



# Unveiling Legal and Religious Divergence: Abandoned Husband Divorce in Indonesian and Syrian Contexts

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## ARTICLE INFO

### Article history

Received: June 24, 2023

Revised: November 15, 2023

Accepted: November 25, 2023

Published: December 17,

2023

## ABSTRACT

*This study seeks to analyze and contrast the fiqh provisions and legal regulations pertaining to a wife's right to seek divorce in Indonesia and Syria, specifically in cases where the husband is absent. The author aims to employ a normative approach and comparative approaches, together with data analytic techniques like as text analysis, to identify both parallels and discrepancies between fiqh provisions and laws in Indonesia and Syria. Indonesian and Syrian state legislation predominantly aligns with the viewpoints of the Shafi'i, Hanbali, and Maliki schools of thought, which permit the possibility of challenging a divorce on the grounds of the husband's absence. From the two countries, specifically Indonesia and Syria. Indonesia has established the record for the greatest duration of being missing or unseen, spanning two continuous years. Subsequently, Syria undergoes a period of absence or invisibility lasting for one year.*



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Available online at: <https://ejurnal.iainpare.ac.id/index.php/diktum/article/view/5764>



Keywords  
Abandoned Husband  
Fiqh  
Indonesian  
Syrian

*During the specified timeframe for assessing the divergence between the nations of Indonesia and Syria, the majority of individuals have not adhered to the teachings of the fiqh scholars. The Shafi'i, Hanbali, and Maliki schools establish a four-year time frame within which a wife may wait for her missing husband. Both Indonesia and Syria share similar provisions regarding the dissolution of a marriage due to an absent husband. Specifically, they consider an absent husband as one of the reasons that can lead to the termination of a marriage. Additionally, these countries also prohibit a wife whose husband is absent from remarrying until a court decision has been made.*

## 1. Introduction

The fundamental tenet of marriage in Islam is to establish a family unit that is boundless in its scope. (Rehman 2007) Spouses must consistently exert diligent and conscientious endeavors to sustain their familial existence. Nevertheless, a significant number of marriages that were initially robust ultimately prove to be unsatisfactory, leading to unhappiness for one or both partners. (Mulyawan 2019)

If the marriage poses a threat and cannot be sustained, and if its continuation will bring injury or prolonged misery to either spouse, exceeding the boundaries set by Allah SWT, Islam permits divorce through talak, fasakh, or khulu while respecting human values. (Hasbi and Hasbi 2016) One of the principles of jurisprudence states that it is necessary to eradicate all forms of harm. Hence, in the context of marriage, if one or both parties experience suffering and loss, it is imperative to address and resolve this issue. If this is unattainable, either party has the option to request the termination of the marriage. (Mashhour 2005)

In fiqh, fasakh or annulment refers to the dissolution of a marriage that is granted by a judge or court. (Sitompul, Tanjung, and Erma 2023) A court judge can proclaim a marriage as fasakh for several reasons, including if one of the parties has a disability, if one of the partners goes missing, if one of the partners is imprisoned, if either the husband or wife is harsh, or if there are persistent and ongoing conflicts or quarrels. (Linawati, Septiandani, and Yulistyowati 2017)

One of the causes for the case filed by the jurisprudence and legal schools is the husband's unexplained absence or disappearance. The man's departure will undoubtedly create bewilderment and uncertainty for the lady he left behind, regarding the possibility of dissolving her marriage to a missing spouse. (Asmawi 2004) Essentially, a paranormal spouse has the ability to unequivocally inflict injury or detriment onto their partner. The Hanafi and Shafi'i schools of law contend that when a person goes missing, their partner is obligated to wait for them until there is definitive evidence of their death, as they cannot be considered different entities. Scholars hold differing opinions over whether a husband's absence is a valid grounds for divorce. Furthermore, the treatment of this issue varies across different Islamic countries' laws and regulations. (Mayer 2018)

A study was conducted to examine the status of Mafqud's wife according to the perspectives of Imam Syafi'i and Ibnu Qudamah. This study is a comparative analysis of the opinions of Imam Syafi'i and Ibnu Qudamah, building upon a prior study on topics relating to Ikmal Hafifi. (Hafifi 2021) This research explores a comparative analysis of the viewpoints of Imam Syafi'i and Ibn Qudaman on the legal status of mafqud spouses. This research focused on the status of the mafqud's wife, specifically examining the

perspectives of Imam Syafi'i and Ibnu Qudamah. This article distinctly focuses on the legal perspectives of jurisprudence and legislation in Indonesia and Syria.

