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**PRESUMPTION OF DEATH LAW IN MALAYSIA: THE CASE OF
MISSING PERSONS**

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Abstract

The snags indispensable matters in managing the affairs of person who has disappeared and remained absent without explanation are both bountiful and thought-provoking. If it is not known whether a person is alive or dead, the status of his personal law remains uncertain and his properties are rendered virtually useless. At present, there is no specific legislation which deals with presumption of death in Malaysia despite of many cases had occurred in the past. To cater the issue, the judiciary has followed the common law doctrine of presumption of death rules to handle long-term unexplained absences. Therefore, this paper aims to examine the current legal framework of presumption of death in Malaysia. This article adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory, case law and other legal and non-legal literatures relating to the presumption of death in Malaysia. This article concludes that there are various laws that governed the matters relating to the missing person to be presumed dead. The variety of laws has constantly post hardship to the family members. For the Muslim, even though they have two options to choose, in reality they actually need to go to both court. Firstly, they need to attend the Syariah High Court to dissolve the marriage after the expiry of 4 years and secondly, they need to go to Civil High Court after another three years to settle the matters relating to estate administration.

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1. Introduction

In Malaysia to be declare dead, there must be evidence of physical body before the law recognized the end of presumption of life of person. The problem arises where a person has been missing and his whereabouts is not known to the person close to them. They cannot be declared dead as there is no body to support the contention. Missing persons invoke a traumatic experience to the family members not only due to the loss but also to the legal difficulties or plight suffered by them particularly to the wife on the status of her marriage and to the beneficiaries on the status of estate administration. The Malaysian law is silent on the definition of missing persons and incorporated the common law principle of presumption of death as evidence to negate the presumption of life of a person and the proposition can be found in section 107 and section 108 of Evidence Act 1950 respectively.

Even though the position has been left in abeyance and accepted universally without objection, the traumatic loss of Flight MH17 and mysterious disappearance of Flight MH370 has trigger the needs to revisit the Common Law doctrine of presumption of death and its application in Malaysia. There exist opinions from the scholars and academicians that the common law waiting period of seven year to be endure by the family members before the application of presumption of death can be filed before the High court is absurd and no longer relevant in the modern society. United Kingdom, United States and several other Commonwealth countries such as Australia and Canada have started to move from the common law principle waiting period of seven years to a much shorter period by acknowledging the ‘specific peril’ rule such as accident and disaster as justification to make a declaration of presumption of death to missing persons where their physical body cannot be found (Noor & Halim, 2015). Therefore, this paper aims to examine the current legal framework of presumption of death in Malaysia and identify the loopholes there exist in the prevailing laws.

2. Problem Statement

It has been established that there is no specific legislation which deals with presumption of death in Malaysia (Salleh & Mahamood, 2016; Mahmud & Ali, 2013). In the absence of the specific legislation, it is difficult to ascertain the legal position of the missing person and to protect the interest of surviving legal heirs. Among problems that arises due to the absence of specific legislation are difficulties in not only determining the rights of inheritance of the surviving heirs (Salleh et al., 2017; Mohamad & Sulaiman, 2015; Abdullah, 2010) but also on the status of wife in the case of missing husband (Muda & Mohd, 2015; Mokhtar & Mahmud, 2015). The laws applicable in existing legal framework are scattered and consequently had caused hardship to the family members. Based on that premised, this article is undertaken to examine the existing legal framework of presumption of death in Malaysia applied by the judiciary and tend to identify the loopholes there exist in the prevailing laws.

3. Research Questions

This article aims to examine what is the current legal framework of presumption of death in Malaysia.

4. Purpose of the Study

This article is intended to analyse the relevant law applicable on deciding the case relating to presumption of death in Malaysia which includes but not limited to Evidence Act 1950, Births and Deaths Registration Act 1957, Criminal Procedure Code, Islamic Family Law (Federal Territories) Act 1984 and Syariah Court Evidence (Federal Territories) Act 1997.

