missing (*mafqud*) husband.

¹ Isnawati Rais, "Tingginya Angka Cerai Gugat (Khulu') Di Indonesia; Analisis Kritis Terhadap Penyebab dan Alternatif Solusi Mengatasinya", *Al Adalah*, 1, (Juni, 2014) 195. <https://doi.org/10.24042/adalah.v12i1.183>

² Sudono, "Penyelesaian Perceraian dengan Khulu' dan Akibat Hukumnya", diakses tanggal 25 Mei 2020 <http://www.pablitar.go.id/informasi-pengadilan/164-penyelesaian-perceraian-dengan-khulu-dan-akibathukumnya.html>

This verdict caused the wife can not get her rights because she is the one who initiate the divorce. If there is a norm regarding the determination of the death of a missing (*mafqud*) husband, of course, it eases the wife to get her rights like part of the inheritance husband because the wife did not file for divorce but the registered determination of presumption of death to the court to dissolve his marriage with her missing (*mafqud*) husband.

An example case regarding the article that has multiple interpretations is a case registered at the Mahkamah Syar'iyah Tapaktuan Number 0205/Pdt.G/2016/MS.Ttn. The husband and the wife got married in 2012. In 2013, among the husband and wife had happened irreconcilable dispute. The irreconcilable dispute happened because the husband had gotten married to another woman without the permission of his wife, the husband got drunk many times and often did abusive towards the wife. After that, the husband left his wife without her permission for around six months and the wife filed for divorce at Religious Court. The judge dissolved the marriage with the missing (*mafqud*) husband verdict because the judge considered the irreconcilable dispute that happened in her marriage with her husband.³ In the author opinion, the judge's verdict was not correct because if we look at the lawsuit, it was written that between the husband and wife had happened an irreconcilable dispute and the husband had left the house without the permission of his wife and this condition is more suitable to absent (*ghaib*) husband case instead of missing (*mafqud*) husband. Then the right verdict to dissolve this marriage was marriage annulment (*fasakh*) or absolute divorce (*talak bain*) because of the absent (*ghaib*) husband⁴ not missing (*mafqud*) husband determining the death of her husband. This misinterpretation article would not happen if there were clear regulations governing the missing (*mafqud*) husband and absent (*ghaib*) husband.

An example case regarding the provisions of missing (*mafqud*) husband which has not provided legal certainty is when the husband is missing (*mafqud*) but the judge decides irrevocable divorce of minor degree (*talak bain sughra*) to wife. This case was registered at the Ponorogo Religious Court Number 959/Pdt.G/2018/PA.PO regarding missing (*mafqud*) husband. The husband had disappeared for seven years and his whereabouts, life, and death were unknown. The judge determined divorce irrevocable divorce of minor degree (*talak bain sughra*) through verstek to his wife with a period of waiting (*idah*) one time monthly period.⁵ The judge's verdict was based on Law on Marriage No. 1 Year 1974 in Government Regulation no. 9 of 1975 article 19 (b) states "One party left the other party for 2 (two) years successively without the permission of the other party and without a valid reason or for any other reason in beyond his means." This article does not provide legal certainty because the judge

³ Harry Kurniawan dan Maisuriati, Dasar Pertimbangan Hakim Dalam Putusan Perkara Cerai Gugat Suami Mafqud (Analisis Putusan Nomor 0205/Pdt.G/2016/Ms.Ttn), Al Murshalah, No. 1 (Januari-Juni 2017): 11-12. <http://jurnal.staitapaktuan.ac.id/index.php/Al-Mursalah/article/view/86>

⁴ Jauharil Ulya, "Status Hukum Isteri Orang Mafqud/Ghaib". 7. <https://drive.google.com/file/d/1Tf4agUoqWSVSPBbuM7cvYm4XLiO9SQjK/view>

⁵ Ria Rahmawati, Ihsan Nur Hakim "The Analysis of Judge's Decision Mafqud's Husband in Case of Claim for Divorce in Ponorogo Religion Court and the Law Impact of the Mafqud's Husband (Analysis of Decision Number. 959/Pdt.G/2018/PA.PO)", *Ijtihad Jurnal Hukum dan Ekonomi Syariah*, No. 2, (2019): 220. <https://doi.org/10.21111/ijtihad.v13i2.3542>



determined missing (*mafqud*) husband by the irrevocable divorce of minor degree (*talak bain sughra*) through *verstek* because the wife filed for divorce at the instance of a wife who pays redemption (*khuluk*). In the author's opinion, this verdict was not correct because if we look at the divorce suit, it stated that the husband had disappeared for seven years and his whereabouts, life, and death were unknown, then the judge should state, regarding the existence of a legal suspicion, that the husband had died and his wife had passed the period of waiting (*idah*) of death, which was for four months and ten days because she was a deceased widow. According to the author, the judge's reason did not determine the death of the husband due to the absence of norms that regulate the determination of death by a judge. In addition, due to the absence of norms regarding the determination of the death of the missing (*mafqud*) husband, the wife only filed for divorce to legalize her widow status because her husband was missing and his existence was unknown. If the judge determined death for the husband, the wife could prosecute inheritance from her husband's property so the wife got justice for the missing of her husband for a long time.

The article written by Mia Aisyah and Dinie Ratri about the experience of a wife who experienced separation without divorce show the result of her husband leaving the house because another ideal woman is that the wife has to work hard to fulfill household needs. At first, the children felt sad because of their father's departure but over time, children get used to their father's departure.⁶ Mia Aisyah's article is different from this article because Mia Aisyah's article discusses the missing husband from the psychological side of his wife and abandoned child. Meanwhile, this article compares the rules for missing husbands in Indonesia and Malaysia to provide regulations that provide legal certainty for women. Data taken from Office for Religious Affairs at Malang stated that in 2016 received as many as 2467 lawsuit divorce (*cerai gugat*) cases and 546 repudiation divorce (*cerai talak*) cases. The reason for the divorce because the spouse's whereabouts are unknown as many as 195 cases.⁷ Novita Dwi Lestari's research discussed the views of Syafi'iyah Scholars in terms of waiting for missing people. In New Fatwas (*Qaul Jadid*), the waiting period is 90 years, while in Old Fatwas (*Qaul Qadim*) is 4 years and makes the period of waiting (*idah*) with the death period of waiting (*idah*) which is four months and ten days. He stated that the similarity between the Compilation of Islamic Law and the opinion of the Syafi'iyah Scholars is that a wife must wait for her missing (*mafqud*) husband for some time before conducting the next marriage. The difference between the Compilation of Islamic Law and the opinion of the Syafi'iyah Scholars is the difference in waiting time. The Compilation of Islamic Law states that the waiting time is two years.⁸ Ani Khomsatun's article discusses the marriage law of a wife whose husband is missing according to Islamic law. The result of the article is that the marriage between a wife and a missing (*mafqud*) husband is valid. If the wife wants

⁶ Mia Aisyah Putri dan Dinie Ratri Desiningrum, "Pengalaman Istri yang Mengalami Separation Without Divorce studi kualitatif fenomenologi pada wanita dewasa madya yang mengalami perpisahan tanpa perceraian", *EMPATI*, No. 1 (Jan 2017): 281. <https://ejournal3.undip.ac.id/index.php/empati/issue/view/966>

⁷ Laporan Tahun 2016 Pengadilan Agama Malang kelas 1A, diakses tanggal 6 Mei 2020 https://drive.google.com/file/d/16Boyi5c_6DzggTo2X01HO6_GY2jEqEu/view.

