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# Towards Formulating a Specific Legislation on the Law of Presumption of Death in Malaysia

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## ABSTRACT

The existing law in Malaysia authorized an evidence of existence of physical body before the law recognized the end of presumption of life of person. Hence, problem may arise where a person has been missing and his whereabouts is not known to the person close to them as no declaration of dead can be made as there is no body to support the contention. This article seeks to examine the specific law in England & Wales namely Presumption of Death Act 2013 in order to suggest an appropriate legal framework on presumption of death in Malaysia. For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials includes statutory provisions, case law and other legal and non-legal literatures relating to the presumption of death and missing persons. This article concludes that there is a need to propose a specific legislative act to harmonize the uncertainties in the existing legal framework. There must be a statutory recognition of 'specific peril' rules to circumvent the hardship of seven years common law waiting period. The law must have following features which are, the court must have jurisdiction's over the property of the missing person; notice to the presumed missing person must be attempted; the lapse of time before the presumption can be raised must be reasonable and there should be some safeguard for the missing person should he return.

**Keywords:** *Presumption of death, missing persons, England, Al-Mafqud, Malaysia.*

## INTRODUCTION

Proving that a missing person is dead is not an easy task. Such situations in which a presumption of death may be employed may gave rise to different legal problems. 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 position which has been incorporated in section 107 and section 108 of Malaysian Evidence Act 1950. The common law has developed doctrine of presumption of death rules to handle long-term unexplained absences.

Even though the position has been left in abeyance and acknowledged universally without objection, the traumatic loss of Malaysian Flight MH17 and mysterious disappearance of MH370 has trigger the needs to revisit the doctrine of presumption of death and its application in Malaysia. There exist opinions from the scholars and academician that the common law waiting period of

seven year to be tolerate 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. England law has started to move from the common law principle waiting period of seven years to a much shorter period by acknowledging the 'specific peril' 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<sup>1</sup>.

## PROBLEM STATEMENT AND RESEARCH METHOD

**Problem Statement:** Despite of many tragedy of missing person such as the missing of pilgrims in Al-Muassim Tunnel tragedy in 1990, the collapse of condominium Highland Tower in 1993 and the disappearance of Malaysian Airlines Flight MH370 in 2014, there is no specific legislation which deals with presumption of death in Malaysia<sup>2</sup> causing problems in administration of missing persons estate<sup>3</sup>.

These tragedies are among the many cases where one has to deal with the agony of not knowing whether the missing person is still alive or already died until and unless the death is confirmed or presumed after some lapse of time. The ascertainment of death and the survival of legal heirs in a missing person case is extremely important because it determines whether any rights of inheritance exist or not<sup>4</sup> and also Muslim women's right to marriage dissolution in the case of missing husband.<sup>5</sup>Based on that premised, this article is undertaken to formulate an appropriate legal framework relating to presumption of death in circumventing the ambiguities and inconsistencies of existing laws in Malaysia. Hence, this article aims to examine the specific statute in England & Wales namely, Presumption of Death Act 2013 in order to suggest an appropriate legal framework on presumption of death in Malaysia.

## RESEARCH METHOD

Aiming to formulate an appropriate 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<sup>6</sup>. For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources especially statutory provisions as provided by Presumption of Death Act 2013 of England, case law and other legal and non-legal literatures relating to the presumption of death and missing persons. An analysis of the statutes is made in order to evaluate the loopholes in the law and suggest necessary improvement to the existing law in Malaysia that there are various law that governed the matters relating to the missing person to be presumed dead.

## EXISTING LAW ON PRESUMPTION OF DEATH IN MALAYSIA

In Malaysia, there are various laws that governed the matters relating to the missing person to be presumed dead<sup>7</sup>. At present, there is no specific legislation which deals with presumption of death in Malaysia except the common law doctrine of presumption of death rules

which has been incorporated in the Malaysian Evidence Act 1950. There are also other provisions which discuss on the framework relating to presumption of death which are scattered in several provisions of distinct statutes such as Births and Deaths Registration Act 1957, Criminal Procedure Code, Syariah Court Evidence (Federal Territories) Act 1997 and Islamic Family Law (Federal Territories) Act 1984.

