
Missing Person Presumed Dead: The Anomalies in the Malaysian Law of Presumption of Death

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Abstract

In Malaysia, a dead corpse, physical body, or corpus must be shown as proof in order for a person to be deemed legally dead. The issue arises in situations in which a person has been reported missing and the whereabouts of that person are unknown to those who are close to them. As there is no physical body to support the assertion that the missing person is dead, this conclusion cannot be reached. In order to properly recognise the passing of a person, the presumption of death, which is a legal theory based on common law, was applied. However, there is no explicit regulation that addresses whether or not a missing person should be deemed to be dead after a specified amount of time has passed. The laws are difficult to follow since they are dispersed throughout several clauses of separate legislation. This has caused difficulty for the family members of those who have gone missing. In pursuant thereto, this article examines the existing legislation in Malaysia that governs the presumption of death and determines the anomalies that exist in the various sets of laws. This article utilised qualitative legal research and a doctrinal legal analysis to examine the applicable legislation, reported cases, and other legal and non-legal literatures. This article indicates that there are several anomalies or irregularities in the present legal system, including the lack of a definition for missing person, the question of which jurisdiction should be applied, the length of time to wait, and the administration of the matters relating to missing persons. In order to explain the legal uncertainties, the inconsistencies necessitate an upgrade to the present legal system in Malaysia.

Keywords: Missing person, presumption of death, anomalies, legislation, Malaysia

Introduction

A missing person is someone who has vanished without a trace and has lost touch with their loved ones. In Islamic law, a missing person is referred to as a "Mafqud." Salleh & Mahamood (2016) hypothesised that people who go missing fall into one of two categories: those who vanish during times of peace and those who vanish during times of anarchy or conflict. It is impossible to overstate the impact that a person's disappearance has on those who are left behind, particularly on members of the person's family, regardless of the circumstances surrounding the disappearance or the length of time that the missing person has been missing. Due to the fact that the disappearance of a person is frequently sudden and unannounced, the psychological distress brought on by the disappearance may be quite detrimental to those who are left behind. Those who are left behind are forced to deal with the uncertainty of their loved one's continued absence, and they frequently feel as though they are either stranded or frozen in time.

However, death is a process, and regardless of the term employed, everyone agrees that a person is considered dead after their physical life on Earth has come to an end. (Galbally, 1983). A person is to be considered dead if, in the announced judgement of a legally licenced physician, that individual has undergone an irreversible cessation of spontaneous respiratory and circulatory functions. Such an opinion must be based on the current norms of medical practise. Part III of the Birth and Death Registration Act of 1957 (BDRA) is the section that governs the process of registering a person's death. According to Section 18 of the BDRA, the Registrar of Births and Deaths in any registration area is required to register the death of every person who dies in Malaysia as well as the cause of that person's death. This is done by entering into a register such particulars concerning the death as may be prescribed by the government.

It is the responsibility of the registered medical practitioner who is attending the deceased during his final illness or who is in charge of a post-mortem examination of the body of any person to send a certificate in the prescribed form to one of the persons required by the Act to furnish particulars of the death (Section 22 BDRA) or to the Registrar of Births and Deaths within seven days of the person's passing away. This must be done in accordance with the provisions of the BDRA (Section 23 BDRA). As a result, in order to be pronounced dead, there needs to be proof of a dead body, physical corpse, or corpus.

The issue arises in situations in which a person has been reported missing and the whereabouts of that person are unknown to those who are close to them. Because there is no corpse to back the assertion that they are dead, it is impossible to make that determination. As a result, the law introduced a principle based on presumption by acknowledging the conclusion of a person's life in situations in which there is no physical body or corpus found, such as in the case of a disappearance or missing person. Specifically, this applies to situations in which the person in question has been reported as missing. The common law theory of presumption of death is the idea that a person has died if they have suddenly vanished and have been consistently missing for a lengthy period of time. This principle is also known as the assumption that a person has passed away. In other words, this circumstance occurred when there was a missing individual or a person who had vanished and stayed absent without providing an explanation for their absence. This supposition falls under the category of being able to be refuted.