⁸ Novita Dwi Lestari, "Kompilasi Hukum Islam (KHI) Dan Pendapat Madzhab Syafi'i Tentang Batasan Masa Tunggu Suami/Isteri Mafqud," *Jurnal Islam Nusantara*, No. 1 (Jan-Juni 2018): 146. <https://jurnalnu.com/new/index.php/as/article/view/76>

to remarry, the waiting time for the missing husband is four years according to Old Fatwas (*Qaul Qadim*) Syafi'iyah scholars, and 90 years according to New Fatwas (*Qaul Jadid*). This article also mentions the waiting time for a missing husband two years according to the Islamic Compilation Law. If the wife has waited for this waiting period and filed for the dissolution of marriage to the court, then the wife's marriage with the new husband is valid.⁹ These two studies do not criticize the regulation of missing (*mafqud*) husbands in Indonesia which are not differentiated from the regulation of absent (*ghaib*) husbands.

Neneng Desi's article discussed the use of the presumption of continuity of case (*istishab al haal*) in determining the right of inheritance status of a missing (*mafqud*) person according to Hanafiyah Scholars. Hanafiyah scholars argued that the use of the presumption of continuity (*istishab al haal*) of case recognizes the existence (nature of life) of people who have missed. As a result, his marriage is still valid and his property is still his until there is evidence that he had died.¹⁰ Mirna Riswanti's article compared missing (*mafqud*) inheritance based on Islamic law and Civil Code. The inheritance of a missing (*mafqud*) person according to Islamic law is if the judge has determined his death, the inheritance is divided among the heirs. The division of missing (*mafqud*) person inheritance is only partially, the rest is postponed because it is worried if the missing (*mafqud*) person will return. The Civil Code regulates the inheritance of missing people by allowing heirs to divide the inheritance of missing (*mafqud*) people who have been controlled by the heirs.¹¹ Both of these articles discuss the inheritance of a missing (*mafqud*) person, not the dissolution of marriage due to a missing (*mafqud*) husband.

The article by Nurhayati M Hasan and Ajub Ishak found several facts in the settlement of an absent divorce (*cerai gaib*) at the Limboto Religious Court, some facts are the witness was considered weak because the witness did not know for sure about the subject matter of the case being trial. In addition to witnesses, the proof letter that failed to be proven while this letter is a matter for the panel of judges to consider in dissolving the marriage.¹² Harry Kurniawan and Maisuriati's article discusses the judge who dissolved the marriage with a missing (*mafqud*) husband case while the husband had just left the house for approximately six months. The judge's consideration is between husband and wife there are often irreconcilable disputes. In addition, the husband is known to have remarried without the wife's consent and has

⁹ Ani Khomsatun, "Hukum Pernikahan Istri yang Disebabkan Suami Mafqud Menurut Perspektif Hukum Islam," *Jurnal Al-Wasith: Jurnal Studi Hukum Islam*, No. 1 (2021): 50. <https://doi.org/10.52802/wst.v6i1>

¹⁰ Neneng Desi Susanti, "Penggunaan Istishab Al-Hal Dalam Menetapkan Hak Status Kewarisan Mafqud Menurut Hanafiyah," *Jurnal Tamaddun Ummah*, No. 1 (Oktober 2015): 13. <https://docplayer.info/51838773-Vol-01-no-1-oktober-2015-issn-penggunaan-istishab-al-hal-dalam-menetapkan-hak-status-kewarisan-mafqud-menurut-hanafiyah.html>

¹¹ Mirna Riswanti, "Analisis Komparatif Kewarisan Mafqud (Orang Hilang) Berdasarkan Hukum Islam dan KUH Perdata," *Syakhsia Jurnal Hukum Perdata Islam*, No. 1 (2019): 94. <http://jurnal.uinbanten.ac.id/index.php/syakhsia/article/view/1986>

¹² Nurhayati M Hasan dan Ajub Ishak, "Putusan Hakim Atas Perceraian Salah Satu Pihak Gaib Dan Implikasinya Terhadap Para Pihak Di Pengadilan Agama" *Jurnal Ilmiah Al Jauhari*, No. 2 (September 2018): 66. <https://journal.iaingorontalo.ac.id/index.php/aj/article/view/541>



left his wife for approximately six months without informing his wife.¹³ These two articles discuss the divorce process if one of the parties did not attend court, not about the regulations governing missing (*mafqud*) husbands in Indonesia.

The author also found that the missing (*mafqud*) husband's regulations are not yet completed with the minimum limit for determining death for missing (*mafqud*) husbands in the determination death contained in article 171 (b) of the second book of the Compilation of Islamic Law. The article states "Heirs are people who at the time of death or who declared dead based on the decision of the Islamic Court, leaving heirs and inheritance." Incomplete regulations in determining the period of the loss of the husband so the missing (*mafqud*) husband can be determined the dead by the Court. The need to set the loss period of this missing (*mafqud*) husband is to make it easier for the wife to register her case in court, whether to register for divorce because the husband left with bad intentions (absent husband) or register the death determination of her husband who is missing for some reasons which his whereabouts can not be known (missing husband). In addition, to determine on dissolution of marriage in accordance with the circumstances of the husband's departure from home.

This article uses the Statute Approach because this article uses Law on Marriage No. 1 Year 1974, it also uses the Compilation of Islamic Law and Civil Code. In determining which laws can be adopted to solve the problem of missing (*mafqud*) husbands in Indonesia, the author must use the principles contained in the statute approach such as *lex posterior derogate legi priori*. In addition to using the laws in Indonesia, this article also uses the laws in Malaysia, Islamic Family Law (Federal Territory) 1984. This article also uses a Comparative Approach or comparison study of law. Gutteridge split the comparative approach into two types, one is a descriptive legal comparison with the aim of its main purpose is to obtain information and another one is a comparison of applied law which has a specific target.¹⁴ As mentioned by Gutteridge, one of the types of comparative approach is a comparison of applied laws which has a specific target. This article compare the applied laws to get specific target. The specific target of using a comparative approach is to provide legal certainty to the problem of missing (*mafqud*) husband law in Indonesia by adopting regulations in Malaysia.

