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THE PERIOD OF MAFQUD ACCORDING TO HUKUM SYARA' AND THE SHARIA LAW ACT IN BRUNEI DARUSSALAM

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Abstract: A mafqud is a person who has been missing from their original location for a long period, during which news about them has ceased, and their whereabouts are unknown. The occurrence of a mafqud leads to several issues, especially in managing property and the status of the abandoned wife. This is because, if it is proven that the mafqud has passed away, their heirs are entitled to inherit their property according to the distribution of faraidh according to hukum syara', and it also allows the wife of the mafqud to remarry. Therefore, this study aims to explore the period of mafqud according to hukum syara', along with the implementation of the act that has been enacted by Sharia legislation in Brunei Darussalam. The research methodology employed is descriptive qualitative, using content analysis as the analytical method. The analysis is conducted by examining secondary data, particularly legal acts, writings, journals, and articles. Additionally, library methods are used, sourcing from Islamic jurisprudence books, seminar papers, and reputable websites. According to the findings, the implementation of Brunei's Sharia law does not specify the period for managing the property of a mafqud, but only states the period for the wife believed to have been abandoned by her mafqud husband to remarry. Scholars unanimously state that the period of mafqud is based on the ijihad (juridical reasoning) of the judge. The effectiveness of the implementation of the law, especially Sharia law, plays a crucial role in enhancing the development of mafqud management in Brunei Darussalam based on Islamic legal principles.

Abstrak: Seorang mafqud adalah seseorang yang telah hilang dari lokasi asalnya untuk jangka waktu yang lama, di mana berita tentangnya telah terhenti, dan keberadaannya tidak diketahui. Kejadian mafqud menimbulkan beberapa masalah, terutama dalam mengelola harta benda dan status istri yang ditinggalkan. Hal ini karena, jika terbukti bahwa mafqud telah meninggal, ahli warisnya

berhak untuk mewarisi harta benda sesuai dengan pembagian faraidh menurut hukum syara', dan memungkinkan istri dari mafqud untuk menikah lagi. Oleh karena itu, penelitian ini bertujuan untuk mengeksplorasi periode mafqud menurut hukum syara', serta penerapan tindakan yang telah diberlakukan oleh undang-undang Syariah di Brunei Darussalam. Metodologi penelitian yang digunakan adalah deskriptif kualitatif, dengan analisis konten sebagai metode analisis. Analisis dilakukan dengan memeriksa data sekunder, terutama undang-undang, tulisan, jurnal, dan artikel. Selain itu, metode kepustakaan digunakan, dengan sumber dari buku-buku fikih Islam, makalah seminar, dan situs web terpercaya. Berdasarkan temuan, penerapan hukum Syariah di Brunei tidak menentukan periode untuk mengelola harta benda seorang mafqud, namun hanya menetapkan periode bagi istri yang diyakini telah ditinggalkan oleh suaminya yang mafqud untuk menikah lagi. Para ulama sepakat bahwa periode mafqud didasarkan pada ijtihad (penalaran yuridis) hakim. Efektivitas penerapan hukum, terutama hukum Syariah, memainkan peran penting dalam meningkatkan perkembangan pengelolaan mafqud di Brunei Darussalam berdasarkan prinsip-prinsip hukum Islam.



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INTRODUCTION

A mafqud is defined as a person who has disappeared from their original location for a prolonged period, during which time all news regarding their status has ceased, rendering their whereabouts unknown. The occurrence of someone becoming a mafqud gives rise to several complications, particularly concerning the management of their property and the legal status of the wife who has been left behind. This situation is significant because if it is established that the mafqud has indeed passed away, then their heirs are entitled to inherit their assets according to the principles of faraidh as stipulated in Hukum Syara'. Additionally, this situation allows the wife of the mafqud the opportunity to remarry.

The scholars of the four major Sunni of thought: Hanafi, Maliki, Shafi'i, and Hanbali, differ in their opinions regarding the appropriate waiting period for a mafqud. They consider various factors, such as the ijtihad (juridical reasoning) of the judge, the application of fiqh principles, whether the individual is presumed to be in a safe condition or not, as well as both rational

(dalil aqli) and textual evidence (dalil naqli). Furthermore, they take into account whether individuals of similar age to the mafqud have also passed away.