The following text is a research paper titled "Husband Imprisoned as a Ground for Divorce: Perspectives on Jurisprudence and Legislation in Muslim Countries" authored by Ali Trigiyatno. (Trigiyatno 2021) For this study, four countries were chosen: Indonesia, Jordan, Morocco, and Qatar. This diverges from the author's work, which just examines divorce resulting from husband's absence, and encompasses two countries, excluding Syria from the study.

The research conducted by Mukhlis Bakri, titled "Komparasi Fikh Munakahat Dengan Hukum Positif Terhadap Gugat Cerai Mafqud (Suami Yang Hilang) Pada Nomor Pekara 2791/PDT.G/2021/PA.KNG Di Pengadilan Agama Kuningan," compares Islamic jurisprudence on divorce with positive law in relation to the case of divorce due to the disappearance of the husband, specifically in case number 2791/PDT.G/2021/PA.KNG at the Religious Court of Kuningan. This research examines the legal aspects of a divorce dispute involving a husband who is absent, as outlined in case no. 2791/Pdt.G/2021/PA.Kng, from the standpoint of jurisprudence and legislation. The author explores the perspectives on jurisprudence and legislation in Indonesia and Syria, focusing specifically on the concept of invisible husbands.

Thus, it is worth noting that no previous scholarly research has been made to compare Indonesian and Syrian fiqh (Islamic jurisprudence) with state legislation. The concept of divorce based on the husband's absence has been extensively elucidated in the writings of Islamic legal experts, particularly within the Syafi'i, Hanbali, and Hanafi schools of thought. Indeed, it is quite customary for numerous contemporary Munakahat fiqh texts to thoroughly examine this subject matter within their publications. (Djawas et al. 2022)

This research is limited to two nations. Indonesia follows the Shafi'i Imam, however in Syria, some individuals subscribe to the Hanafi and Hanbali schools of thought. However, it is important to realize that two countries may have divergent legislation regarding the subject of divorce caused by husbands who are absent or cannot be located.

The research aims to address the following inquiry: What are the legal laws concerning the concept of absent husbands as a grounds for divorce in jurisprudence? Furthermore, I would want to inquire about the specific legal provisions in Indonesia and Syria pertaining to the dissolution of marriage on the grounds of husbands who are absent or cannot be located.

## **2. Research Method**

This study methodology employs qualitative research techniques. The utilized strategy is a normative or doctrinal methodology, along with a comparative technique. In Islamic jurisprudence, this process is referred to as the juxtaposition of fiqh and law. The data source utilizes supplementary data sources in the form of books and documents. The analysis of primary legal texts in Indonesia and Syria involves examining general law and then applying the jurisprudence of four schools of thought, together with their respective explanations. Secondary legal literature encompass books and expert commentaries pertaining to family law. This study employs a content analytic approach to examine the legislative material pertaining to divorce cases involving missing husbands in Indonesia and Syria, as well as the perspectives based on fiqh principles.