The comparative approach used in this article is a comparative analysis of the civil regulations in Indonesia with civil regulations in Malaysia regarding missing (*mafqud*) husbands. Although Indonesia and Malaysia have a different legal system, Indonesia has a civil law legal system and Malaysia adhere to the common law legal system. Islamic law in Indonesia is at the national level while Malaysia is a federation, and each state has authority for Islam, so there are some variations in the application of laws. However, there are some similarities between Indonesia and Malaysia, namely: the majority of the population is Muslim. Another reason is that majority Muslims in Indonesia and Malaysia adhere to Syafiiyah Scholars in practicing their religion, so it is better to use the opinion of Syafi'iyah Scholars to regulating the laws. In Malaysia divorce after an Islamic marriage comes under the jurisdiction of Syariah Courts, not District Courts and so does in Indonesia. These

¹³ Harry Kurniawan dan Maisuriati, Dasar Pertimbangan Hakim Dalam Putusan Perkara Cerai Gugat Suami Mafqud (Analisis Putusan Nomor 0205/Pdt.G/2016/Ms.Ttn), Al Murshalah, No. 1 (Januari-Juni 2017): 11-12. <http://jurnal.staitapaktuan.ac.id/index.php/Al-Mursalah/article/view/86>

¹⁴ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Prenada Media Group, 172.

similarities make the author comparing civil regulations in Indonesia with civil regulations in Indonesia and Malaysia.

Result and Discussion

The Concept of Missing (*Mafqud*) Husband in Classical Jurisprudence

According to classical fiqh jurisprudence (*fikih klasik*), if the husband does not provide the wife's livelihood for several months, the wife is allowed to file for divorce. However, for absent (*ghaib*) husband cases, it has some opinions, as well as missing (*mafqud*) husbands there are some opinions that are put forward by scholars. Hanafi scholars argued about missing husbands, their opinion is the case left to the judge regarding the death of the husband following the available evidence. If there is no evidence then the wife must wait for her husband for some time to determine the death of her husband. Malikiyah scholars argued the period to wait missing (*mafqud*) husband is for one year and Hanabilah scholars argued for four years. If the husband had been determined dead by the judge, then the wife makes her period of waiting (*idah*) with the death.¹⁵

Imam Mawardi from the Syafi'iyah scholars said that the husband's departure from the home has two conditions. The first is if the husband left home, but the news was still found and his life was still known, in this case, the wife was not allowed to remarry despite the period of the husband's departure being long and even though the husband left the property for the wife to fulfill her needs or not. The second situation is the departure of a husband, his news and life and death can not be known again even though the circumstances are different, whether they still live in the same country or have left the country by road trip or sea travel. Whether the vehicle is destroyed or lost during the war, this state is called missing (*mafqud*). In missing cases, the missing (*mafqud*) husband's property should not be used and inherited. If the husband had been away for a long time, and his news was not known, there were different opinions about the fate of the wife.¹⁶

Two circumstances of the husband's departure from home cause different steps a wife can take. For the wife, whose husband is absent, Shafi'iyah scholars argued that the wife has no right to file for divorce on the grounds that her husband was absent. This opinion was based on the right of ongoing sexual relations between husband and wife to be the right of husbands. So, if the husband had copulated with the wife once, then the husband was not guilty of before the judge. This is because the wife's right to have sex is only necessary only done once.¹⁷

The wife whose husband is missing, The Shafi'iyah scholars had two opinions. The first opinion was the wife was required to wait for four years with the judge's verdict, then the judge determined on the death of the missing (*mafqud*) husband specifically regarding the right to his wife, after that the wife made her period of waiting (*idah*) for four months ten days. If it had finished, then the wife was allowed to remarry. This Shafi'iyah Scholar's opinion is in Old Fatwas. This opinion is based on QS Al Baqarah 2:231 which means: And do not retain them only to harm them

¹⁵ Jauharil Ulya, "Status Hukum Isteri Orang Mafqud/Ghaib", 3.

¹⁶ Imam Al Mawardi, "Al Haawi Al Kabiir", (Libanon: Dar El Kutub Al 'Ilmiyah, 1994), Juz 11, 316.

¹⁷ Wazaratu al Awqaf wa al Syu'un al Islamiyah, "Al Mausuu'ah Al Fiqhiyyah Al Kuwaitiyyah", 62.



or to take advantage of them.¹⁸ The point of this verse is that if the wife is left to be a wife to a missing husband, it will cause harm to the wife.

The second opinion was the wife was still a legal wife for her missing (*mafqud*) husband, still bound by marriage with a missing (*mafqud*) husband until the arrival of the missing (*mafqud*) husband even though the loss of the husband was in a long time, as long as there was no firm belief of her husband's death. This is the opinion of the Syafi'iyah scholars in New Fatwas (*Qaul Jadid*).¹⁹ This opinion was based on the Hadith of the Prophet Muhammad SAW which means: "The wife of a lost man remains his wife until she receives news about him." (HR Al-Daruqutniy).²⁰ The purpose of the wife has to wait for four years to be able to determine the death of her missing husband is the most abundant time used to find out the wife's uterus is clear of the fetus. For the period of waiting (*idah*) for four months and ten days due to the dissolution of the marriage between missing (*mafqud*) husband and wife are by the verdict of the missing husband's death not because of divorce.²¹

Missing (*Mafqud*) Husband Regulation in Indonesian Civil Law

The phenomenon of the husband's departure from home is also common in Indonesia. This statement is corroborated by data taken from the Malang Religious Court. The data stated that in 2016 there were 195 divorce cases due to: the whereabouts of the partner being unknown.²² The author will mention the regulations governing missing (*mafqud*) husbands in Indonesia. The regulations that will be mentioned in this article are not only limited to Law on Marriage No. 1 Year 1974 because this article uses a legal approach so all regulations relate to missing (*mafqud*) husbands will be mentioned in this article.

The Civil Code regulates statements about the death of a husband who left home. This regulation is suitable with the definition of missing (*mafqud*) husband referred to Syafi'iyah scholars. The regulation regarding the death determination of the husband who left the house is contained in Articles 467-471 of the Civil Code. Article 467 stated, if a person had left his place and did not give any authorization to a representative, to represent himself and administer his property for five years or more, whereas in that five years there was never any sign about whether the absent person is still alive or has died, then, no matter, at the request of the interested parties and after obtaining permission from the District Court of the place of the residence left behind, may be summoned to appear before the same Court, which summons was made generally and was valid for a grace period of three months or so long, as the Court may be pleased to order it. All the summons each time must be made in a way advertising it in newspapers

¹⁸ <https://quran.com/al-baqarah/231>

¹⁹ Ibid., 317.