In contrast, the legal framework of Sharia law in Brunei Darussalam does not contain specific provisions related to mafqud. However, it does include regulations that touch upon the matter of mafqud within the context of Islamic family law, specifically in the chapters concerning marriage and guardianship. Consequently, there is a pressing need for substantial evidence, grounded in Hukum Syara', along with the necessary conditions to be met before officially declaring the death of a mafqud.

Thus, it is essential to ensure that the waiting period for a mafqud is relevant and applicable to contemporary times. This is particularly important given the advancements in technology and communication tools available today, which enable individuals, especially the agencies involved, to obtain information about the mafqud more easily and efficiently compared to the past, where such resources were significantly limited.

METHOD

This study used qualitative approach that is more effective in addressing the objectives of the article. It employs library methods where primary and secondary materials are used directly or indirectly, including *turath* books, modern fiqh, thesis, articles, and journals, to conduct an in-depth study related to the researcher's topic. Through the reading of *turath* and modern fiqh, the researcher is able to connect the article with the topic "The Period of Mafqud According to Hukum Syara' and the Sharia Law Act in Brunei Darussalam," in which Brunei Darussalam adheres to the beliefs of Ahl al-Sunnah wa al-Jama'ah according to the Shafi'i school of thought. Additionally, the researcher employs case study methods and the Sharia Law Act of Brunei Darussalam. After conducting the study using library methods and case studies along with legal acts, the next step is to analyze the findings from these methods.

DISCUSSION

THE CONCEPT OF MAFQUD

The term mafqud originates from the Arabic word فُقِدَ – يَفْقُدُ – فُقُودًا – فُقُودًا – فُقُودًا, which is associated with the meanings of being lost, losing something, or disappearing¹. A mafqud refers to an individual who has vanished from their homeland, and for an extended period, no one has been able to locate or trace their whereabouts. Furthermore, there is no information available regarding their status, whether they are alive or deceased. This state of being lost not only highlights the absence of the individual but also the profound uncertainties that arise for their family and loved ones, as they grapple with the emotional and practical implications of not knowing the fate of the mafqud.²

The Concept Of Mafqud Of The Four Scholars

According to the Hanafi scholar, a mafqud is defined as an individual whose existence is uncertain, with no clear indication of whether they are still alive and may potentially return, or if they have already passed away and been buried. This definition also encompasses individuals such as prisoners of war and apostates, whose current status, whether they are alive or deceased, remains unknown. In light of this ambiguity, the mafqud is presumed to be alive based on the principle of al-istishab, which maintains that one should assume the continuation of an existing state until evidence suggests otherwise³.

From the perspective of the Maliki scholars, a mafqud is characterized as a person who cannot be traced or contacted by the authorities through letters or orders. This situation arises when communication between the mafqud and their family or local leaders has been severed, rendering their whereabouts

¹ Mahmud Yunus. 1973M/1393H. Kamus Arab – Indonesia. Jakarta, Indonesia. Ciptaan Pertama. Hlm 320.

² Wahbah Al-Zuhaili. 1999. Fiqh Dan Perundangan Islam. Jilid 5. Dewan Bahasa Dan Pustaka, Malaysia. Hlm 769.

³ Ibn Abidin. 1386H/1966M. Radd Al-Mukhtar ala Durr al-Mukhtar Sharh Tanwir al-Absar. Cetakan Kedua. Dar al-Fikri, Beirut. Juz 4. Hlm 292.

completely unknown. Despite efforts to search for and inquire about the individual, including investigations by the authorities, the person remains unlocated, leading to further complications for those left behind⁴.

In the Shafi'i scholar, a mafqud is understood to be someone from whom all news has been cut off, and their status remains unknown, regardless of whether they are traveling, engaged in warfare, experiencing a shipwreck, or involved in other situations that obstruct communication. Additionally, this definition includes prisoners of war for whom contact has been lost, further complicating the understanding of their fate⁵.

The Hanbali scholar defines a mafqud as an individual whose life or death is indeterminate due to the interruption of information regarding them. This category is divided into two types: first, individuals whose news has been severed due to what appears to be a safe departure, such as traders; and second, those whose information is cut off under circumstances that typically lead to death, such as individuals whose ships have sunk or who are otherwise missing in perilous situations⁶.

