Abstract

Al-Mafqud, or a missing person is defined as someone who is lost for a long period of time without any news of his whereabouts and his status whether he is still alive or otherwise. This uncertainty of his or her status creates the conflict and their properties need to be frozen due to law constraints. At this point of time, it has been identified that more than one million cases of inheritance of missing persons' properties are unable to be resolved and the value of the properties reached billions of Ringgit. This phenomenon raises many issues and problems that become increasingly critical and extremely difficult to resolve and until now, no solution has been proposed by the government. Besides, if the issue stays unresolved, it will give detrimental effect to society. However, if the properties are used wisely, it will give a positive impact to the society. However, managing of Al-Mafqud properties are not a simple matter. It involves legal issues, inheritance rights, and various relevant issues. Those issues bring challenges in managing al-Mafqud properties in civil and Islamic law perspectives, which this study attempts to discuss. This research hopes to bring awareness to the parties involved on the importance of managing and utilizing al-Mafqud properties in a good manner.

Keywords: Missing person, Al-Mafqud, Frozen property, Legal issues.

1.0 INTRODUCTION

The missing person’s properties are not new issues in Malaysia. From Islamic perspectives, the missing person is known as ‘Al-Mafqud’ which means the person had an unknown status; either alive or dead. In 2013, the value of unclaimed missing person’s property was estimated to worth RM66.6 billion [1]. These issues give a negative impact to the heirs, religion, country and society, but people generally disregard this issue. However, this issue has been debated since Malaysian MH 370 missing tragedy on 8th March 2014. Until today, there is no conclusion regarding this tragedy. On 29th January 2015, the Malaysian Government has declared MH370 as an accident and all passengers and crews are presumed dead. MH370 issue is just a tonic to tell the public about the importance for property management of Al-Mafqud. Although the issue seems small, its impact is enormous. The uncertainty status affects the inheritance issue of property. The problem is the property of Al-Mafqud or the inheritance will freeze. The freeze period ends once Al-Mafqud or the heirs come forth to claim. However, in certain cases, heirs are not aware about these issues. The situation worsens when there is a family dispute, because no one even knows the family background of Al-Mafqud. Currently in Malaysia, the government has no right to melt the unclaimed property. Besides the Civil law restrictions, the Syariah Law does not allow to melt the frozen property without any strong reason. However, the National Fatwa Committee in 1982 has given the decree that the government has the right to acquire or use any form of property that is not used for public interest [2]. But the Fatwa Decision cannot be taken as a governing law as it is just a guideline. That means, based on this Fatwa, the government should take action to solve the problem. This paper focuses on analyzing issues related to property management in Islamic law perspective. The concept of property in Islam should be understood as providing a best solution suited to the nature of
2.0 PROPERTY IN ISLAM PERSPECTIVES

Wealth is a trust by Allah S.W.T and given to humans as a symbol of Blessing in the world. Human received the wealth from God and it is a right to use it and disburse to the beneficiary through an organized way by Syarak. Thus, the administration and management of property in Islam are emphasized with reference to the established concept and rules or laws [4]. The wealth is a temporary gift from Allah S.W.T as an award to achieve a blessed life.

In Islam different categories of wealth are Mutaqawwan, Ghair Mutaqayyam, Mithy, Qimmi, Manqul, Ghair Manqul, Istikhali and Istiklak [6]. The property includes a property type Ghair Manqul also known as A’aqar. The concept of A’aqar covers all the things that exist on the surface of the earth, such as buildings, water, vegetation and mineral resources that exist under it. Property in Islam has its own unique concept. There are various opinions, estimates and an opinion concerning to this property was said by Muslim scholars. However, despite the different aspects of assessment, goal and purpose are still the same. There are two key features in determining property in Islam [7];

- An object that can be stored and collected which can be used as a right.
- Objects that can be taken advantage and benefit.