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<https://islamic-content.com/hadeeth/2191/en#:~:text=Al%2DMugh%C4%AABrah%20ibn%20Shu%27bah,she%20receives%20news%20about%20him.%22>

²¹ Al Mawardi, "*Al Haawi Al Kabiir*", 318.

²² Laporan Tahun 2016 Pengadilan Agama Malang kelas 1A, https://drive.google.com/file/d/16Boyi5c-_6DzggTo2X01HO6_GY2jEqEu/view diakses tanggal 6 Mei 2020.

Article 468 stated, if after the third summons and whether the absentee or his representative did not come to appear, the Court may declare, that the person has died since the day he should be presumed to have left his residence, or from the day of the last news of his life, the day where should be clearly stated in the verdict.

Article 469 stated, before taking a verdict, the District Court shall pay attention to the causes of this absence, as well as to the causes which may have hindered the receiving of the news from the absentee and of all other matters relating to the presumption of death. In connection with all the foregoing, the District Court may suspend its verdict for a period of five years more than the grace period mentioned in section 467 and may order such further summonses and their placements in newspapers. Article 470 stated, if the absentee had appointed a representative but after ten years or more his whereabouts can not be known, at the request of the interested persons, may be summoned and it may be stated that there is a legal presumption of death, by way of and under the provisions of the three past articles.

Article 471 mentioned, "A statement about the presumption of death should be announced in the same newspapers in which all summonses had been advertised." Articles 467-471 of the Civil Code do not govern someone who can be judged by death. These articles also explain the procedural law in determining the death of a husband who has left his home or a missing (*mafqud*) husband. The summons to the missing person is conducted three times within the three-month grace period. If he did not attend then the court can order death for the missing person. However, after the existence of Law on Marriage No. 1 Year 1974, this regulation was no longer used to dissolve marriage due to the principle of legislation, *lex posterior derogate legi priori*, which means statutory regulations which then abolish the previous statutory regulations.²³

Apart from the principle of these laws and regulations, the Civil Code governs about marriage no longer applied because in accordance with Article 66 of Law on Marriage No. 1 Year 1974 mentioned, "For marriage and everything related to marriage under this Law, then with the enactment of this Law contains provisions stipulated in the Civil Code (Burgelijk Wetboek), the Christian Indonesian Marriage Ordinance (Hiiwelijks Ordonnantie Christen Indonesiers S. 1933 No. 74) the Mixed Marriage Regulation (Regeling op de gemengde Hiiwelijken S. 1898 No. 158) and other regulations govern the marriage as it had been regulated in this law, is declared invalid." The dissolution of marriages in Indonesia is regulated in Article 38 of Law on Marriage No. 1 Year 1974, "A marriage can be dissolved because: a. Dead; b. Divorce; c. By the court's decision." The reasons for allowing to file for divorce according to Law on Marriage No. 1 Year 1974 is contained in Article 39 Explanation of Law on Marriage No. 1 Year 1974 mentioned again in Article 19 of Government Regulation No. 9 Year 1975 concerning the Implementation of Law on Marriage No. 1 Year 1974 and also mentioned again in Article 116 (b) Compilation of Islamic Law. The reason for the dissolution of marriage because the husband left the house is in the verse (2) of each of the articles which mentions "one of the parties left the other party for 2 (two) consecutive years without the permission of the other party and without a reason that legitimate or because of something else beyond his ability."

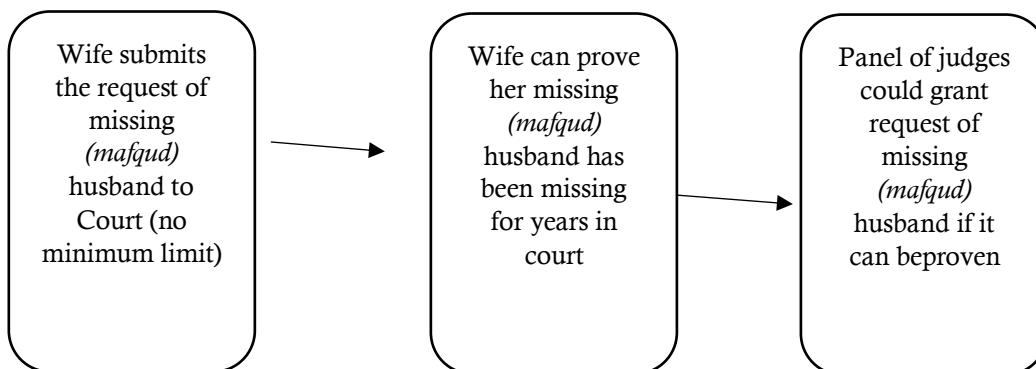
²³ Peter Mahmud Marzuki, *Penelitian Hukum*, 141



This article can be understood as one of the parties leaving the house for two years in a row without ever returning. There are two conditions for this reason. The first condition is to leave the house without the other party's permission and without a valid reason. The second condition is to leave the house with the permission of the other party and for a valid reason, but there was something else beyond his ability. The meaning of something else beyond his ability is one of the parties impatiently had waited for the arrival of the party who left the house.²⁴ This article has two interpretations, namely the absent (*ghaib*) husband and the missing (*mafqud*) husband. So, it is necessary to set a minimum limit for the husband's departure from home to be able to determine his death for the missing (*mafqud*) husband so that the wife can get justice.

Other regulation regarding missing (*mafqud*) husband or death declared by the court is contained in article 44 paragraph (4) of Law on Population Administration no. 23 Year 2006, In case of ambiguity the presence of a person, because he is missing or dead but his body is not found, the recording by the Civil Registration Officer was only made after the court's ruling." As it is known Law on Marriage No. 1 Year 1974 and the Compilation of Islamic Law have mentioned regulations regarding missing (*mafqud*) husbands but not yet completed with a minimum limit for the husband to leave home to determine his death.

Figure 1 Flow of Request for Missing Husband in Indonesia



Source: data processed from the Civil Code Articles 467-471 and the Explanation of Law on Marriage no. 1 Year 1974 Article 39 and Compilation of Islamic Law Article 116

The case of determining the death of a missing (*mafqud*) husband becomes absolute power in religious courts. This is in accordance with article 2 of Law no. 3 Year 2006 concerning Amendments to Law No. 7 Year 1989 concerning Religious Courts, "The Religious Court is one of the subjects of judicial power for people seeking justice who are Muslims on certain matters as referred in this Act." The meaning of people seeking justice is every individual, both individual with Indonesian citizenship and foreign nationalities seek justice in the Courts of Indonesia.²⁵

²⁴ Ulya, Status Hukum Isteri Orang Mafqud/Ghaib, 6-7.