The Concept Of Mafqud According To The Sharia Law Act In Brunei Darussalam

In the laws of Brunei, there is no specific interpretation provided to clarify the meaning of the *tempoh mafqud* (period of being missing). According to the Interpretation and General Clauses Act, Chapter 3, the interpretation of a word plays a crucial role in understanding a law. If there is no interpretation available within the legislation itself, references from Arabic manuscripts can be appropriate for elucidating the meaning of a statute. However, the Interpretation Act of Brunei does not elaborate on the term *mafqud*.

⁴ Malik bin Anas. 1415H/1994M. Al-Mudawwanah. Cetakan Pertama. Dar Al-Kutub Al-Ilmiyyah. Juz 2. Hlm 31.

⁵ Nawawi, Muhyi d-din Abi Zakariyya Yahya ibn Sharaf. 1412H/1991M. Raudah At-Tholibin. Cetakan Ketiga. Maktab Al-Islami: Beirut, Damsyik, Oman. Juz 6. Hlm 34.

⁶ Al-Bahuti, Mansur bin Yunus. 1421H-1429H/2000M-2008M. Kashaf Al-Qina' 'An Al-Qina'. Cetakan Pertama. Arab Saudi. Juz 10. Hlm 460-461.

In light of this gap, the concept of the *tempoh mafqud* can be referenced through *Hukum Syara'*, as outlined in the definitions of *mafqud* provided by the scholars of jurisprudence (*fuqaha*). Nevertheless, the following definitions are utilized in the Islamic Family Law Act of 1999, particularly in the sections concerning guardianship and the dissolution of marriage:

12 (b) "...Such consent may be given if the wali cannot be found..."⁷

The phrase "*wali cannot be found*" effectively carries the same meaning as the loss or absence of a guardian, which can also be referred to as *mafqud*.

53 (1) "Where the husband of any woman is believed to be dead, or has not been heard of a period of 4 years or more..."⁸

In this context, *mafqud* is also described as "*has not been heard*". Both of these phrases are synonymous with the term *mafqud*, even though the specific word "*mafqud*" is not used; rather, alternative phrases with similar meanings are employed.

In conclusion, the term *mafqud* refers to a person who has long departed from their place of residence, with their whereabouts unknown, leading to complete uncertainty about their living or deceased status over an extended period. Based on the definitions provided by scholars from the four jurisprudence of thought, along with the provisions of Sharia law in Brunei Darussalam, it can be concluded that key phrases such as "unknown," "unable to be traced," "unable to be contacted," "cut off from news," and "interrupted information," as stated by the scholars, convey meanings that align with the terminology used in Brunei's Sharia law, specifically phrases like "cannot be traced" and "no news has been heard," both of which serve to define the concept of *mafqud*.

Determination Of The Period Of Mafqud According To Hukum Syara'

⁷ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3)). Perintah darurat (Undang-Undang Keluarga Islam), 1999. Hlm 853.

⁸ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3)). Perintah darurat (Undang-Undang Keluarga Islam), 1999. Hlm 873.

The scholars of Islamic jurisprudence (fuqaha) have differing opinions regarding the duration of time that may lead to the assumption that a mafqud (missing person) has passed away.⁹ This divergence arises primarily because there is no explicit and definitive text in the Al-Quran or Sunnah that specifies a fixed period for declaring someone a mafqud¹⁰. Consequently, the duration for considering a person as deceased when they are mafqud is based solely on the interpretations and opinions of various jurisprudence of thought, as outlined below:

Hanafi

According to the opinion of Hanafi scholars, if an individual has been missing for a duration exceeding the typical lifespan expected for a human, they are presumed to be deceased. Al-Hassan bin Ziyad reported from Abu Hanifah, stating that he estimated the period for declaring a mafqud dead to be around one hundred and twenty years from the date of the individual's birth. This estimation is rooted in historical context, particularly during the time of Abu Hanifah, when a man went missing during the battles of Siffin or Jamal, leading to disputes over his estate among his heirs at that time. It is said that Ali ibn Abi Talib passed away in the year forty of the Hijrah, while Abu Hanifah himself died in the year one hundred and fifty of the Hijrah. This timeline is based on the accounts of Imam Muhammad, may Allah have mercy on him.¹¹

Another narration from Imam Muhammad suggests that he estimated the period for a mafqud to be one hundred years. If this time has elapsed without any news or evidence of the individual's whereabouts, they are legally presumed dead. Consequently, all matters concerning the legal implications of a mafqud, such as the status of their wife and the distribution of their estate,

⁹ Wan Zahari Wan Yussof, Muhammad Azwan Sulaiman, Wan Ainaa Mardhiah Wan Zahari. *Isu Dan Penyelesaian Harta Al-Mafqud: Satu Pemerhatian*. International Journal of Islamic And Civilizational Studies. Vol 6, no.2-2 (2019) pp. 13-33. Hlm 17.