It has been determined that there is no explicit legislation in Malaysia that deals with the presumption of death (Noor, Aziz & Halim, 2018, Salleh & Mahamood, 2016; Mahmud & Ali, 2013). It is difficult to identify the legal situation of a missing person and to safeguard the interests of surviving legal heirs in the absence of particular law, which makes it difficult to protect the interests of surviving legal heirs. As a result, Noor and Halim (2015) suggested that a particular piece of law should be enacted in order to address the problem of missing persons in the judicial system. An order for presumption of death should address the addition of unique risk rule to avoid the lengthy waiting time of seven years if a similar disaster is expected to accommodate future occurrences. It is difficult to determine not only the rights of inheritance of the surviving heirs (Salleh et al., 2017; Mohamad & Sulaiman, 2015; Abdullah, 2012), but also the status of woman if her husband has vanished. (Salleh et al., 2017; Mohamad & Sulaiman, 2015). This is one of the problems that arises as a result of the absence of specific legislation (Muda & Mohd, 2015; Mokhtar & Mahmud, 2015). Sulaiman and Wan Yusof (2015) suggested that in order to prevent confusion among the heirs of a missing person, there is a need for a model of law to manage matters related to them until it is confirmed that they are dead. According to Sulaiman, Wan Yusoff, and al-Edrus's (2016) analysis, Malaysia ought to enact a specialised legislation to handle the properties of missing individuals, and this law ought to be modelled after laws in other countries.

The management of the missing person's affairs is a task that is both fruitful and thought-provoking. When there is a case of missing persons, the members of the family go through a traumatic experience. This is not only because of the loss of the loved one, but also because of the legal difficulties or plight they face as a result of the situation, particularly the wife in regard to the status of her marriage and the beneficiaries in regard to the status of administration of the estates of the deceased. It is important to keep this in mind since, if it is unknown whether a person is alive or dead, the status of his personal law is left in a state of ambiguity, and his properties are rendered essentially useless.

At the moment, the law in Malaysia does not provide any definition for missing person or a person who has disappeared and has stayed absent without providing an explanation. In spite of this, Malaysian laws was revised to include the antiquated common law notion of presumption of death as evidence to refute the presumption of life of a person. This was done in order to manage the problem. When there is no evidence upon which the fact or time of death can be proven, the presumption of death is a valuable principle that has been accepted for a very long time and serves as a beneficial purpose (Kimball, 1954). The traumatic loss of Flight MH17 and the mysterious disappearance of Flight MH370 have triggered the needs to revisit the Common Law doctrine of presumption of death and its application in Malaysia. Although the viewpoint has been put on hold and was generally accepted without controversy, recent developments have made it necessary to reconsider the underlying philosophy. As a result of those tragedies, there is a pressing need to explain to family members how the presumption of death will affect them, especially in regard to the missing person's marital and property rights.

Methodology

Since this paper wants to go into great depth and detail on the subject at hand—examining the anomalies or irregularities in the existing legal framework on presumption of death in Malaysia—a qualitative doctrinal legal study was conducted. Using qualitative methodologies allows researchers to uncover previously unnoticed facets of an issue, increasing the usefulness and applicability of their study results (Yin, 2013).

To bridge the gap between scientific discovery and practical application, qualitative doctrinal legal research (McConville & Chui, 2007) has been established. The analysis was conducted using the legal research technique, which encompasses all forms of systematic legal study: historical, philosophical, comparative, and analytic (Abdullah, 2018; Yaqin, 2007).

The Law of Presumption of Death

Since the beginning of time, people everywhere have believed in the idea of presumption of death. In the absence of proof to the contrary for seven years, the court will presume that the individual in question is deceased on the basis of common law presumption. The presumption of death under the common law norm established by the courts of England and Wales states that:

where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, [...] there arises a rebuttable presumption of law that he died sometime within that period (Halsbury Law of England, 1973).

The most important parts of the law as it stands now are that a person who has been reported missing for up to seven years is assumed to still be alive, but that a person who has been reported missing for more than seven years is assumed to be dead. The presumption of life is qualified in some circumstances by the presumption of death. According to the common law principle, in order to claim the presumption of death, it is necessary to show four fundamental facts first. First, the individual must have been absent for a period of at least seven years. Second, the location of individual in question was completely unknown. Thirdly, by those who are likely to have heard, and finally, by the fact that all appropriate enquiries have been made.