## **3. Results and Discussion**

### **a. Unseen Husband as Reason for Divorce According to Fiqh**

Within the realm of Fiqh, a subject of debate on esoteric subjects revolves around the permissibility of divorcing a wife subsequent to marriage. Fiqh academics hold divergent

perspectives.(Ayubi 2015) Certain scholars claim that the individual who is currently missing remains alive, hence preventing the male partner from terminating his relationship with his wife. Conversely, other scholars permit the dissolution of the marriage between the male partner and his wife.(Omar 2007)

According to the traditional opinion of the Shafi'i school, a wife who is unable to see her husband can seek a legal termination of her marriage, known as *fasakh*, as a result of her marriage to a ruler. Following this, the wife is granted a period of 4 years. Subsequently, if the search has been conducted for a duration of 4 years and has concluded without the husband's whereabouts being ascertained, the woman will observe the *'iddah* period and subsequently has the option to enter into a new marriage. The Syafi'i school relies on various foundations, including the *atsar* (narrations) of Umar bin Khattab's companions. Furthermore, Imam Syafi'i draws a parallel between an unseen husband and an impotent husband who is unable to engage in sexual intercourse with his wife. He also likens an economically challenged husband to a potential source of danger. These occurrences can occur even when the husband is not observed. The husband's absence grants it priority in determining *fasakh*.(Fauzi, Adly, and Firmansyah 2023)

The subsequent viewpoint articulated by Imam Syafi'i in his *qaul Jadid*, which was subsequently adopted by the Shafi'iyah scholars, was also shared by the Hanafi School of thought and the majority of *tabi'in*, including Ibrahim An-Nakha'i, Abu Qilabah, Asy-Sya'bi, Hamad bin Sulaiman, Ibnu Abi Laila, Ibnu Syubrumah, and Sufyan Ats-Tsauri. They maintain that a woman should not be divorced from her unseen husband, and she must continue to wait for her unseen husband until there is clear evidence of his death or divorce, even if it takes a considerable amount of time. Imam Al-Nawawi, in his book *al-Majmu'*, affirms that a woman's marital status persists even if her husband has been absent for an extended period, as long as there is no clear evidence of divorce.(Hidayatulloh 2019) This aligns with the opinion of Imam Syafi'i in *Qaul Jadid*, as well as the viewpoint of Ali bin Abi Talib's companion, Imam Abu Hanifah, and various Iraqi ulama. The Shafi'i school of thought scholars have not established a specific duration for how long a wife must wait for her missing husband. Instead, they leave this determination to the judge's *ijtihad*.(Fardiana, Hidayah, and Borhan 2022)

According to Sheikh Ahmad al-Quduri, a prominent cleric of the Hanafi school, in cases where a man goes missing and his location is unknown, with uncertainty about whether he is alive or deceased, a judge will designate someone to manage his assets, uphold his rights, and support his wife and young children using the man's inheritance. If a man's wife reaches the age of 120 years after her birth, it can be concluded that she has passed on and cannot be separated from him. Regarding the waiting time, there are six factors to consider. The first is determined by the judge's interpretation of Islamic law. The second, according to Imam Abu Hanifah, is based on the historical account of Hasan until he reached the age of 120.(Abdal-Haqq 2002) The third is determined based on the woman's age. The fourth, according to Abu Yusuf, is determined by the woman's ability to conceive. The first centenary is reached at one hundred years of age, the fifth generation of invisible individuals achieves ninety years of age, and the sixth invisible generation reaches sixty years of age.(Rabb 2011)

The Maliki school of thought categorizes the unseen into four distinct types: loss within a Muslim country, loss within an infidel country, loss throughout a Muslim-Muslim conflict, and loss within a Muslim-infidel conflict. According to Imam Malik, in Muslim countries, if a spouse goes missing, the wife is allowed a period of four years to report the situation to the authorities. During this period, an inquiry is conducted into the survival or demise of the husband who remains unseen. Upon the conclusion of the four-year duration, the wife is required to undergo a time of mortality lasting four months and ten days. According to Imam Malik, if a marriage is dissolved because the spouse is absent, it is classified as *Talak Bain*.(Hinchcliffe 1971)