¹⁰ Mariyatul Qibtiyyah binti Haji Mohammad, Dr Noralfishah binti Sulaiman. *Isu Dalam Menguruskan Harta Al-Mafqud Di Malaysia*. International Conference and Ph.D. Colloquium On Islamic Economics And Finance 2015. Hlm 2.

¹¹ Al-Kasani, Abu Bakr bin Mas'ud. *Badai' As-Soni' Fi Tartib Ash Syaraik*. Cetakan Pertama. Dar Alkutub Al-Ilmiyyah. Juz 6. Hlm 197.

are addressed as if the individual has indeed passed away. This presumption allows for the resolution of issues surrounding inheritance and marital status, thereby providing clarity and legal standing for the family and heirs left behind¹².

Maliki

According to the Maliki scholar, the period for a wife to remarry due to her husband being missing is that she must bring the case before a qadhi (judge) to confirm the death of the mafqud (husband), provided that a waiting period of four years has passed. After this, the wife must observe the iddah of death for four months and ten days¹³. This opinion is supported by Umar ibn Khattab in his narration:

أَيُّمَا امْرَأَةٍ فَقَدَتْ زَوْجَهَا فَلَمْ تَدْرْ أَيْنَ هُوَ فَإِنَّهَا تَنْتَظِرُ أَرْبَعَ سِنِينَ ثُمَّ تَعْتَدُ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا ثُمَّ تَحِلُّ

*When a woman loses her husband and does not know where he is, then she must wait for her husband for four years. After that, she should observe the iddah for four months and ten days, and then she can release herself from her iddah. It is thereafter permissible for her to remarry.*¹⁴

In other words, based on the narration of Saidina Umar bin Al-Khattab, a wife is required to exercise patience and wait for a period of four years after her husband's disappearance before she can submit a formal request to the qadhi (judge) or hakim (jurist) to dissolve the marriage. This waiting period is necessary to ensure that there is a firm belief or certainty that her husband, who is considered mafqud (missing), can rightfully be presumed dead. Only after this duration can she seek the legal dissolution of the marriage, as it reflects both the legal and ethical considerations involved in such a serious decision.

¹² Al-Kasani, Abu Bakr bin Mas'ud. (1337H-1338H). *Badai' As-Soni' Fi Tartib Ash Syaraik*. Cetakan Pertama. Dar Alkutub Al-Ilmiyyah. Juz 6. Hlm 197.

¹³ Al-Asbahi, Malik bin Anas. 1994M/1415H. *Al-Mudawwanah*. Dar Al-Kutub Al-Ilmiyyah. Juz 2. Hlm 31.

¹⁴ Al-Asbahi, Malik bin Anas. 1994M/1415H. *Al-Mudawwanah*. Dar Al-Kutub Al-Ilmiyyah. Juz 2. Hlm 31.

The period of mafqud for someone who is detained (الأسير) is regarded as equivalent to that of a mafqud in Islamic territory, where the status of the detainee is known at one point, yet it remains unclear whether they are alive or deceased. In contrast, for someone who is mafqud in enemy territory (Dar Al-Harb), the waiting period is typically considered to be between seventy to eighty years. If this duration has elapsed without any information regarding the person's status, then the wife is permitted to remarry¹⁵.

Moreover, when it comes to a mafqud situation arising from a battle among Muslims, the duration is determined based on the judge's discretion and the specific circumstances surrounding the case.¹⁶

If an individual goes missing during a war against non-believers, both Imam Malik and Abu Qasim hold the view that the wife of the missing person should wait for a period of one year before she can perform the iddah (mourning period) following the completion of this waiting time. This ruling is also stated to be similar to that of individuals who are missing within an Islamic country.¹⁷

Shafi'i

The Shafi'i scholar presents two opinions, known as qaul qadim (the old opinion) and qaul jadid (the new opinion). According to Imam Ibn Hajar al-Haitami, qaul qadim refers to Imam Shafi'i's perspective prior to his arrival in Egypt, as documented in his book Hujjah. In contrast, qaul jadid represents Imam Shafi'i's viewpoint during his time in Egypt, with notable texts that fall under this category including Mukhtasar al-Buwaiti and al-Umm¹⁸.