Islam as a religion that encompasses all aspects of life and every single problem has solution in Islam, including the issue of the administration of property. Thus, the main principles that should be understood and appreciated in a deliberate policy of land administration and management from the perspective of Islam is a reference to the principles of justice, the principle of Shura, the principle of transparency and the principle of Amar Maaruf and Nahi Munkar. This is because these principles anchored on the belief that absolute administrative power belongs to Allah S.W.T [8].

In Islam, the property management must follow the Syariah law in order to ensure the property is outstanding and active in various sectors of life so as to allow the development of property and its use widely and thoroughly in accordance with Islamic guidelines [9]. In addition, the management of property in Islam should encourage property transactions, to be able to expand the scope of circulation of property. Then the wealth that can be enjoyed by all levels of society in a fair and to avoid the difficulties which may weaken economic activity such as the flexibility to do not use a witness in the course of business directly [8].

Freezing property or monopoly by certain parties is a condition that is rejected by Islam because it can cause a variety of negative symptoms and disasters on society and the country. With reasonable care of the property administration system according to Islam, the circulation of wealth will occur in a healthy and harmonious manner. But by itself, the inherent value of the property can be maximized through of direct use or investments. This situation certainly can improve the lives of Muslims or country. History also shows that the law serves as the basis for establishing a justice that exists along with the existence of a society. The existence and application of this law affected sentiment and understanding, customs, religion, culture and many others. It begins in a relatively simple form and grows to be a complex issue [10].

2.1 Property in Al-Maqsasid Syariah

The most importance of human life which is termed as daruiyat represents the main purpose which must be preserved by Islamic law. Allah s.w.t reduces mankind by law for a number of purposes, objectives, goals, needs and wisdom. Maqasid al-Syariah (objectives of Syariah) is a term that refers to the preservation of order, achievement of benefit and prevention of harm or corruption, establishment of equality among people, causing the law to be revered, obeyed and effective as well as enabling the ummah to become powerful, respected and confident. Maqasid al-Syariah generally is a chain of five basic principles of Islam as agreed by Imam Al-Ghazali Syartibi and that the law applicable goals include five components Maqasid shown in Figure 1.0 below [10];
Protection of wealth (Hifz al-mal) is one of the requirements of human life and human beings will not separate from it. Islam does not prevent the human search for treasure as much as possible while affordable and does not violate Islamic law. This is consistent with human to maintain the property in order to increase the degree and the pleasures of the world. However, in fact that all wealth belongs to Allah, but Islam also recognizes the right of a private person. Therefore man is obsessed with wealth, and working through the various roads set by Islam to avoid chaos within each other.

Nowadays, there are plenty of opportunities for one to engage in permissible business activities, be it small proprietary businesses up to the level of corporations. Besides creating wealth via direct engagement with businesses, wealth can also be created when one invests in Syariah compliant instruments that are offered in one’s country such as investing in stocks, unit trusts, Sukuk or investing in investment accounts approved by the respective Syariah advisory councils.

Besides that, the Quran and Sunnah have also elaborated on the importance of wealth creation in Islam by setting the parameters on the responsibility of those who have adequate means to help those who are less fortunate. This can be observed through the encouragement to give hibah (gifts), alms and to give out the obligatory zakat to the rightful recipients which have been outlined by the Syariah law. The Quran has also stated the important principles in managing the wealth of a country whereby the responsible parties are required to ensure that its wealth is justly distributed among the citizens. To further emphasize on the importance of the wealth creation, Allah has explicitly prohibited the act of hoarding and monopolizing the wealth of a nation in a way that will deny the needy of their rights to the wealth.

2.2 Al-Mafqud and Concept

The definitions of a missing person or Al-Mafqud are:

- It does not look or sound significantly,[11]
- Cause to disappear does not appear again, and wipe himself [11]
- Eliminated by not specify whether alive or dead [11]

Al-Mafqud is defined as someone who are lost from place in a long period without news and no one knows about him and is also unknown whether he is still alive or had pass away [12]. In another reference Al-Mafqud is defined as someone who is lost from some place without any news and his status is unknown [13].