²⁵ M. Burhanudin Ubaidillah, "Yurisdiksi Ijtihad Umar bin Khattab dalam Kasus Anggapan Kematian Suami Mafqud", *Usratuna*, 2, (Juli 2019), 40. <https://ejournal.staida-krempyang.ac.id/index.php/usratuna/issue/view/18>

The absolute power of religious courts is stated in Article 49 of Law No. 3 Year 2006 concerning Amendments to Law no. 7 Year 1989 regarding the Religious Courts, "The Religious Courts have duty and authority to examine, decide and solve cases in the first degree between Muslims in the fields of: a. marriage; b. inheritance; c. clause of will (*wasiat*); d. gift (*hibah*); e. waqf; f. zakaah; g. expending (*infaq*); h. charity (*shadaqah*); and i. sharia economics." The meaning of a Muslim is a person or legal entity within itself subject to Islamic law regarding matters of the Religious Court's authority in accordance with the provisions of the article.²⁶ As mentioned above, the determination of the death of the missing (*mafqud*) husband in the marriage is used to dissolve the marriage. Marriage becomes the absolute power of religious courts as mentioned in article 49 of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Court.

Theoretically, efforts to defend rights through religious courts have two possibilities, *volunteer jurisdictie* and *contentiuse jurisdictie*. The born concept is to receive, examine, adjudicate and resolve disputed cases and have the authority to examine and adjudicate cases within the scope of the unilateral request. Furthermore, it is expressly stated that one of the voluntary jurisdiction contents of the religious courts is the application for someone determined missing (*mafqud*).²⁷ The unilateral application cases only involve one party i.e applicant. The application case is not a disputed case but the application to be determined to have a certain position in a particular case and nothing more. This request is to fulfill a unilateral wish. The verdict is declaratory or a verdict in the form of an explanation or determination of a right or title or status. Unilateral application cases have a limited number such as the determination of the heirs and the share of each member of the inheritance, and the determination of the missing (*mafqud*) husband.²⁸

Missing (*Mafqud*) Husband Regulation in Malaysian Islamic Law

Besides mentioning the regulations regarding missing (*mafqud*) husbands in Indonesia, this article will mention the regulations regarding missing husbands in Malaysia. Regulation of missing husbands is regulated in Islamic Family Law Act (Federal Territory) 1984 and in all Islamic Family Law Enactment in Malaysia. Section 53 Islamic Family Law Act (Federal Territory) 1984 mentions,

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 Syara' 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

²⁶ Ubaidillah, "Yurisdiksi Ijtihad Umar bin Khattab dalam Kasus Anggapan Kematian Suami Mafqud", *Usratuna*, 40. <https://ejournal.staida-krempyang.ac.id/index.php/usratuna/issue/view/18>

²⁷ Mahkamah Agung RI, "Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama", 59-60.

²⁸ Mahkamah Agung RI, "Pedoman Teknis Administrasi dan Teknis Peradilan Agama", Buku II, 2008, 58.



order for the dissolution of marriage or fasakh as provided for under section 52. A certificate issued under subsection (1) shall be deemed to be a certificate of the death of the husband within the meaning of paragraph 14 (4) (b). 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. A certificate issued under subsection (1) shall be registered as if it effected a divorce.

Section 53 of Islamic Family Law Act (Federal Territory) 1984 can be understood as the period of the husband's departure from home to be determined his death is four years. Besides, the wife is not allowed to remarry except after a death decision from the Malaysian religious court. Then after the death determination for the missing (*mafqud*) husband, it is necessary to issue a death certificate by National Registration Department (JPN). This stipulation is in accordance with Section 14(4)(b) Islamic Family Law Act (Federal Territory) 1984, "(4) Where the woman is a widow (b) she shall not be married unless she has produced a certificate of the death of her late husband or otherwise proved his death."

In general, all the provinces which are called states in Malaysia have a regulation that says a person can be declared missing (*mafqud*) after leaving home for four years. But Terengganu has a regulation that says a person can be declared missing (*mafqud*) after leaving home for seven years.²⁹ Analysis of the different periods of husband's departure from home in Terengganu is that women are allowed to apply for missing husband determination to court after her husband leaves left home for seven years but the proof of the husband has been leaving home is for four years.³⁰ Determination of the death of a missing (*mafqud*) husband in Malaysia becomes the absolute power of Religious Courts, in Malaysia are called Sharia Courts (*Mahkamah Syariah*), this is in accordance with Section 46(2)(i) Islamic Law Administration Act (Federal Territory) 1993,

"(2) A Syariah High Court shall – (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to - (i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;"

This section states cases that are not related to crime in the relationship between Muslim husband and wife become the absolute power of the religious court or called the sharia court (*Mahkamah Syariah*) in Malaysia. Cases that become the absolute power of the sharia court (*Mahkamah Syariah*) in Malaysia include engagement, marriage, divorce, and reconciliation (*ruju'*). Regulations in Malaysia differentiate between an absent (*ghaib*) husband and a missing (*mafqud*) husband. This statement can be seen in section 52 Islamic Family Law Act (Federal Territory) 1984,

²⁹ Halimatun Sa'diyah binti Mohd. Mahdee, *Permohonan Anggapan Mati dari Aspek Kekeluargaan Islam: Kajian di Mahkamah Syariah, Disertasi Syariah*, (Kuala Lumpur: Universitas Malaya, 2012), 67.

³⁰ Sa'diyah, *Permohonan Anggapan Mati dari Aspek Kekeluargaan Islam*, 78.

“(1)A woman married in accordance with Hukum Syara', shall be entitled to obtain an order for the dissolution of marriage or fasakh on any one or more of the following grounds, namely - (a) that the whereabouts of the husband have not been known for a period of more than one year;”

The procedural law regarding the application of a missing (*mafqud*) husband in Malaysia can be found in Section 7 Mode of beginning civil proceedings Syariah Court Civil Procedure Act (Federal Territories) 1998, Section 7 Mode of beginning civil proceedings “(1) Subject to subsection (2) or any other written law, every civil proceeding in a Court shall be begun by summons. (2) All proceedings in respect of any of the matters specified in the Second Schedule shall be begun by application.” The meaning of this section is process to court for cases that are not related to crime (civil law) should be begun with the summons. All trial processes with the cases mentioned in the Second Schedule should be started by application. The second schedule of this act mentions proceeding to be begun by application. One of them is the presumption of death of a missing (*mafqud*) husband. Application of the death of missing (*mafqud*) husband uses code 15. This stipulation can be found in Practice Instructions No. 1 Year 2000 Department of Sharia Justice Malaysia. The second schedule under section 7 mentions, “Second Schedule [Subsection 7(2)] Proceedings to be begun by Application. Matters relating to personal and family law are as follows: Presumption of death.”