¹⁵ Al-Qurtubi, Abu Umar Yusof bin Abdullah. (1400H/1980M). Al-Kafi Fi Ahli Al-Madinah. Maktabah Riyadh Al-Hadithat, Arab Saudi. Cetakan Kedua. Juz 2. Hlm 567-570.

¹⁶ Suhana binti Amiril & Muhammad Ismail bin Abdullah. (2022). Garis masa tempoh Perisytiharan Al-Mafqud: kajian Perbandingan Antara Fiqh Dan Undang-Undang Keluarga Islam. 6th Muzakarah Fiqh & International Conference. E-ISSN: 2710-6241. Hlm 425.

¹⁷ Suhana binti Amiril & Muhammad Ismail bin Abdullah. (2022). Garis masa tempoh Perisytiharan Al-Mafqud: kajian Perbandingan Antara Fiqh Dan Undang-Undang Keluarga Islam. 6th Muzakarah Fiqh & International Conference. E-ISSN: 2710-6241. Hlm 425.

¹⁸ Al-Haitami, Ahmad bin Muhammad bin Ali bin Hajar. 1983M/1357H. Tuhfah Al-Muhtaj Fi Syarhi Al-Minhaj. Dar Ahya' At-Turath Al-Arabiyy, Beirut. Juz 1. Hlm 53-54.

According to the qaul qadim of Imam Shafi'i, a wife of a mafqud is required to wait for four years after the news of her husband has ceased. Following this waiting period, she must observe an iddah (mourning period) lasting four months and ten days. Upon completing both the waiting and iddah periods, the wife is permitted to marry another individual.¹⁹

In contrast, under the qaul jadid, the wife of a mafqud must wait until she receives confirmation regarding her husband's death, based on the testimony of witnesses or other presented evidence. This is supported by the narration from Al-Mughirah bin Shu'bah, in which the Prophet Muhammad is reported to have said:

امرأة المفقود امرأته ما لم يأتها يقين طلاقه أو وفاته

A woman whose husband is missing (mafqud) is still considered his wife as long as she has not received confirmation of divorce or her husband's death.

In addition, Imam As-Syafi'i also explained that a person who is still alive, even if they have apostatized or fled to an enemy country, cannot be considered dead because their status of being alive remains. This relates to the concept of mafqud (missing person) because an individual who is missing should not be automatically regarded as dead simply due to their absence for a certain period. The determination of a person's status must be based on specific criteria, as Imam As-Syafi'i rejected opinions that contradict the Quran and Sunnah, even if those opinions come from respected individuals. He emphasized that all legal decisions must align with what has been established by Allah and His Messenger.²⁰

Nevertheless, the prevailing and well-known opinion among the scholars of the Shafi'i is that the waiting period for a mafqud should be left to the discretion and judgment of the judges to determine. However, there are also views suggesting that this waiting period could be after sixty-eight years,

¹⁹ Al-Juwainy, Abdul Malik bin Abdullah. 2007M/1428H. Nihayah Al-Matlab Fi Dirayah Al-Mazhab. Cetakan Pertama. Dar Al-Minhaj. Juz 15. Hlm 287.

²⁰ Syafi'i, Abu Abdillah Muhammad bin Idris. 1403H/1983M. Al-Umm. Dar Al-Fikri, Beirut. Cetakan Kedua. Juz 6. Hlm 182.

seventy years, eighty years, one hundred years, and even one hundred and twenty years.²¹

Hanbali

In the Hanbali scholar of thought, the duration for declaring someone mafqud (missing) is divided into two categories:

i. Those Whose News is Cut Off but are in a Secure Situation: This category includes individuals such as captives whose absence is physically evident but who are presumed to be safe, such as prisoners of war, or traders engrossed in their business and unable to return home, travelers who have chosen to settle in a faraway land, or students pursuing education. All these situations are characterized by a known condition of safety; thus, the waiting period for such individuals is considered to be a full ninety years from their date of birth, as it is generally believed that no one lives beyond this duration. This is the view held by the Hanbali scholar and others. There are those who argue that one must wait until there is certainty of death or until it has been established that the individual could not have lived as long, relying on the discretion of the judge. This view is also supported by Imam Shafi'i, Muhammad ibn Hasan, and is widely accepted among Abu Hanifah, Malik, and Abu Yusuf, as they all agree that the default assumption regarding the missing person is that they are alive²².