According to the Estates of Missing persons Act 1996 of Canada, gave a definition of a missing person is a person who lives in a place where relatives of the person who knows it, and you might hear the news, it was already unable to hear any news from him that at least 3 last month,[14]. Whereas according to the Estates of Missing persons Act (management) 1973 Uganda stated purpose of being a person who disappeared without making reasonable provision for the administration of his property, if any, and they disappeared without the news in the last six months, any relative of a missing person may, with the consent of the family, ask the court to issue commands to manage the property, but the court may, if it deems necessary or desirable, giving orders to more than a heirs to manage the property together [15].

2.2 The cause of the Mafqud

In Civil law, the determination of a person can be considered lost is different. According to Victoria Gregory (2008), there are four categories of people lost the run of the house, could not be reached, mental illness and criminal cases [16]. According to the Royal Malaysian Police (RMP) (2015), categorizes the cause of the
loss occurred due to physical violence, disappears when seeking employment, peer influence, had eloped that fooled so many become prostitutes [17]. In Islam, the determination of someone as Al-Mafqud, the scholars agreed, the cause of the loss is constantly changing according to the times. The confirmation the person, whether alive or dead is crucial in resolving matters relating to marriage, divorce, and also inheritance of unclaimed property.

2.3 Period to wait for Al-Mafqud for presume of death

There is difference of definition from scholar regarding the period for Al-Mafqud to be declared as dead or known as presumption of death [18]. Basically, the period of someone missing or disappeared as the main consideration. The scholars have different definitions as listed below [5]:

- **Imam Hanafi**
  Determination of period should depend on the peer of Al-Mafqud. When peers of Al-Mafqud no longer exist, then the confirmation of the death can be declared. He believes that because during his time, most of the people died around the age of 120 years.

- **Imam Al-Maliki**
  Al-Mafqud can be considered dead when their ages reach the age around 70 to 80 years old.

- **Imam Syafie**
  The missing person will be presumed dead when his entire peer had already gone, whereas in terms of age, he/she must past 90 years old.

- **Imam Hambali**
  A person is found to be missing in a situation, where the situation was destroyed, like those lost in the war, sailing or in the plane that crashed, then it should be investigated for four years and if one is lost in a condition that is not the case of destruction, like those who go to trade or travel, or study. So it is in this state, there are two opinions:
    i. Wait until the 90 years since it was born.
    ii. Handed to Ijtihad (decision) of Judge

2.3 Period to wait for al-Mafqud to be presumed dead in Malaysia Syariah and Civil Law.

The legal system in Malaysia is divided into two, namely Syariah and Civil law. Each law, not just have different period for presumed of death, but also have different functions.

- **Civil Law.**
  Regarding the section 108, Evident Act 1950, the period for Al-Mafqud can presume as dead is 7 years and can be declared by the Civil High Court and above. Only the presumed of death or Death Declaration from Civil court can be used by the heirs in the claim process of inherence property [19].

- **Syariah Law**
  Syariah law is under the state government Authority. All states in Malaysia (except Terengganu) in Syariah law stated the waiting period for a presumption of death is 4 years. However, the function of presumption of death from the Syariah Court in matters relating to the dissolution of marriage, such as a wife of Al-Mafqud who
wants to remarry and are not valid for property claims. Table 1.1 shown the time period for Al-Mafqud to be presumed as dead according the Syariah Law in Malaysian States.