Under the Maliki school of law, if an individual goes missing in a hostile nation, they are subject to jail as a form of punishment. Consequently, a woman is prohibited from marrying another man unless her husband is confirmed deceased or the missing person cannot be located. Imam Malik and Ibn Qasim lived approximately seventy years after his birth. Imam Malik expressed an alternative viewpoint, stating that the duration can extend to a maximum of eighty years. According to Ibn 'Arafah, the time frame extends until a supernatural being passes away seventy-five years after their birth. Ashhab, on the other hand, asserts that in Muslim nations, such an individual is penalized similarly to someone who is considered lost or missing. (Riaz and Zia 2019)

Regarding individuals who are unaccounted for in the conflict between Muslims and non-believers, the Maliki School presents four distinct viewpoints. First and foremost, they are subjected to the same punishment as the one who is being detained. Furthermore, the legal treatment is same to that of an individual who is deceased after a one-year period of waiting. However, if the invisible individual is situated in an open location, they will be considered equivalent to someone who perished in a military conflict. Furthermore, in a Muslim country, the act of missing will be subject to equivalent punishment. Furthermore, the legal status of a deceased individual's marital connection is equivalent to that of a person who has been killed, but the legal status of their property is akin to that of a person who has gone missing in a Muslim country. Imam Malik and Ibn Qasim believe that individuals who suffer defeat in conflicts between Muslims are considered equivalent to those who are murdered instantly, without any delay. Some argue that this outcome was predictable due to the proximity or distance from the theater of combat. Imam Malik further states that the duration of waiting in this particular situation is one year. (Shiddiqi and Fajrih 2021)

Views espoused by the Hanbali school of thought. He categorized missing individuals into two distinct circumstances: firstly, disappearances that looked distressing or perilous. According to the Hanbali school of thought, women are required to wait for a period of four years in such an unfavorable circumstance. (Azman 2020) In the absence of any updates for a period of four years, the woman will carry out her promise for a duration of four months and ten days, during which her belongings may be distributed. Dispersed among his beneficiaries. (Mallarangeng and Ali 2023) (Alfarez, n.d.) Furthermore, the absence of what appeared indisputable. In accordance with the Hanbali school of jurisprudence, lost property is not subject to division, and a woman is not permitted to seek divorce from her husband until it is evident that he is approaching death. Subsequently, the judge's *ijtihad* is presented to establish the temporal constraint. Alternatively, according to a different interpretation, the duration extends until the mystical individual attains the age of ninety years. (Harry Kurniawan 2018)

**Table 1.** Comparison of four schools of thought regarding the permissibility of suing a divorce because the husband is unseen

No.	Isu	Syafi'i	Hanafi	Maliki	Hanbali
1.	Allows divorce due to supernatural husband	✓	-	✓	✓
2.	It takes a long time to file for divorce	4 Years	-	more than a year	More than six months
3.	Types of divorce	<i>Fasakh</i>	-	<i>Ba'in</i>	<i>Fasakh</i>

#### **b. Unseen Husband as Reason for Divorce According to Indonesian and Syrian State Legislation**

According to Indonesian Family Law, the primary objective of marriage is to establish a joyful and everlasting family unit. According to Article 1 of Law No. 1 of 1974 jo. Law No. 16 of 2019 on Marriage, marriage is a union between a man and a woman, both

physically and spiritually, as husband and wife. (Rangkuti and Agustar 2022) The purpose of this union is to establish a joyful and everlasting family (home), founded on the divine authority. The Marriage Law upholds the principle of imposing barriers to divorce, as evident in the overall explanation of Law No. 1 of 1974 regarding Marriage, specifically in point four letter e. It states that since the objective of marriage is to establish a perpetually blissful and prosperous family, this law adheres to the principle of making divorce challenging. It requires specific grounds and must be conducted through a formal court proceeding. (Ceria 2020)

Presidential Instruction No.1 of 1991 provides comprehensive regulations on the causes of divorce, procedures, and legal consequences. These regulations align with the provisions stated in Article 38 of Law No. 1 of 1974 jo. Law No.16 of 2019 regarding Marriage. (Setyawan et al. 2023)

Article 114 of Presidential Instruction No.1 of 1991, which pertains to the Compilation of Islamic Law: The dissolution of a marriage can occur as a result of divorce, either via mutual agreement or through legal proceedings. Presidential Instruction No.1 of 1991, often known as Article 115, pertains to the Compilation of Islamic Law. Divorce can only be initiated within a Religious Court session, following unsuccessful attempts by the court to reconcile the two parties. Article 115 reiterates the provisions stated in Article 39 paragraph (1) of Law No.1 of 1974 in conjunction with Law No.16 of 2019.