5. Research Methods

Aiming to examine the current legal framework on presumption of death in Malaysia, this article employed a qualitative doctrinal legal research as the article intends to discuss in-depth and detailed on the particular matters. By using qualitative methods many new aspects of problem can be identified and thus once they are identified, suggestion would follow resulting in the research result and findings being more beneficial and practical (Yin, 2013). For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory provisions as provided by Evidence Act 1950, Births and Deaths Registration Act 1957, Criminal Procedure Code, Islamic Family Law (Federal Territories) Act 1984, Syariah Court Evidence (Federal Territories) Act 1997, case law and other legal and non-legal literatures relating to the presumption of death and missing persons in Malaysia. A comparative analysis has also been made where ever appropriate with the law in England, Scotland and United States (Yaqin, 2007). An analysis of the statutes is made in order to evaluate the loopholes in the Malaysian law and suggest necessary improvement to the existing law. Furthermore, in examining fundamentals of judicial and legislative policies, the cases can teach not only problems to be provided for but also court attitudes to be guarded against. Careful analysis of a case in the context in which it was decided can suggest the probable reshaping in the future of the problem with which it deals and probable changes in judicial attitudes that will take place by the time the reshaped problem is presented for decision (Ritchie et al., 1993).

6. Findings

6.1. Theory of Legal Presumption

Legal presumptions are the creature of both Common Law and statute. They are not necessarily the result of a process of logical reasoning. Instead they normally reflect a variety of policy considerations. Some, such as the presumptions of marriage are aimed at preserving social institution. Others such as the presumption of death provide a mechanism whereby a contested issue with major implications and legal consequences (missing person's death) can be determined in a predictable and conclusive manner. Syariah Law also subscribe to this view (Mohamed & Ramlee, 2015).

Two predominate theories exist relative to the effect of presumption namely Thayer Wigmore Theory and Morgan Mc Cormick Theory. The first theory sees presumption as a mechanism for shifting only the burden of going forward meanwhile the second theory interpret presumption as shifting both the burden of going forward. Under the law of evidence, a legal presumption is a conclusion based upon a particular set of facts combined with established laws, logic or reasoning. This inference must be made in the light of certain facts that the law recognizes as logical conclusion from the proof that has been

introduced. It is a rule of law which allows a court to assume a fact is true until it is rebutted by the greater weight (preponderance) of evidence against it (Walton & Gordon, 2005).

Most presumptions are rebuttable, meaning they are rejected if proven to be false or at least thrown into sufficient doubt by the evidence. A presumption shifts the burden to the opposing party to prove that the assumption is untrue. Presumption is not to the time or date of death. The exact of time of death is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential (*Re Osman Bachit* [1997] 2 CLJ Supp 269; [1997] 4 MLJ 445; *R Muthu Thambi v. K Janagi* [1955] 1 LNS 106; [1955] 21 MLJ 47; *Re Gun Soon Thin* [1997] 2 CLJ Supp 53; [1997] 2 MLJ 351 and *In Re Application of Tay Soon Pong; Ex P* [2009] 9 CLJ 778).

6.2. The Current Law in Malaysia on Presumption of Death

The presumption of death is an exception to the presumption of life. In order to invoke the presumption of death, two basic facts must be proved, that the person must not have been heard of for seven years; and he must not have been heard during that time by those who would naturally have heard of him. In the absence of specific legislation, the laws applicable in existing legal framework relating to presumption of death is scattered in several provisions of distinct statutes such as Evidence Act 1950, Births and Deaths Registration Act 1957, Criminal Procedure Code, Syariah Court Evidence (Federal Territories) Act 1997 and Islamic Family Law (Federal Territories) Act 1984.

6.2.1. Evidence Act 1950

Section 108 of the Evidence Act 1950 contemplates a case where nothing more was known than that a person had not been heard of for seven years or more. It provides that, “When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

The above provision designates that the High Court will only grant a declaration of presumption of death, if an applicant can satisfy the court that the missing person in the application had not been heard from for at least seven years. Section 108 is actually a proviso to section 107 where the provision stated that, ‘When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.’ The provision applies to impose the burden of proof on an applicant who asserts that a person is dead, if that person has been alive within the past 30 years. However, if such person has not been heard of for seven years by those who would naturally have heard of him, section 108 would then apply to shift the burden of proof back to any person who asserts that the person concerned is still alive. If there is no one interested in asserting that the person concerned is alive however, section 108 can only be apply in order to establish the presumption of the fact of death, though not to establish the particular time of death. Relatively, an applicant who seeks for a declaration of presumption of death with respect to an individual where he or she has been missing for less than seven years would not benefit from this presumption (Noor & Halim, 2015).