Table 1.1: Syariah Law in Malaysia States for Al-Mafqud

<table>
<thead>
<tr>
<th>No.</th>
<th>States</th>
<th>Enactments</th>
<th>Section</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Perlis</td>
<td>Islamic Family Law Enactment 1991</td>
<td>Section 53</td>
<td>4 years</td>
</tr>
<tr>
<td>2.</td>
<td>Kedah</td>
<td>Islamic Family Law Enactment 2008</td>
<td>Section 54</td>
<td>4 years</td>
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<td>3.</td>
<td>Perak</td>
<td>Islamic Family Law Enactment 2004</td>
<td>Section 54</td>
<td>4 years</td>
</tr>
<tr>
<td>4.</td>
<td>Pulau Pinang</td>
<td>Islamic Family Law Enactment 2004</td>
<td>Section 53</td>
<td>4 years</td>
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<td>5.</td>
<td>Selangor</td>
<td>Islamic Family Law Enactment 2003</td>
<td>Section 54</td>
<td>4 years</td>
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<tr>
<td>6.</td>
<td>Negeri Sembilan</td>
<td>Islamic Family Law Enactment 2003</td>
<td>Section 54</td>
<td>4 years</td>
</tr>
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<td>7.</td>
<td>Melaka</td>
<td>Islamic Family Law Enactment 2002</td>
<td>Section 54</td>
<td>4 years</td>
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<td>8.</td>
<td>Johor</td>
<td>Islamic Family Law Enactment 2003</td>
<td>Section 54</td>
<td>4 years</td>
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<tr>
<td>9.</td>
<td>Pahang</td>
<td>Islamic Family Law Enactment 2005</td>
<td>Section 53</td>
<td>4 years</td>
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<tr>
<td>10.</td>
<td>Terengganu</td>
<td>Islamic Family Law Enactment 1985</td>
<td>Section 53</td>
<td>7 years</td>
</tr>
<tr>
<td>11.</td>
<td>Kelantan</td>
<td>Islamic Family Law Enactment 2002</td>
<td>Section 54</td>
<td>4 years</td>
</tr>
<tr>
<td>12.</td>
<td>Sarawak</td>
<td>Islamic Family Law Ordinance 2001</td>
<td>Section 53</td>
<td>4 years</td>
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<tr>
<td>13.</td>
<td>Sabah</td>
<td>Islamic Family Law Enactment 2004</td>
<td>Section 53</td>
<td>4 years</td>
</tr>
<tr>
<td>14.</td>
<td>Wilayah Persekutuan</td>
<td>Islamic Family Law Act 1984</td>
<td>Section 53</td>
<td>4 years</td>
</tr>
</tbody>
</table>

Article 121 (1A) of the Federal Constitution states the Civil Court cannot ‘ultra virus’ about Syariah Court [20]. Amendment of Article 121 of the Constitution in 1988 showed that the existence and integrity of Sharia law has been recognized by the Federal Constitution and the Syariah Court now has the absolute power to decide and resolve cases or some things that are under its jurisdiction. This means that the civil court can no longer talk about a case that is under the jurisdiction of the Syariah Court.

The purpose of this change is because there are some cases in which the court had previously discussed the Civil certain cases even the basic thing in this case is under the jurisdiction of the Syariah Court. Thus, these changes are expected to be the solution to disagreements which arise and clarify the division of jurisdiction between the two courts. The amendments have given special status to the Syariah Court. The greatest effect is obtained and this change is a conflict between Syariah court decisions and the civil court can be avoided.

As it happened in some previous cases involving custody of children cases, matrimonial property, and so illegitimate child at the Civil High Court, which is not in favor of Islamic law so that the parties are Muslims feel it is harmful. On the other hand, the Civil High Court decision in favor of the law contrary to Islamic law. Civil courts have also made decisions on matters within the jurisdiction of the Syariah Court and sometimes have to change a decision made by the Syariah court.