The foregoing four facts stated above taken together strongly suggest that the individual in issue is deceased. The courts have demonstrated a readiness to rule a person dead on evidence inadequate to raise the presumption, which is a strong indication of the strength of the inference from the four facts or circumstances which give rise to the presumption. This means that deaths have been documented from absences lasting much less than seven years (Stone, 1981). The *Chard v. Chard* [1955] 3 All ER 721 case is illustrative of this view. The court ruled that a missing person is presumed dead if there is no sign of life for seven years, no contact has been made with the people who are most likely to have heard from the missing person, and efforts to locate the missing person during that time have been fruitless.

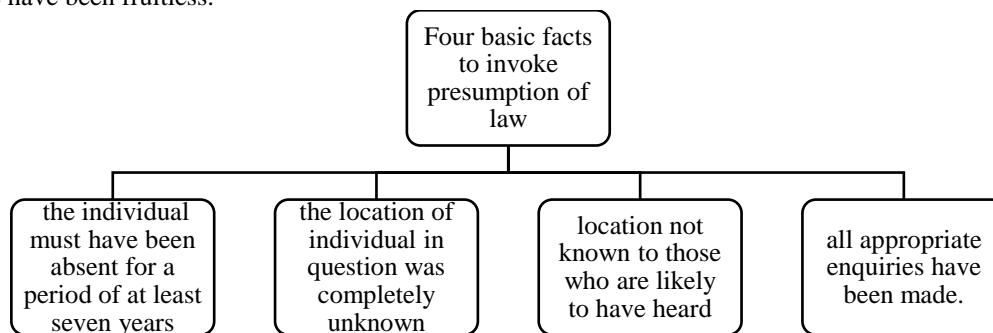


Figure 1: Four basic facts to invoke presumption of law under Common Law

If a person has been missing for less than seven years, the law presumes that they are deceased until there is proof to the contrary. Therefore, it is not always the case that someone is deemed dead after seven years of non-contact. Whoever claims the individual is missing must provide evidence of this fact. After that, it's the other side's responsibility to disprove the presumption. The time and date of death are irrelevant considerations for determining assumed death for a missing individual. An individual's time of death cannot be assumed; rather, it must be proven. If a person has been missing for less than seven years, the law presumes that they are deceased until there is proof to the contrary. Therefore, it is not always the case that someone is deemed dead after seven years of non-contact. Whoever claims the individual is missing must provide evidence of this fact. After that, it's the other side's responsibility to disprove the presumption. The time and date of death are irrelevant considerations for determining assumed death for a missing person. An individual's time of death cannot be assumed; rather, it must be proven. Whoever asserts a right to the establishment for which knowledge of the date of death is a prerequisite bears the burden of proof. The case *Re Application of Tay Soon Pong; Ex P* [2009] 9 CLJ 778 affirmed this premise.

The Current Laws Relating To the Presumption of Death in Malaysia

In Malaysia, the presumption of death is governed by both legislative and nonstatutory regulations, the latter of which are grounded in common law. The method that families of missing persons, especially those gone for long years, had to follow was disjointed, with no single piece of legislation guiding the process (Lexology, 2014). Several different statutes, including the Evidence Act 1950, the Births and Deaths Registration Act 1957, the Criminal Procedure Code, the Islamic Family Law, and the Syariah Court Evidence of State Enactments, all have provisions that apply to the current legal framework regarding the presumption of death. Because of the disjointed nature of the current legal system, family members have had to endure a lot of stress. To determine the wife's legal standing and the administration of the supposed deceased's inheritance, for instance, the family must file a separate set of applications with the court, which can be time-consuming and expensive.