Those Whose News is Cut Off but are in a Situation of Peril: This includes situations such as someone lost at sea when a ship sinks, or a person who is separated from their family, like someone who leaves for prayer and does not return, or who is lost in a deadly environment such as the deserts of Hijaz. Furthermore, if someone goes missing during a fierce battle, the assumption is that they are presumed dead after a period of four years since their disappearance, as this is a typical duration during which travelers and

²¹ Muhammad Al-Khatib Al-Syarbini. (1994),

Suhana binti Amiril & Muhammad Ismail bin Abdullah. (2022). Garis masa tempoh Perisytiharan Al-Mafqud: kajian Perbandingan Antara Fiqh Dan Undang-Undang Keluarga Islam. 6th Muzakarah Fiqh & International Conference. E-ISSN: 2710-6241. Hlm 426.

²² Al-Buhuti, Mansur bin Yunus. (2000M-2008M). Kasyaffu Al- Qinai' 'An Al-Iqna'. Arab Saudi. Juz 10. Hlm 460-461.

merchants often find themselves delayed, leading to a halt in news regarding them. If they were still alive, their news would have continued until they reached their destination; therefore, they appear to have been confirmed as deceased.²³

Based on the opinions of various juristic scholars regarding the duration of being declared mafqud, it is aligned with the circumstances surrounding a person's disappearance, as discussed by the four well-known scholars of thought. The more widely accepted opinion is to delegate the determination of the absence period required to declare someone missing to the judge. The judge is deemed the most capable authority to assess the circumstances of an individual's disappearance, as these situations vary from one case to another.

Duration Of Mafqud From The Perspective Of Sharia Law In Brunei Darussalam

In Brunei Darussalam, the authority responsible for issuing death certificates is the Department of Immigration and National Registration, under the Birth and Death Registration Act, Chapter 79. However, there is no provision that specifies how the registration of death for missing persons, whose bodies are not found, is to be handled in Chapter 79. This differs from the laws in Malaysia, where in cases of missing persons, the heirs must apply to the court for a declaration of presumed death before it can be registered, as stated in Section 24.²⁴

In the Civil Court of Brunei Darussalam, there is also no clear law regarding initiating action to obtain a declaration for missing persons and presumed death. The relevant provisions are found in Chapters 107 and 108 of the Evidence Act, Chapter 108. The provisions in this law are similar and applicable to declarations of death in Malaysia under the Evidence Act 1950,

²³ Al-Buhuti, Mansur bin Yunus. (2000M-2008M). Kasyaffu Al- Qinai' 'An Al-Iqna'. Arab Saudi. Juz 10. Hlm 460-461-462.

²⁴ KES MAL BIL: BM/MTS/MAL-B/P034B/585/09-2019 : Permohonan Pengisytiharan Mafqud Dan Pensabitan Kematian. Hlm. 5-6.

Act 56, Chapters 108, and in Singapore under provisions 109 and 110 of the Evidence Act.²⁵

The courts in Malaysia and Singapore serve as references for the courts of Brunei Darussalam in resolving applications for the declaration of a missing person and the confirmation of death of a specific individual, as a guideline for handling cases in Brunei Darussalam regarding initiating actions for death declarations. In Brunei Darussalam, the jurisdiction of the existing Syariah Court refers to the Syariah Court Evidence Order, 2001, which includes Chapters 96 and 97²⁶. Therefore, in this context, the duration applicable in Brunei Darussalam is four years from the time of disappearance, in accordance with Hukum Syara'

Islamic Family Law Act, 1999

In the Islamic Family Law Act of 1999, the determination of the period of a missing person (mafqud) is related to a lawful wife who has been abandoned by her husband, whose whereabouts are unknown or who has had no news regarding his life for a period of four years or more. In other words, it pertains to a husband who is considered missing and who wishes to remarry. This is as stated in Chapter 53 (1) and (2):

53 (1) Where the husband of any woman is believed to be dead, or has not been heard of a period of 4 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 have died, the Court may on the application of the woman in the prescribed form and after such inquiry as may be proper, issue a Certificate of Presumption of Death of the husband in the prescribed form and the Court may, on the application of the

²⁵ KES MAL BIL: BM/MTS/MAL-B/P034B/585/09-2019 : Permohonan Pengisytiharan Mafqud Dan Pensabitan Kematian. Hlm. 7-8.