For cases registered with applications such as the presumption of death of a missing (*mafqud*) husband, the registration is conducted at the next stage. The submitted registration form must be completed and have been signed by Registrar or Assistant Registrar. Then the Applicant should tell the matters relate to her application about the death of a missing (*mafqud*) husband to the legal aid center.³¹ This form should be neatly typed to make it easier to read and submitted to the registration desk and pay RM 40 if registration is conducted in the Religious High Court or called the Sharia High Court (*Mahkamah Tinggi Syariah*) in Malaysia and pay RM 20 if registration is conducted in religious court or called Sharia Court (*Mahkamah Syariah*) in Malaysia. Any personal data that is written on the registration form needs to be carefully checked. Terms to register the presumption of death of a missing husband application at the Federal Territory Sharia Court are: (i) The Plaintiff or Defendant must be a resident of the Federal Territory (a copy of an identity card with an address in the Federal Territory or a letter of confirmation of residency; (ii) Proof of residence from the Chairman or Iman Qariah must be included if the address on the Identity Card is outside the Federal Territory; (iii) For Police or Military Members Proof of Residence and Employer; (iv) All registration forms must be neatly typed; and (v) Registration fee of Application or claim according to fee rules must be submitted.³²

The application for the death of the missing (*mafqud*) husband will be processed if it was confirmed that the husband had left the home for four years. If it can not be confirmed the period of time the husband left the house for four years then the court does not have the power to determine the death of the missing (*mafqud*) husband.

³¹ Ibid., 83.

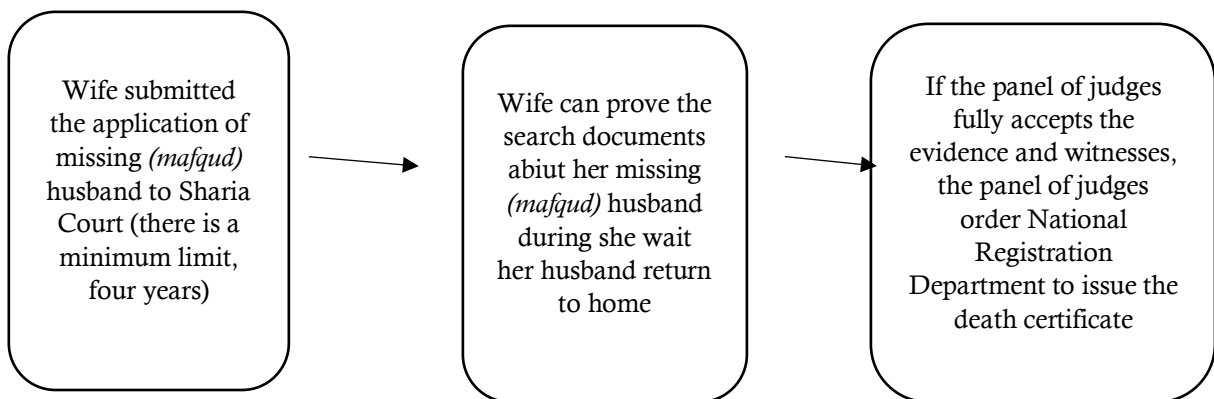
³² Ibid., 83-84.



However, the court can still dissolve the marriage if there is one other party who registers in the case of conditional divorce (*talak ta'liq*), rescission of marriage (*fasakh nikah*), and so on.³³ This procedure also states if the husband does not return to the family and does not notify his wife or father for more than four years, then the wife and his heirs may apply for death for a missing (*mafqud*) husband to court.³⁴ At the time of the trial, the Applicant should state: if the defendant has left the house and has not returned for four years. During the time the husband left home, the husband also did not give the news to the family. This case needs to be stated in the letter of application for the determination of death accompanied by supporting documents such as the applicant's efforts to find her husband through announcements posted in public places and searches made in the mass media. The judges will usually see the applicant's efforts in seeking her missing (*mafqud*) husband, whether the Applicant had made an announcement regarding the loss of her husband or not. After the court, in this case, the panel of judges, examines and hear the witness statement and the wife's statement regarding the missing (*mafqud*) husband, if the panel of judges fully accepts the statement of the witness, then the panel of judges will issue an order to declare death for the missing (*mafqud*) husband.³⁵

After the panel of judges dissolves the marriage by death, then the wife does the period of waiting (*idah*) for four months and ten days. The wife is allowed to remarry another man if the period of waiting (*idah*) has finished. If the Applicant, in this case, is the wife, filed cumulative lawsuits such as guardianship and inheritance, after the order of death for her missing (*mafqud*) husband from the court, then the suit of guardianship and inheritance can be processed soon. After an order declaring the death of the missing (*mafqud*) husband was made, then the calculation of the missing (*mafqud*) husband's inheritance can be done and the guardianship is transferred to another further guardian (*wali ab'ad*) or apply the magistrate guardian (*wali hakim*) to court if the daughter does not have any descent guardian.³⁶

Figure 2 Flow of Application for Missing Husband in Malaysia



Source: a data processed of Section 53 Islamic Family Law (Federal Territory) 1984.

³³ Ibid., 84

³⁴ Ibid., 84.

³⁵ Ibid., 87-88.

³⁶ Ibid., 85.

The similarities of both regulations in Indonesia and Malaysia are both regulations govern absent (*ghaib*) husbands. The difference is that Malaysian regulation differentiates between missing (*mafqud*) husband and an absent (*ghaib*) husband. The period of the husband's departure from home for an absent (*ghaib*) husband is one year and for a missing husband is four years. The regulations in Indonesia do not differentiate the regulations for missing (*mafqud*) husbands and absent (*ghaib*) husbands. The period of husband's departure from home to dissolve the marriage is two years. The procedural law to determine the death of a missing (*mafqud*) husband in Malaysia, The Court does not summon the defendant in the mass media. However, the Applicant with her initiative to look for her husband by making the news of loss and then posted in public places before submitting an application for the determination of the death of her missing (*mafqud*) husband or in other ways by reporting to the police. This Applicant's effort is used as evidence at trial if the Applicant had been trying to find her missing (*mafqud*) husband. This process shortens the trial time, without having to summon the missing (*mafqud*) husband several times to prove if his whereabouts can not be known, until the wife can get the verdict about her marriage quickly. Malaysian regulations require the issuance of death certificates for missing (*mafqud*) husbands by the State Registration Office (JPN). Issuance of death certificates for missing (*mafqud*) husband by the National Registration Department after the order from the court that determines the death of the missing (*mafqud*) husband. The Procedural law to determine the death of a missing (*mafqud*) husband in Indonesia, The Court summons the missing (*mafqud*) husband three times before the trial. The interval of each summon is one month. If the missing (*mafqud*) husband does not come to appear in court after the third summon to attend the trial, the trial will be proceeded by the panel of judges.