### **The Presumption of Death based on Common Law**

**Principle:** The presumption of death is an exception to the presumption of life. A "missing person" can be defined as a person who is observed to be missing from his or her normal patterns of life, that those who are likely to have heard from the person are unaware of the person's whereabouts and that the circumstances of the person being missing raises concerns for his or her safety and well-being. The definition invoke that in claiming a presumption of death, two basic facts must be proved, firstly that the person must not have been heard of for seven years; and secondly that he must not have been heard during that time by those who would naturally have heard of him.

The prevailing law in Malaysia relating to the presumption of death are section 107 and section 108 of Malaysian Evidence Act 1950. Both section incorporate the Common law presumption of life up to seven years and presumption of death after seven years. The principle has been explained in *In Re Application of Tay Soon Pang*; Ex P [2009] 9 CLJ 778 where the court held that the mere facts of person not having been heard of affords no inference of his death, for in certain circumstances, it is probable that he could never be heard of again by his relatives. The onus of proving death must rest with the person to whose case that fact is essential. 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. The principle has furtherly been discussed in *Lau Suet Wan v Hong Leong Assurance Bhd* [2015] 2 CLJ 681 where the court held that the person who has been missing from 2002 was presumed death as no prove has been adduced to rebut the claim by those who would naturally have heard from that person if he had been alive.

**Registration of Births and Deaths:** Prior to the 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. This is based on the fact that a person cannot be declared dead if there is no body to support the claim. The information on person who has been presumed dead by the High Court will only be update in the NRD system. However, 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. By this amendment, it shows that the Malaysian legislation had acknowledge two types of death in Malaysia, firstly by an actual death and secondly a presume death declared by the court.

**Death based on the Circumstantial Evidence:** 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. The stand is entangled with the decision made by Augustine Paul in *Re Osman Bachit* [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. 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)

In the current system, there exist a statutory framework which would provide for the making of a presumption of death order in respect of two categories of missing persons. The first category is where the circumstances of the disappearance indicate that death is virtually certain. The second category is where both the circumstances and the length of the disappearance indicate that it is highly

probable that the missing person has died and will not return, which is where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed.

For the first category, section 329(6) of the Criminal Procedure Code provides a hideaway 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 7 years waiting period. The court in *Re Inquest into the Death of Lim Chin Aik, Deceased* [2014] 1 CLJ 136 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 decision was made based on the proof that the victim's daily routine was to pick his daughter using the similar road in Penang where 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.

For the second category, the tragedy of the missing Malaysian Flight MH 370 in 2014 would be the best examples as the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed. The length of the disappearance also indicate that it is highly probable that the missing person has died.

**Presumption of Death under Islamic Law:** Islamic law too recognises the concept of presumption of death but wisely it is not stuck with the common law and Evidence Act notion of not less than seven years<sup>8</sup>. Interestingly to note 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<sup>9</sup>. For illustration, even though the wording in section 80 of the Syariah Court Evidence (Federal Territories) Act 1997 is similar as provision in section 108 of Evidence Act 1950. The only difference is the waiting period under the former is only four years not seven years as provided by the later legislation. The situation is supported by the law that allow for the purpose of enabling a woman to remarry, she may file for an order of dissolution of marriage or fasakh on the ground that her husband is believed to have died, or has not been heard of for a period of four years or more.

For instance, Section 53(1) of the Islamic Family Law (Federal Territories) Act 1984 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. 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.

In discussing the issue, the court in *Re Ex Parte Application of Ridzwan Ibrahim (Presumption of Death)* [2002] 4 CLJ 502 held that 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. The provision in former legislation is regarded as general law and the fact that it provides for a period longer than what is available under the latter legislation justify their consistency to each other. Moreover, the learned judge opined that with the two legislations 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. The waiting period of seven years should be amended [10] to a shorter period of four years following the provision in Islamic law to give effect of certainty in law<sup>11</sup>.