²⁶ KES MAL BIL: BM/MTS/MAL-B/P034B/585/09-2019 : Permohonan Pengisytiharan Mafqud Dan Pensabitan Kematian. Hlm. 8-9.

*woman in the prescribed form, order the dissolution of marriage by fasakh.*²⁷

*(2) A certificate issued under subsection (1) shall be registered in Register of Divorces, Annulments and Ruju'as if it effected a divorce.*²⁸

Therefore, a wife whose husband has been declared mafqud (missing) is allowed to apply for dissolution of the marriage through fasakh (annulment). However, the application must begin with confirming the husband's death with strong evidence based on Hukum Syara'. Once the status of mafqud is confirmed, the marriage between them is legally dissolved through fasakh. Consequently, the former wife is required to observe the waiting period ('iddah) according to Hukum Syara', which is four months and ten days, after which she may remarry.

Meanwhile, under Section 144(2) of the Islamic Family Law Act, Chapter 217, the Syariah Court is granted jurisdiction to hear the applicant's claim regarding mafqud and presumed death, particularly in cases not aimed at enabling the wife to remarry, as such cases may be pursued under Section 53(2).

*144 (2). In relation to any matter which is not expressly provided for in this Act or in any rules made under this Act, the Court shall apply Hukum Syara'.*²⁹

Syariah Court Evidence Order, 2001

Meanwhile, under the Syariah Court Evidence Order of 2001, it explains and clarifies the requirements for proving that a person has gone missing or has not been heard from by family members or those close to them for a period

²⁷ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3)). Perintah darurat (Undang-Undang Keluarga islam), 1999. Hlm 873.

²⁸ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3)). Perintah darurat (Undang-Undang Keluarga islam), 1999. Hlm 873.

²⁹ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3)). Perintah darurat (Undang-Undang Keluarga islam), 1999. Hlm 905.

of four years from the time of their disappearance. Therefore, the burden of proof is placed upon these individuals. As stated in the following Section 97:

97. Subject to Hukum Syara' and any other written law, when the question is whether a man is alive or dead, and it is proved that he has not been heard of for 4 years from the time he was missing 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.³⁰

In Section 97, the judge will order the applicant, who seeks to confirm the death and disappearance of the mafqud, to present any evidence that substantiates that there has been no contact or communication from the missing person to the applicant or other heirs for a period of four years or more.

RESULT

SIMILARITIES AND DIFFERENCES FROM THE PERSPECTIVE OF HUKUM SYARA' AND SHARIA LAW IN BRUNEI DARUSSALAM

Therefore the similarity between the period for declaring a mafqud (missing person) under Hukum Syara' and Syariah law in Brunei Darussalam can be understood from multiple important perspectives, such as the legal framework for determining the mafqud period, the methodology for proving someone's disappearance, and the approach taken by the judge in applying independent judgment (ijtihad). Both systems place significant emphasis on ensuring that the process is thorough, just, and in accordance with established legal principles. In both Hukum Syara' and Brunei's Syariah law, special attention is given to protecting the rights of those impacted by a mafqud case, including the wife of the missing person, as well as the heirs and children. These protections are crucial, particularly in matters related to inheritance, marriage, and guardianship, which are deeply affected by the legal status of the mafqud. The timely resolution of such claims is essential, as any delays in

³⁰ Perlembagaan Negara Brunei Darussalam (Perintah di bawah bab 83(3). Perintah Keterangan Makamah Syariah, 2001. Hlm 902.

addressing mafqud cases could hinder future cases from being resolved in an orderly and systematic manner, potentially leading to complications and legal disputes.