The reasons for divorce are outlined in Article 19 of Government Regulation No. 9 of 1975, which pertains to the implementation of Law No. 1 of 1974 on Marriage, in conjunction with Article 116 of Presidential Instruction No.1 of 1991, which deals with the compilation of Islamic Law:

- a. One of the parties commits adultery or becomes a drunkard, addict, gambler and so on which is difficult to cure;
- b. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without a valid reason or for other reasons beyond his or her ability;
- c. One of the parties receives a prison sentence of 5 (five) years or a heavier sentence after the marriage takes place;
- d. One party commits serious cruelty or abuse that endangers the other party;
- e. One of the parties suffers from a physical disability or illness as a result of being unable to carry out their obligations as husband or wife;
- f. Between husband and wife there are constant disputes and quarrels and there is no hope of living in harmony again in the household;
- g. Husband violates divorce agreement;
- h. Changing religions or apostasy which causes disharmony in the household.

According to the information provided in the article, a divorce can occur if one party voluntarily separates from the other party for a continuous period of two years without the other party's consent and without a solid justification, or due to circumstances beyond their control. The article establishes fundamental criteria for the termination of a marriage by one of the parties, which might serve as grounds for divorce. These circumstances include:

- a. Left for two years.
- b. Done consecutively.
- c. Without the other party's permission.
- d. Without a valid reason

e. Because other things are beyond his ability.

Therefore, according to Indonesian positive law, a wife is allowed to seek a divorce if her spouse is of supernatural nature, goes missing, or abandons her, according to the aforementioned conditions. According to article 119 of the KHI, the court punishes divorce resulting from divorce as *talak ba'in sughra*. *Talak ba'in sughra* prohibits the husband from referring to his wife, even during the *iddah* time. However, it still allows the husband to remarry by entering into a new contract, according to the same restrictions as the initial marriage.

The legal framework governing family matters in Syria is referred to as *Qanun al-Ahwal al-Syakhsiyyah as-Suri*. It encompasses several aspects such as marriage, divorce, birth, lineage, custody, representation (*an-miyabah*), wills, inheritance, and other related matters. The *Qanun al-Ahwal al-Syakhsiyyah as-Suri* is based on the *Qanun Huquq al-Ailah al-Utsmani*, which is the Ottoman Family Rights Law. It also incorporates Egyptian Law based on the principle of benefit, as well as *al-Ahkam as-Syar' Qadri Basya's iyyah*. This compilation is considered important by legal scholars outside the Hanafi school of law, as it is in accordance with sharia law. The author of *al-Ahwal al-Syakhsiyyah* is Ali al-Thanthawi, a judge in Damascus. (Al-Bugha and Al-Bugha 2018)

In relation to an unseen husband being a reason for divorce, in *Qanun al-Ahwal al-Syakhsiyyah as-Suri*, it is explained in Article 109, namely:

- 1) If the husband is absent for more than one year, his wife may ask the judge to separate him because of the loss of his absence, even if he has money that he can spend.
- 2) If the husband is sentenced to imprisonment for more than three years, his wife, after six months of imprisonment, may ask the judge to separate her for his absence from him, even if he has money than can be spent.
- 3) If the wife proves her claim with evidence, the judge swears to her for the losses caused by her husband's absence.
- 4) This separation is a divorce that can be annulled, if the absent person returns or the captive is released while the woman is in her waiting period, he has the right to take her back. (Al-Bugha and Al-Bugha 2018)

Then in Article 110 it is stated that:

1. A wife may ask for separation if the current husband refuses to support his wife and he does not have real money and it is not proven that he is unable to support her.
2. If he proves his incapacity or is absent, the judge gives him a reasonable time of no more than three months, if he does not support, the judge separates them.
3. The judge's separation due to non-support is considered a divorce that can be annulled, and the husband has the right to take his wife back during the waiting period, as long as he proves his left hand and agrees to provide support.