With this amendment the difference between the Civil Court and Syariah Court will not occur again because the matter can only be brought to the Syariah and Civil courts no longer have jurisdiction. Therefore, this problem can be solved. The jurisdiction of the two courts, each run as the track is in the constitution and will not at all extreme power.
Syariah law is a law that was revealed by Allah SWT that is complete and become a guide for human being. The differences between other legal systems and Islamic Syariah law is the Islamic law is derived from the Quran and Sunnah, the real revelation and revelation implied to all of humanity [21]. Overall, people are collectively responsible for dispensing justice. Syariah law is not the same as the existing law and practice, and also not the same as the British Common Law resulting from the writ [22]. This is because Syariah is the main source of the Al-Quran and Al-Sunnah Muhammad Islamic law in Malaysia is based on:

- **First**: Al-Quran, as the Muslim holy book and the word of God is addressed to the Prophet Muhammad (PBUH) and the Muslims worldwide.
- **Second**: Al-Hadith i.e. all words, deeds, and approvals of the Prophet Muhammad s.a.w which is then utilized as a source of law. Hadith function among others is to reinforce the law of the Al-Quran and clarify the law of the Al-Quran.
- **Third**: 'Ijma' (the consensus). The consensus of the scholars in establishing a law in Islam-based al-Quran and al-Hadith in a matter of a case.
- **Fourth**: Qiyas (analogy). The process of Qiyas based on analogy and scripture or commands that are known to new things. Qiyas role in regulating a matter of law for something new that has not existed in the past based on past things have in common and the reasons, benefits, dangers and various other aspects of the same until convicted.
- **Fifth**: Ijtihad (Judge Decision) which is an effort to establish Islamic law based on the Al-Quran and Al-Hadith and Ijtihad happened after Prophet Muhammad (PBUH) death.

### 3.0 ISSUES IN THE PROPERTY MANAGEMENT OF AL-MAFAQUD

On the issue of ownership before somebody is Al-Mafqud, or property acquired during his disappearance, the property cannot be distributed among the heir or nominated until there is death confirmation such as a death certificate or court declaration after certain period. The period is not fixed, but will depend on the judge to confirm his death. Before probate any property transaction is illegal because the Al-Mafqud is still assumed alive. The property can not also be inherited wealth, but convincingly. After the judge confirmed his death his property passes to the persons entitled to receive it.

#### 3.1 Inheritance of Al-Mafqud's property.

Inheritance means pertaining to the legal heirs or the estate and inheritance [23]. While the heir are the party entitled to receive an inheritance from a person who had died. In the inheritance of Al-Mafqud problem, there are two conditions, namely [23];

1. **Al-Mafqud as people who inherit property (muwaris).**

   After the court issues an order for the presumption of death of Al-Mafqud, the property can be inherited by their families in accordance with the command of Allah in the Qur'an. However, before the property can be distributed to those who are nominated, something should be done by the heirs in advance, the rights related to the estate is divided into five (5) areas namely;
   - The rights to the goods,
   - The right to prepare the funeral cost of the deceased,
   - The right to settle the debt.
   - Execute a will.
   - Distribute the remaining inheritance to the heirs of the right according to the position

However, before possessions of Al-Mafqud become inheritance, scholars have different views on the issue of Al-Mafqud is property that can be passed to heirs,

- **First opinion**: That Al-Mafqud is still considered to be alive either to matters relating to itself or associated with other people. Therefore, the law applicable to it is the same with people who are still alive. Thus, all property owned by the Al-Mafqud cannot be passed on to his heirs until proven by law that an Al-Mafqud was dead.
- **Second opinion**: Al-Mafqud considered alive if it relates to the rights themselves. This opinion is based on the view that islihab only be used to support the existing law only such as Civil or Syariah law in Malaysia Law context.

- **Third opinion**: Al-Mafqud was still considered alive, whether for himself or for the rights of others over the last 4 years since Al-Mafqud has unknown status. If the last four years has elapsed, then it is considered mafqud had died and all things related to Al-Mafqud rights over others have dropped out. Means any substance can be divided into heirs and Al-Mafqud is no longer relevant to inherit his kin.