### **LAW ON PRESUMPTION OF DEATH IN ENGLAND AND WALES**

Under the law of England and Wales the disappearance of a person does not affect the ownership or control of their property and affairs. In such circumstances, it may be difficult or impossible for those left behind to obtain a death certificate if they believe the missing person must be dead. Without a death certificate, the missing person will for legal purposes generally be assumed to be alive. In these circumstances, there are a number of specific procedures under which the missing person may be presumed dead. In most of these cases the presumption of death is limited to the purposes of the specific procedure in question.

Presumption of Death Act 2013 (PDA) was passed in England to simplify the earlier common law process in presumption of death. The Act broadly follows the form and content of the Presumption of Death (Scotland) Act 1977 and the Presumption of Death (Northern Ireland) 2009 and is considered to be consistent with the Council of Europe's 2009 Recommendation on principles concerning missing persons and the presumption of death. The Act allows relevant person to apply to the Court for the declaration of presumption of death on the ground that the missing person is thought to have died or has not been known to be alive for at least seven years<sup>12</sup>. At that time the declaration will be conclusive cannot be appealed as to the presumed death and effective for all purposes and against all persons<sup>13</sup>. The missing person's property will pass to others in the same way as if the missing person had died and been certified dead in the normal way and his or her marriage will end as a marriage on death<sup>14</sup>. It is recorded on a new Register of Presumed Deaths, and has the same effect as a registration of death. Death is taken to occur on (a) the last day that they could have been alive (if the court is satisfied that they are dead), or (b) the day seven years after the date they were last seen (if death is presumed by the elapse of time).

Section 5 provides that the High Court can order the variation or revocation of a declaration of presumed death (an obvious example of circumstances in which this would be appropriate being where the missing person returns, still alive; or where there is clear evidence of the missing person having been alive at a time later than that declared as the time of death in the original declaration. The variation order however neither of itself affect property acquired as a result of the declaration as to protects those coming into possession of property in good faith, nor reviving any marriage or civil partnership ended by the declaration in ensuring validity of the subsequent marriages or civil partnerships of the missing person's spouse or civil partner<sup>15</sup>.

The legislation in England and Wales have inserted a 'specific peril rule' provision in their legislation to circumvent the lengthy seven years waiting period<sup>16</sup> as to the suspended years to wait will prejudicially effect the family members. This principle has been inserted in Section 17 of PDA, enabling the Secretary of State to change the length of the periods specified in the Act that are currently seven years; and the period after which an order under section 7(3) can only be made in exceptional

circumstances and the length of period currently is five years. This power is to be exercised by making regulations by statutory instrument and the regulations will be subject to affirmative resolution procedure<sup>17</sup>

The 'specific peril' rule was first enunciated in *Burr v. Sim*, 4 Whart 150, 171 (Pa. 1838), where the judge opined that to accelerate the presumption from time, it is necessary to bring the person within the range of a particular and immediate danger. Under the specific peril rule, attempts to fix the time of death within the period are universally successful, when it can be satisfactorily shown that, when last seen, the missing person was confronted with some dangerous, specific peril, calculated presently to destroy his life<sup>18</sup>. Some Western scholar has pointed out that the common law waiting period of seven years is arbitrary, impractical, anachronistic, obstructive, harsh and unrealistic<sup>19</sup> and might pose hardships on surviving family. Comparatively, in United States, the post 9/11 amendments represent an important step in the evolution of mass fatality and presumptive death certificates by adding specific peril clauses such as catastrophic event or disaster to existing presumptive death statutes, or creating new statutes exclusively dealt with mass fatalities<sup>20</sup>.

### CONCLUSION

This article concludes that there is a need to establish a specific legislation to harmonise the uncertainties in the existing law in Malaysia. The Presumption of Death Act 2013 of England would be a good model to the Malaysian legal framework subject to several modifications to suit the existing law and the local circumstances by acknowledging the existing of parallel judicial system for Muslim and Non-Muslim. There must be a statutory recognition of 'specific peril' rules to circumvent the hardship of seven years common law waiting period. The model law must have the following features which are, the court must have jurisdiction's over the property of the missing person; notice to the presumed missing person must be attempted; the lapse of time before the presumption can be raised must be reasonable and there should be some safeguard for the missing person should he return.

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