Furthermore, Article 111 states that:

1. A wife can ask for a divorce if her husband leaves her or swears not to have sex with her for four months or more.
2. If the husband obeys the judge by abandoning desertion, the judge sets a suitable period for him, and if he refuses, he divorces him with a revocable divorce.

3. For the sake of validity, the return must be made, unless there is a legal age, in which case the return is valid by saying. (Al-Bugha and Al-Bugha 2018)

According to article 109 of Syrian family law, if a husband is absent for a period exceeding one year, his wife has the right to request a judge to legally separate from him. This provision serves as the basis for a wife to initiate divorce proceedings against her husband. The wife's absence is a result of her husband's imperceptible actions. The drawbacks are elucidated in sections 110 and 111, specifically highlighting the lack of spousal support and the inability to engage in marital intimacy.

The matter of divorce (*thalaq*) is a prominent concern in Syrian family law as it pertains to the wife's entitlement to initiate divorce proceedings against her husband via the *khulu'* method. (Rehman 2007) The matter of *talaq* in Syrian legislation is governed by articles 85-94. Meanwhile, the matters pertaining to *khulu'* are governed under articles 95-104. One of these stipulations is that the *khulu'* gift can be retracted prior to its acceptance by the recipient. During the *iddah* period resulting from *khulu'*, the husband remains obligated to pay financial support to his former wife, unless the preceding *khulu'* contract includes a provision stating otherwise. In the matter of *khulu'* ransom for a prepubescent wife, the *an-Naqd* Court clarified that if a husband divorces his young wife who has already attained the age of discernment, and if the wife agrees to accept a dowry as compensation, the divorce will take place but the dowry would not be forfeited. (Maktabi 2010)

In addition to *khulu'*, the wife has the right to petition the court for the termination of the marriage under various circumstances, such as when the husband is afflicted with an illness that hinders cohabitation, when the husband is mentally unstable, when the husband abandons the wife or is incarcerated for a period exceeding three years, when the husband fails to provide financial support, or when the husband engages in abusive behavior towards the wife. Article 105 governs these provisions.

According to Article 105 of the legislation, the wife has the exclusive right to request separation from her husband in two specific cases: if he is suffering from a medical condition that limits sexual intercourse (known as "*jima'*"), or if he is mentally unstable. Granting exclusive authority to the wife aligns with the principles of the Hanafi school of jurisprudence. Meanwhile, the *Jumhur* school of thought grants both husbands and wives the autonomy to request separation from one another. (Al-Bugha and Al-Bugha 2018)

#### 4. Conclusion

The institution of marriage, seen as a prestigious and stable agreement (Mitsqan Ghalizan), should be safeguarded and upheld to prevent the risk of divorce. Nevertheless, legal doctrine also acknowledges the necessity of addressing harm and prioritizing harm prevention over the pursuit of benefits. Consequently, religious groups that adhere to the *Maslahat* model typically permit divorce on the grounds of *Dharar* and his progeny. According to legal experts, scholars from the Hanbali and Maliki schools of thought believe that if a wife is married to a supernatural husband who is causing her harm, Imam Shafi'i's *Qaul Qadim* permits her to end the marriage in order to protect herself from further harm.

Indonesia and Syria have opportunities to seek divorce, however with modest variations in their respective regulations. The husband's period of absence or invisibility can range from one to two years, whilst the wife's window for requesting a divorce is also one to two years.

To enhance Indonesian legislation, it is imperative to contemplate shortening the duration of a husband's absence or disappearance from two years to one year. This adjustment aims to prevent the protracted distress experienced by a wife who is abandoned by her husband during his absence, while also mitigating potential risks and



compensatory issues. This can occur as a result of the husband's absence or being mafqud.

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