Missing (*Mafqud*) Husband Regulations That Can Provide Legal Certainty for Women in Indonesia

The purpose of this article is to provide input to revise the law governing missing (*mafqud*) husbands so this law can provide protection to wives whose husbands are missing which meet the principle of legal certainty. As already explained in the previous discussion, the regulation regarding missing (*mafqud*) husbands in Law no. 1 of 1974 and the Compilation of Islamic Law has two interpretations, namely: for the case of absent (*ghaib*) husbands and missing (*mafqud*) husbands. Regulations regarding missing (*mafqud*) husbands in Marriage Law and Compilation of Islamic Law if viewed from legal certainty, do not provide legal certainty. The regulations in Marriage Law and the Compilation of Islamic Law do not differentiate between absent and missing (*mafqud*) husbands. The need to differentiate these two cases is to differentiate the dissolution of the marriage between the case of an absent (*ghaib*) husband and a missing (*mafqud*) husband in court. Dissolution of marriage by determining the death of the husband for the case of missing (*mafqud*) husband and granting the divorce of the wife for the case of absent (*ghaib*) husband. In addition, it is also necessary to set a minimum limit for the husband's departure from home to determine the death of the missing (*mafqud*) husband. The need to set the minimum limit is to provide certainty to the wife in what year from the departure of her husband the wife can file for the death of her



missing (*mafqud*) husband to court and to take care of the inheritance left by her missing (*mafqud*) husband.

In addition, if viewed from the indicators of Satjipto Rahardjo legal certainty, this regulation does not meet these indicators. The indicators are the law must be positive, meaning it must be enacted. In missing (*mafqud*) husband case, regulations in Law no. 1 of 1974 concerning Marriage and regulations in Compilation of Islamic Law are not yet completed with a minimum limit husband's departure from home so the court can determine his death. Regulations for determining death for missing persons are contained in Civil Code, these regulations cannot be used to dissolve the marriage. The second indicator is the law must be based on facts. As it is known, the missing (*mafqud*) husband cases had happened since Prophet Muhammad SAW period until now so it is necessary to legislate a law that regulates determining the death of missing (*mafqud*) husband. The third indicator is the fact must be formulated in an obvious way to avoid mistakes in interpretation. The regulations contained in Law no. 1 of 1974 concerning Marriage and the Compilation of Islamic Law do not formulate the facts of a missing (*mafqud*) husband clearly. This statement can be seen in the regulations which do not differentiate absent (*ghaib*) husbands and missing (*mafqud*) husbands which these two cases have different verdicts in the dissolution of marriage. These stipulations, differentiating between absent (*ghaib*) husbands and missing (*mafqud*) husbands, can be found in both classical jurisprudence and Civil Code. The fourth indicator is positive law should not be changed frequently. In the case of a missing (*mafqud*) husband, the regulations in Law no. 1 of 1974 concerning Marriage and the Compilation of Islamic Law have never been amended, therefore it is necessary to legislate a new regulation based on facts with a clear formulation to regulate determining the death of a missing (*mafqud*) husband in order to provide justice for a wife whose husband is missing.

Legal uncertainty regarding regulations for determining the death of a missing (*mafqud*) husband which results in injustice for the wife whose husband is missing can be seen in verdict No. 0049/Pdt.P/2018/PA.Jepr.³⁷ This verdict is about the determination of a missing (*mafqud*) husband filed by his wife after the husband has been missing for 24 years. The determination of the missing (*mafqud*) husband is not to dissolve the marriage but to determine the property purchased by the applicant, in this decision the wife, as a joint property of Applicant

In this case, the applicant is legally married to the defendant. In 1993 the defendant had gone abroad. In 1999 the applicant purchased a plot of land with an area of 795M². From 1993 to 2018 the applicant and his family had tried their best efforts to get news from the defendant but did not receive any news about the defendant and his whereabouts were unknown. Then the applicant asked for a Certificate from the Village Government where the applicant lives regarding the whereabouts of her husband. This letter of the statement was issued on 27 February 2018. On 26 March 2018, the wife filed a determination of missing person for her missing (*mafqud*) husband. The applicant's reason filed a death determination for her missing (*mafqud*) husband is that he found it difficult to transfer the land rights

³⁷ <https://putusan3.mahkamahagung.go.id/search.html?q=mafqud>, diakses pada tanggal 12 Oktober 2020.

purchased by the applicant in 1999. When the Applicant filed the determination of missing (*mafqud*) husband to the court, the applicant needed money to fulfill her needs of daily life. Judge determined that the applicant's husband died according to the law because the husband is missing. Besides, the Judge also determined that the plot of land with an area of 795M² was purchased by the applicant in 1999 as joint property of the applicant and the defendant. In this decision, Judge refers to Article 467-471 of the Civil Code because the registered case was the determination of the husband's death to determine a land area as joint property, not to dissolve the marriage between the wife and her missing (*mafqud*) husband.

The author opines the incompleteness of regulations stipulating minimum periods of the husband's departure from home to determine his death caused to the absence of justice for the wives. It can be seen from the judge's verdict no. 0049/Pdt.P/2018/PA.Jepr, where the wife or applicant filed a death determination for her husband who disappeared after 24 years. The application is made by the applicant after the applicant found it was difficult to fulfill her needs in life. If there were regulations governing the determination of death after the husband left for a few years, of course, the wife did not have to wait for decades to file for the death of her missing (*mafqud*) husband and her marriage to a missing (*mafqud*) husband can be dissolved quickly.

Another thing that causes injustice to the applicant is when the applicant purchased a plot of land with an area of 795 M² in 1999 or when the defendant had been missing for approximately six years and the Judge determined the land as joint property of the applicant and the defendant because it was purchased at the time of marriage. If there were regulations governing the dissolution of marriage with the determination of death of missing (*mafqud*) husband after the husband left home for five years as regulations contained in Civil Code, of course, the land purchased by the applicant would not be joint property because the applicant purchased a plot of land after the death of the defendant and the marriage between the defendant and applicant had been dissolved. If so, then such a plot of land became the full property of the applicant then the applicant was free to transfer the land rights.