2. **Al-Mafqud as heirs will inherit the property.**

   Al-Mafqud will still be considered alive as long as there is no evidence, or prove of his death or until the judge does not confirm his death. Based on this principle he was entitled to inherit until there is confirmation and if there are heirs who will not receive an inheritance in one assumption, this heir cannot inherit the estate because there is a possibility that the missing are still alive. This means, if any heir Al-Mafqud died and left behind a number of properties he lost during the period, missing persons still has the right to inherit property. In this case, it will cause a severe crisis, as long as the status is not decided by the court, the other heirs cannot claim.

### 4.0 THE CHALLENGE OF PROPERTY MANAGEMENT OF AL-MAFQUD

Unclear status of death can create a conflict, especially in the issues related to inheritance of Al-Mafqud property to the heirs. Civil and Syariah law barrier have a significant impact [27]. This is because basically, Al-Mafqud belongings cannot be claimed by the relatives until a confirmation about the status of death is determined by the court. Due to the problem, new efforts are required to solve the real estate of Al-Mafqud issue. In an effort to resolve issues related to real estate of Al-Mafqud, a declaration of presumption of death must be obtained in advance from the court. However, Malaysia has a legal system, Syariah Law and Civil Law, which states that any legislation should not ultra-virus [20]. However, in terms of implementation and understanding of the community there is a challenge in order to develop the Al-Mafqud property. Syariah court judge’s decision only affects the dissolution his wife and not to the issue of succession, although the waiting period only just 4 years. The presumption of death issued by the Syariah courts is only received by the Office of the Registrar of Marriages and Divorces in the states, but does not mean the division of inheritance [23]. For the purposes of inheritance, the Presumption of Death issued by civil high court is required [19]. According to the Civil law, which stipulates that a person can be considered dead when there is no any news heard from him for seven years by those who would normally have heard of him. However, through the civil legislation, still have a chance for the acquired property temporarily by the government and the heirs, via High Court orders [26]. But it is rarely practiced because there is no specific law in this case, besides it’s very costly.

### 5.0 BENEFIT OF THE PROPERTY MANAGEMENT OF AL-MAFQUD

A number of advantages can be achieved when the Al-Mafqud property can be used for the society and also the development of the nation. Since the large value of property can be managed properly and wisely. Without the proper strategy for property management of Al-Mafqud, it will lead to high loss for the country. Following are the advantages that can be considered to be applied for Al-Mafqud property:

- **Poverty**
  A majority of the indigent consists of Muslims themselves. This group looks so weak that it leads to it the other problems such as social issues, education and poverty. Property owned by Al-Mafqud can be developed to eradicate poverty among Muslims. Payment of zakat from Al-Mafqud property and the involvement of the indigent in developing property of Al-Mafqud will create a harmonious society.

- **Education.**
  The formation of human capital in Islamic societies is crucial to ensure continuity and sustainability of the Islam. Various programs such as scholarships, establishment of religious schools, the construction of the universities and short courses can be implemented if the property of Al-Mafqud can be defrosted and used towards the better development of human capital.
Economy

The economic power of the Muslim community does not describe as it should be despite being a majority in Malaysia. Equity holdings in company shares and the Muslim community is still weak. Economic empowerment of Muslims is crucial and with the existence of proper management of Al-Mafqud property, it will provide better opportunities.

3.0 CONCLUSION

The different of perspective in Islam of duration of missing person (Al-Mafqud) have been discussed. Undeclared status of Al-Mafqud affects the property distribution to the heirs and unclaimed property due the status of Al-Mafqud can be use full if the property can be utilized for society especially for development of Islamic society. The advantage management of Al-Mafqud property also have been presented which can provide benefit to elevate poverty, education and the economy. Moreover, the property management of Al-Mafqud properties can be introduced in order to effectively utilize the property. The government should play a major role as well as draft a special law on Al-Mafqud property management as already done in a few countries in the world.

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