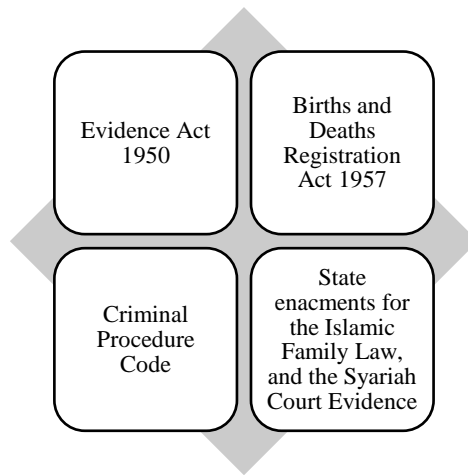


Figure 2: The existing statutory framework for presumption of death in Malaysia (Sources: Author's research)

The Malaysian Evidence Act 1950 governs issues relating to the legal presumption of life and death. It specifies who has the burden of proof when determining whether or not someone who was last seen seven years ago is still alive, as well as who has the burden of proof when establishing whether or not someone who was last seen 30 years ago is dead. Section 107 and Section 108 of the Malaysian Evidence Act 1950 include the relevant provisions for the proposition. Both this section and Section 110 of the Singapore Evidence Act 1997 are equivalent here. Based on this basis the Singapore cases are cited when appropriate in light of this foundation.

This principle can be traced back to the historical introduction of English common law in Strait Settlement and Malays States through the three Charter of Justice. It is the basis of the law in the Malaysian legal system, and its origins can be found in the years 1807, 1826, and 1855. (Ibrahim, 2015). The charters include provisions for the application of English law, but this was to take place only when the conditions of the states of Malaya and the people who lived there at the time permitted it, and it was to be subject to any qualifications that were deemed necessary by the specific conditions of the area. Section 3 of the Malaysian Civil Law Act of 1950 includes this guiding concept as one of its provisions.

The Anomalies in the Law

There are several examples of anomalies in law and justice, which can be described as inconsistencies, contradictions, or absurdities in law and justice, both in the existing laws and in the decisions made by the judiciary. There are some anomalies or irregularities that, owing to intrinsic limits, cannot be fixed. Even if some of the irregularities cannot be fixed, they can be explained by referring to ethical or legal principles instead. To our relief, many of the irregularities may be corrected. Anomalies are typically caused by one of three factors: omissions and commissions made by legislatures and the judiciary; the difference that exists between concepts of morality and concepts of law; and the inherent limitations of the legal system. All of these factors are shaped by the political, economic, and social necessities that exist in society. Some of the more common anomalies to Malaysian's presumption of death law are as follows:

Lack Of A Precise Definition Of "Missing Person"

In spite of the significance of the presumption of death for a missing person after a certain period of time, the law is quiet on the definition of missing person. Despite the fact that a High Court order regarding a missing person's presumed death under any written law is now recognised for the purpose of registration by virtue of the addition of new sections 24A and 24B to the Births and Deaths Registration (Amendment) Act 2017 for the purpose of registration, no provisions were added on how or whom the law can regard as a missing person.

There is just one place in Malaysian law where the term "missing person" is defined as can be found in section 124 of the Merchant Shipping Ordinance 1952. Under the provisions of Section 4 of the Merchant Shipping (Amendment) Act of 2016, "missing person" for the purpose of this section means a person that could not be found on board the ship and no certificate of death has been issued in respect of that person but his name appears— (a) in the passenger list; or (b) in the Article of Agreement and he is not absent without leave.

Jurisdiction

The subject matter of the case is what determines whether or not a court has the authority to consider the case of a missing person who is presumed deceased. In the event of a marriage or a matter pertaining to a Muslim's family, the Syariah court has jurisdiction to decide the case, and there is a waiting period of four years that will apply. However, in terms of the administration of estates, the Malaysian Evidence Act 1950 will be applied because it is

the statute that has general application. As a result, the family will have to wait seven years before the deceased person's estate can be finalised. However, the jurisdiction regarding missing persons who are presumed to be dead in Malaysia is hazy, unclear, and inconsistent between the civil court and the shariah court. Therefore, there is an urgent need to harmonise the civil law and Islamic law regarding missing persons who are presumed to be dead.

The length of time to wait

Scholars and academics are of the opinion that the common law waiting time of seven years that family members are had to suffer through before an application for presumption of death may be submitted before the court is ludicrous and no longer relevant in today's modern society (Noor & Halim, 2015; Henson, 2012). The United Kingdom, the United States, and numerous other Commonwealth nations like as Australia and Canada have begun the process of shifting away from the common law principle waiting period of seven years and toward a waiting period that is far shorter. These states recognised the 'specific peril' rule, which applies in situations like accidents and natural disasters, as basis for making a declaration of presumption of death in cases when the missing person's physical corpse cannot be located (Noor & Halim, 2015). According to the research of one Western academic Radford (2010), the common law waiting time of seven years is arbitrary, unworkable, outdated, obstructive, harsh, and unrealistic, and it may cause difficulties for surviving family members.