The legal determination of the mafqud period under Syara' varies according to the four major scholars of thought, each of which has its own perspective on how the period should be determined based on the circumstances of the missing person. Scholars from the Hanafi, Maliki, Shafi'i, and Hanbali scholars offer different interpretations, and these differences highlight the diverse range of opinions within Islamic jurisprudence. For instance, in the Hanafi scholar, a mafqud is considered when the individual has reached the age of one hundred or one hundred and twenty years, depending on the scholar's interpretation, with some scholars suggesting that the person must have lived beyond the average lifespan expected during that historical period. This view is shaped by the need to ensure that the missing person is presumed dead based on realistic life expectancy during that time.

In contrast, the Maliki scholar takes a more specific approach, establishing a fixed four-year period for cases where a wife's husband has gone missing. After this four-year period has elapsed, the wife is required to observe the 'iddah (waiting period) of four months and ten days, after which she is legally allowed to remarry. The Maliki approach is characterized by its precision and clarity, ensuring that there is a structured timeline for determining the missing status of a husband. Meanwhile, the Shafi'i scholar adopts a more flexible position, where no fixed period is explicitly stated. Instead, the scholars of the Shafi'i scholar emphasize the importance of ijtihad and leave the determination of the mafqud period to the discretion of the judge, who makes the decision based on the specific circumstances of each case. This flexibility allows for a more tailored approach, where the judge can take into account unique factors that may not fit neatly into a predefined timeline.

The Hanbali scholar also provides a specific period for declaring a person as mafqud, setting the time frame at ninety years of age. Some Hanbali scholars suggest an alternative view that aligns more closely with the Maliki scholar, advocating for a four-year period. This diversity of opinion within the

Hanbali scholar reflects the broader spectrum of interpretations within Hukum Syara' on this issue.

In the context of Brunei Darussalam, the Syariah law closely aligns with the Maliki scholar's approach, as it establishes a clear four-year period for determining the status of a mafqud, particularly in cases where a wife's husband has gone missing and no news has been received regarding his whereabouts. This alignment between Brunei's Syariah law and the Maliki scholar offers clarity and predictability for individuals seeking legal resolution in mafqud cases.

Despite the variations among the scholars of thought, there is a clear parallel between Islamic law (Syara') and Syariah law in Brunei Darussalam, particularly in the way that both systems emphasize the importance of judicial discretion. In most cases, scholars from the four scholars of thought agree that the final determination of the mafqud period should rely on the ijthad of the judge or qadhi, who has the authority to evaluate the case based on the evidence and testimonies provided. This reliance on judicial discretion is also practiced in the Syariah courts of Brunei Darussalam, where the determination of the mafqud period is based on a careful examination of the evidence submitted by the applicant. The final decision regarding the declaration of the missing person's death is then made by the judge, who applies both legal principles and ijthad to ensure a fair and just outcome. Thus, both Hukum Syara' and Brunei's Syariah law operate on a foundation of thorough legal reasoning and judicial independence, ensuring that the rights of all parties involved are respected and upheld.

CONCLUSION

According to Hukum Syara' there is a significant divergence of opinion (ikhtilaf) among the four well-known scholars of thought regarding the appropriate time frame to declare a person as mafqud (missing). Each scholar, whether Hanafi, Maliki, Shafi'i, or Hanbali, offers different interpretations based on their understanding of the circumstances surrounding the missing person. However, the generally accepted view, which has gained prominence

across these scholars, is that the determination of the mafqud period should ultimately be based on the decision and independent judgment (ijtihad) of the judge or qadhi, who takes into consideration all relevant factors and evidence. In contrast, under the legal framework of the Syariah Court in Brunei Darussalam, the law clearly stipulates that for a mafqud to be presumed dead, the period of disappearance must reach four years. This guideline is outlined in Sections 96 and 97 of the Syariah Court Evidence Order, 2001. Furthermore, all necessary evidence must be presented to the court, and the final declaration of the individual's status as deceased will only be made after the judge has reviewed and evaluated the evidence in question. The burden of proof, therefore, lies with the applicant, and the judge will issue a ruling based on the strength of the evidence presented. Indirectly, the determination of the period of a missing person (mafqud) affects the management of assets resulting from the accumulation of unresolved missing person cases and the impact of an increasing amount of unclaimed money. To avoid such a situation, research conducted, such as reviews from previous studies, shows that zakat and waqaf are essential elements that can help ensure that this unclaimed money is utilized properly and effectively.

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