Another verdict that showed legal uncertainty and injustice for women can be found in verdict 959/Rev.G/2018/PA. Po.³⁸ In this case, the husband had been missing for seven years and his whereabouts were unknown then the wife filed a divorce at the instance of a wife who pays redemption (*khuluk*). To judge this case, the panel of judges referred to Article 19 (B) of Government Regulation No. 9 of 1975 due to the case registered by the wife is the dissolution of the marriage by the divorce or divorce at the instance of a wife who pays redemption (*khuluk*). The panel of judges granted the divorce at the instance of a wife who pays redemption (*khuluk*) filed by the wife. In addition, the panel of judges judged her period of waiting (*idah*) as one menstruation, the custody of the child falls into the hands of the wife, and the wife did not get any maintenance for her period of waiting (*nafkah idah*) and divorce

³⁸ Rahmawati, "The Analysis of Judge's Decision Mafqud's Husband in Case of Claim for Divorce in Ponorogo Religion Court and the Law Impact of the Mafqud's Husband (Analysis of Decision Number. 959/Pdt.G/2018/PA.PO)", 220. <https://doi.org/10.21111/ijtihad.v13i2.3542>



present (*mut'ah*) because the wife who filed for divorce in accordance with the provisions that exist in classical jurisprudence. The author opines that this verdict did not provide legal certainty and justice to the wife. Legal uncertainty in this verdict is the absence of regulations that regulate the minimum limit of the period the husband left the house so when the husband left the house for a long time his death cannot be determined. If there were regulations governing in detail about the missing (*mafqud*) husband, the wife filed the death of the missing (*mafqud*) husband to court does not divorce at the instance of a wife who pays redemption (*khuluk*) to dissolve their marriage. Injustice for the wife in this verdict is this verdict did not provide any maintenance for the period of waiting (*nafkah idah*) and divorce present (*mut'ah*) for the wife because the wife who filed for divorce as stipulated in classical jurisprudence. This verdict surely made the wife difficult because the wife had been abandoned by her husband for seven years and then she did not get any maintenance for a period of waiting (*nafkah idah*) and divorce present (*mut'ah*). If there were complete regulations regarding missing (*mafqud*) husband, of course, the wife could file for death for her missing (*mafqud*) husband and could take care of the inheritance left by her husband and get her rights from her husband's inheritance. If we look at the judge's considerations in judging a missing (*mafqud*) husband, the judge referred to articles 467-468 of Civil Code and classical jurisprudence. This shows the incompleteness of missing (*mafqud*) husband regulations in Indonesia. In addition, the Compilation of Islamic Law issued with Presidential Instruction 1991 on the Dissemination of the Compilation of Islamic Law caused the Compilation of Islamic Law to have no legal force. This is because the Presidential Instruction only provides directions, guidelines, and guides in terms of the implementation of tasks and works, not binding.

Regulations in Malaysia if viewed from legal certainty indicators, have met those indicators. The first indicator is the law must be positive means that it must be enacted. Regulations in Malaysia have regulated missing (*mafqud*) husbands in detail, from the minimum limit for the husband's departure from home to the procedural law. The second indicator is the law must be based on facts. As previously mentioned, the phenomenon of missing (*mafqud*) husband had happened since the time of the Prophet Muhammad so this is a fact. The third indicator is the fact should be formulated in a straightforward way to avoid mistakes in interpretation. The regulations in Malaysia differentiate cases regarding absent (*ghaib*) husbands and missing (*mafqud*) husbands so the wives know what steps to take when their husbands left the house. The fourth indicator is positive law should not be changed frequently. Regulations in Malaysia are rarely amended. Therefore, regulations in Malaysia have met all indicators of legal certainty, author will use the regulations in Malaysia as a reference in offering legal protection for wives whose husbands are missing which meets the principles of legal certainty.

An example of a missing (*mafqud*) husband's case in Malaysia for dissolution of marriage is a case registered under the number 11006-015-0016-2006. The applicant named Zainun binti Awang, and her husband named Noor Muhammad bin Musa. In 1984, Noor Muhammad went fishing which was his daily job. However, on that day there was a storm in the sea that caused Noor Muhammad not to return home. In 2006 Zainun had registered a death determination application for her missing (*mafqud*) husband to dissolve their marriage to Terengganu Sharia Court. The applicant had presented witnesses and brought evidence such as the announcement

she made to look for her missing (*mafqud*) husband. In addition, the Applicant also had taken an oath. The judge, Mr. Muhammad Nazri bin Yusof had determined Noor Muhammad Musa's death on January 18, 2006, with reference to chapter 50 of Terengganu Islamic Family Administration Enactment 1985. The date setting for Noor Muhammad bin Musa's death was on June 16, 1984, as the date he came out of the house and never came back again.³⁹

Missing (*mafqud*) husband regulations in Indonesia that can provide legal certainty for women is to set a minimum limit for the husband's departure from home for four years to be determined his death as regulations in section 53 of Islamic Family Law Act (Federal Territory) 1984. In addition, in that four-year period, the wife looks for the husband with the help of the police and effort to find her husband through announcements posted in public places and searches made in the mass media. These documents will be used as evidence during the trial so do not need to summon the missing (*mafqud*) husband three times before starting the trial process. This procedural law helps the wife to get a verdict on the death of her missing (*mafqud*) husband quickly. After receiving a death verdict for her missing (*mafqud*) husband, the wife can proceed to take care of the inheritance left by her missing (*mafqud*) husband.

Conclusion

The concept of missing (*mafqud*) husband in article 19 (b) of Government Regulation no. 9 years 1975 concerning Law no. 1 of 1974 and 116 (b) Compilation of Islamic Law has two interpretations, give meaning between missing (*mafqud*) husband and absent (*ghaib*) husband so there are no regulations regarding the minimum limit for the husband's departure from home to be determined the death of missing (*mafqud*) husband. As section 53 of Islamic Family Law Act (Federal Territory) 1984 regulated missing (*mafqud*) husbands with a minimum limit of four years. After the wife filed the missing (*mafqud*) husband's application to the court and the court granted, the wife did period of waiting (*idah*) for four months and ten days then after the end of the period of waiting (*idah*) the wife were allowed to remarry. After getting the verdict on her husband's death, she can process to get the inheritance from her missing (*mafqud*) husband. The author compares the existing regulations in Indonesia and Malaysia regarding missing (*mafqud*) husbands because the regulations in Malaysia have met the indicators of legal certainty. Comparisons were made to find out the regulations for missing (*mafqud*) husbands in Indonesia that could provide legal certainty for women.

The regulation of missing (*mafqud*) husband in Indonesia that can provide legal certainty for women is to set a minimum limit of four years for the husband's departure from home so his death can be determined as stipulated in section 53 of the 1984 Islamic Family Law Act (Federal Territory). In addition, in that four-year period, the wife looked for the husband with the help of the police and effort to find her husband through announcements posted in public places and searches made in the mass media. These documents will be used as evidence during the trial so do not need to summon the missing (*mafqud*) husband three times before starting the trial

³⁹ Sa'diyah, Permohonan Anggapan Mati dari Aspek Kekeluargaan Islam, 123.



process. After receiving a death verdict for her missing (*mafqud*) husband, the wife can proceed to take care of the inheritance left by her missing (*mafqud*) husband. The important results of this study are interesting to be used as recommendations for the government to revise the missing (*mafqud*) husband regulation in Indonesia. The author hopes that the recommendations for the missing (*mafqud*) husband regulation in this article can be considered by the Indonesian government.

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