The above principle can be best illustrated by the case of *Re Ex Parte Application of Tay Soon Pang @ Yeo Hak Seng* [2008] MLJU 928. In this case, the application for the presumption of death was made in 2008 by the son of the alleged deceased. His father was born in China in 1899 and came to Malaysia around about the year of 1914 and most of the time domiciled in Kota Tinggi. In 1970, his father went back to China to stay together with his family and relatives who are domiciled in China. The deceased communicated with the applicant's late mother by letters. However, since 1982 neither the applicant nor his late mother received any information regarding the deceased. They had not heard from him since then. The deceased also did not communicate with any of his other relatives or friends in Malaysia. The applicant believed that his father had died in China and had his father still alive his age would be about 108 years old. The court was satisfied that the applicant's late mother was one of the persons who would naturally hear from the deceased if he were alive. Hence, the court was of the opinion that when a person who had regularly kept in touch with his wife until 1982 and thereafter nothing was heard of him, he must be presumed to be dead. From 1982 until now there was no evidence from which the applicant could have reasonably concluded that his father is still alive.

Similarly, the court in *Lau Suet Wan v. Hong Leong Assurance Bhd* [2015] 2 CLJ 681 held that the presumption of law, via the High Court order, was that deceased had died and the presumption had not since been rebutted by the defendant when this proceeding was heard before the court because at that time, no proof and no sign of him had been forthcoming. If the defendant alleged that deceased was still alive, it was for the defendant to bring proof that deceased was not dead. In this case the deceased, Elvis had been missing from home since 12 December 2002 and the plaintiff then obtained a High Court order pronouncing that Elvis was presumed dead and it was proved that Elvis had not been heard of for the past seven years since 2002 by those who would naturally have heard of him if he had been alive.

If the circumstances of a man's disappearance are such that it is unlikely that his relatives would have heard of him in any event, then the court will not presume his death. In *R Muthu Thambi v. K Janagi* [1955] 1 LNS 106; [1955] MLJ 47, a woman married a man in 1929 and lived with him for two years, after which he was imprisonment for one month for misappropriation of money and after coming out of prison the wife's father gave him some money with which he absconded to India. The wife had not heard from him since. The court in this case held that the application by the wife to have the presumption invoked could not be sustained because the wife would not have heard from her husband in any event.

6.2.2. Births and Deaths Registration Act 1957

Prior to latest amendment in 2017 to the Births and Deaths Registration Act 1957, the National Registration Department (NRD) will not register or issue a death certificate for a person presumed dead. The information on person who has been presumed dead by the High Court will only be update in the NRD system. However, the position is changed by virtue of Births and Deaths Registration (Amendment) Act 2017 (Act A1524). The amendment to the principle act has inserted section 19A as a special provision as to the registration of death. In this case, the Registrar-General if he is satisfied from evidence adduced before him that a death had occurred, may cause such death to be registered by entering in a register such particulars concerning the death. Moreover, by virtue of section 19 of the Births and Deaths Registration (Amendment) Act 2017 (Act A1524), the legislature has inserted two new provisions

relating to registration of presumed dead namely Section 24A and 24B, where the Registrar shall now issue a Certificate of Presumed Death to the person forwarding the Court order of presumption of death under any written law. In other words, on receipt of the order, the Registrar shall make an entry in a register containing the name of missing person and such other information as may be necessary in relation to the missing person's presumed death. The amendment accelerates a light to the family members as the missing person is now been acknowledged in a specific register namely Register of presumed death.

6.2.3. Criminal Procedure Code

It is to be noted that section 108 of the Evidence Act 1950 does not prevent the court from finding on circumstantial evidence that the death of a person occurred before the expiry of seven years from the date of disappearance. In *Re Inquest into the Death of Lim Chin Aik, Deceased* [2014] 1 CLJ 136, the court held that notwithstanding the provision of section 108 of the Evidence Act 1950, may make a finding that the death of a person occurred before the expiry of the seven years if circumstantial evidence existed which showed that death had indeed taken place before the period where it is satisfied that the body of the dead person could not be found.