In Malaysia, the length of the waiting time may be shortened to four years in unusual and real instances rather than seven years as allowed by the Malaysian Evidence Act 1950. This provision is made possible by Islamic Family Law Enactments. Therefore, the length of the waiting time may be shortened if there are circumstances in which it can be proven that, on the basis of the weight of the evidence, the person who has gone missing has most likely already passed away. In the lack of a formal regulation, the decision as to the duration of the waiting time can alternatively be made through the use of a fatwa issued by the National Fatwa Council.

Administration of the Matters Relating To Missing Persons.

According to the legislation that is now in place in Malaysia, when a person goes missing, the law considers that individual to no longer be the owner of any of their property. Nobody has the legal power to safeguard or utilise it on their behalf in any way whatsoever. This can result in assets being wasted away, property going into disrepair, and dependents having to deal with legal and financial issues since they no longer have access to the financial assistance that was previously supplied by the absent individual. The emotional and personal shock that may be given to family members and others when a person disappears is made worse by these financial concerns (Noor, Aziz, 2019). The absence of the missing person can also cause problems for businesses and institutions that hold the missing person's assets or liabilities. These businesses and institutions are forced to deal with the challenges of interacting with the people who were left behind, and creditors may find that they are unable to collect payment as a direct result of the disappearance of the missing person.

It is necessary to have a legal framework in order to solve the problem of managing the assets of missing persons through the appointment of a guardian, just as it is necessary to have such a framework for people who are legally disabled, such as minors and people with unsound minds. According to the opinion of Noor and Aziz (2018), if a person is no longer able to initiate an action to safeguard their legal rights, then another person, known as a litigation representative, can take the action on their behalf. This is allowed by Order 76 regulations 4 of the Malaysian Rules of Court 2012.

In the case of a minor, the minor's statutory or testamentary guardian shall be entitled to be the litigation representatives (Order 76 rule 3 of the Malaysian Rules of Court 2012). On the other hand, in the case of a person of unsound mind, there will be three capable persons who may be ineligible to act as litigation representatives. They are either one of his next of kin or any other person as the Court may appoint (Order 76, rules 6 of the Malaysian Rules of Court 2012). Additionally, they are any person who is authorised under the Malaysian Mental Health Act 2001 to conduct legal proceedings in the name of the patient as provided under Order 76, rule 2 of the Malaysian Rules of Court 2012. (Noor & Aziz, 2018). When it comes to cases involving missing persons, the individual in question might also be considered a legally disabled person, and the court might have the authority to appoint a guardian to handle his affairs until he either returns or is presumed dead after the passage of seven years, whichever comes first.

Since the appointment of a guardian is meant to facilitate the resolution of issues brought about by a person's disappearance in a manner that is controlled, safe, and applicable, the guardian's status must be one that is recognised in the legal system. This ensures that any decisions and actions taken by the guardian have the force of law behind them. It is expected that the actions taken by the guardian in his or her role as such will have the same impact as against any third party as if they had been taken by the individual who has gone missing.

Conclusion

There are two distinct implications that might be drawn from death and the presumption of death. In order to be deemed legally dead, there must be proof of a dead body, physical body, or corpus, and the law is quite specific about how this need should be met. However, since there was no longer a tangible body to examine, the legal

system relied on the presumption of death. As a result, it is essential to make certain that the law is able to mitigate the psychological distress that is inflicted on the members of the family who are left behind by the missing person. When there is no evidence upon which the fact or time of death can be proven, the law of presumption of death acted as a beneficial purpose in order to accomplish its objective. Nevertheless, the idea needs to be interpreted in light of a number of other legislations. This article comes to the conclusion that the current legal system contains a number of inconsistencies, the most notable of which are the lack of a definition for missing person, the question of which jurisdiction should be applied, the length of time to wait, and the administration of the matters relating to missing persons. The irregularities call for an amendment to the present legal framework in Malaysia in order to remove the ambiguities in the existing legal provisions.

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