Section 329(6) of the Criminal Procedure Code provides that; "When the information given is of such a nature that, though it affords reasonable ground for believing that a death has occurred, it is unlikely that the body of such deceased person can be found owing to its destruction by fire or otherwise or to the fact that the body is lying in a place from which it cannot be recovered, the officer shall nevertheless make an investigation and draw up a report, and forward the report to the nearest Magistrate who shall proceed in reference to the report as in the case of a report."

The above provision provides a getaway from the normal inquest proceeding where the body of the dead person could not be found and give the family an opportunity to circumvent the general rule of seven years waiting period. The court in the case of *Lim Chin Aik* come to the conclusion after determining the evidence presented by the wife of the victim is sufficient, adequate, cogent and exact that at the material time, the victim routine is to drive along Jalan Maclister to pick his daughter and on that unfortunate date, a structure fell down from a building known as Menara UMNO and crushed unto the said car creating a big hole in the road and incidentally buried the victim to death.

The circumstantial evidence causing the death may be by misadventure causes, such as accident, struck by lightning, drowning, suicide or death caused by person or persons unknown as a result of lawful or unlawful intentional and or unintentional act culminating in unforeseeable death, death caused by act of God or death caused by natural causes (*PP v. Shanmugam & 5 Others* [2002] 1 LNS 160; [2002] 6 MLJ 562) & *Inquest into the death of Azaria Chantel Loren Chamberlain* [2012] NTMC 020). The stand is intertwined with the decision made by Augustine Paul in *Re Osman Bachit* [1997] 2 CLJ Supp 269; [1997] 4 MLJ 445 where the learned judge held that in cases where circumstantial evidence existed that may prove that the person is dead, the family or interested party cannot be forced to wait for seven agonizing years just for formality. The court has the jurisdiction to decide based on circumstantial evidence to shorten the length of time period.

A Magistrate requested by the Public Prosecutor to sit as a Coroner to conduct the inquest in Coroner's Court Kuala Lumpur in the case of *Re Inquest Into The Death Of Sujatha Krishnan, Deceased*

[2009] 5 CLJ 783 held that the law in Malaysia is still young when it comes to the inquest and the standard of proof in an inquest is on the balance of probabilities sliding to the beyond reasonable doubt. Even though the law relating to the inquest duty of the Coroner is silent on the standard of proof to which a Coroner is to apply his mind when dealing with the evidence presented before him. It is so as it is not a criminal trial, but an inquiry to make a finding of fact. To do that, the evidence adduced must be credible as to become the basis for the coroner's finding as no one is on trial and therefore, hearsay and secondary evidence is allowed but hearsay evidence must be scrutinized with caution. As the finding of the inquiry is legally binding, the facts must be proven beyond reasonable doubt.

The position is quite similar with United Kingdom, except where there is a finding of criminal offence, such as suicide or unlawful killing, where the standard of proof is beyond reasonable doubt. In the case of *In Re Anthony Chang Kim Fook, Deceased* [2007] 2 CLJ 362, the High Court judge in revising the finding of the coroner reminded that a coroner should not make comments or observations which were not under the purview of the coroner's court.

6.2.4. Syariah Court Evidence (Federal Territories) Act 1997

Section 80 of the Act provides that; “When the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

The waiting time as provided in Section 80 of the Syariah Court Evidence (Federal Territories) Act 1997 is different as the interested person shall only wait for four years before filling an application. The above section shows that Muslim heirs of missing person have the option to apply to civil court or Syariah court to obtain a declaration of presumption of death (Hamid, 2014). In other words, they have to countenance a choice of two options in respect of an application for presumption of death, i.e., under section 108 of the Evidence Act 1950 or section 80 of the Syariah Court Evidence (Federal Territories) Act 1997 (*Re Ex Parte Application of Ridzwan Ibrahim (Presumption of Death)* [2002] 4 CLJ 502). The court held that section 108 establishes a uniform rule upon their subject-matter. The application for presumption of death can be made as general law where there is no inconsistency between section 108 as found under the Evidence Act 1950 and section 80 of the Syariah Court Evidence (Federal Territories) Act 1997. Furthermore, the fact that the period stipulated under the former legislation is for a period longer than what is available under the latter legislation.

Furthermore, *In the Matter of The Presumption of Death of Talib Saari; Ex P Kelthom Mohd Amin* [2010] 1 CLJ (SYA) 493, where an application file by the applicant/wife for a declaration/affirmation that her husband ('Talib bin Saari'), who had gone missing and been untraceable for some 32 years, is in law an *al-Mafqud* (missing person), and ought on the facts and in the circumstances to be presumed to be dead. The facts showed that the applicant and Talib bin Saari were married in 1967, that Talib bin Saari had disappeared sometime in 1972, and that no news was heard of him or on his whereabouts ever since. It was further evident that the application was filed with a view of distributing that part of Talib bin Saari's estate which had allegedly accrued to one of his sons who had since passed away. Likewise, the applicant, in her effort to look for Talib bin Saari, had made a search at the National Registration Department, Kuala Terengganu, albeit to no avail since no address change thereat had been registered by

her said husband. Upon obtaining the facts, the Syariah High Court, Kuala Terengganu proclaiming Talib bin Saari as *al-Mafqud* who had since passed away.

Item 4(e) in List 1 9th Schedule of Federal Constitutions mentioned that the subject matter of probate and letters of administration as matters within the competence of the Federal Legislature. It can be inferred that it may be the reason why the Syariah Court Civil Procedure (Federal Territories) Act 1998 does not incorporate provisions corresponding to Order 71 or Order 72 of the Rules of Court 2012. However, in the absence of specific provisions under the Administration of Islamic Law (Federal Territories) Act 1993 or the Syariah Court Civil Procedure (Federal Territories) Act 1998 concerning matters of probate and administration that for purposes of probate and administration, an applicant would still have to resort to the jurisdiction of a civil court. Thus, even if an applicant was to obtain an order under the Syariah Court Civil Procedure (Federal Territories) Act 1998 for a presumption of death, matters of probate and letters of administration will still be dealt with by a civil court, despite of many literatures suggested that the court jurisdiction should be amended (Rashid, Hassan & Yaakub, 2013; Hassan & Rashid, 2014; Marican, 2008). The learned judge in *Ex Parte Application of Ridzwan Ibrahim (Presumption of Death)* [2002] 4 CLJ 502 construed that with the two legislation available in respect of an application for a presumption of death the implementation is to be harmonised rather than to construe that there is any inconsistency as to accommodate the applicant in seeking another jurisdiction of a civil court in order to obtain the letters of administration.

6.2.5. Islamic Family Law (Federal Territories) Act 1984

Section 53(1) of the Act provides that if the husband of any woman has died, or is believed to have died, or has not been heard of for a period of four years or more, and the circumstances are such that he ought, for the purpose of enabling the woman to remarry, to be presumed in accordance with *Hukum 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 order for the dissolution of marriage or *fasakh* as provided for under section 52. This provision is interweaved with the provision in Syariah Court Evidence (Federal Territories) Act 1997 as the law acknowledge four years to be the waiting period before a missing husband is presumed to be dead in allowing a wife to remarry.

A certificate issued under this section shall be deemed to be a certificate of the death of the husband, Notwithstanding that the High Court may have given leave to presume the death of the husband as in the case of a woman who is widow, she shall not be married or shall not be entitled to remarry, in the absence of a certificate issued under subsection unless she has produced a certificate of the death of her late husband or otherwise proved his death. Once the certificate is registered it is effected as divorce.

7. Conclusion

This article concludes that there are various laws that governed the matters relating to the missing person to be presumed dead. The variety of laws has constantly post hardship to the family members. For the Muslim, even though they have two options to choose, in reality they actually need to go to both court. Firstly, they need to attend the Syariah High Court to dissolve the marriage after the expiry of 4

years to allow the wife of missing person to remarry and secondly, they need to go to Civil High Court after another three years to settle the matters relating to estate administration. Therefore, it is suggested that there must be a mechanism to harmonise the existing law to overcome the jurisdictional conflict of High Court and Syariah High Court by providing a specific statute relating to the presumption of death. Moreover, there are still room to consider a length of waiting period best suited to this particular case in order to avoid harm and to attain the benefit, especially in the matter of missing legal person. There is also a need to provide for an order for interim management of property of missing person as two pressing needs on a man's disappearance are to provide for his family, and to care for his property.

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