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Reconstructing the Mechanism of Conditional Inheritance Distribution for Missing Persons (*Mafqud*) in the Aceh Sharia Court: A *Maqasid al-Shari'ah* Analysis

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Abstract
Islamic inheritance law rests on the certainty that heirs are alive when the testator dies. In Aceh, however, armed conflict and the 2004 tsunami have left many missing persons (*mafqud*), whose uncertain status prolongs disputes and freezes the distribution of estates. This study formulates the technical design and legal standing of conditional division (al-qismah al-mu'allaqah) in resolving inheritance disputes involving missing heirs at the Mahkamah *Syar'iyah* in Aceh. Using a qualitative juridical-empirical (socio-legal) method, it combines conceptual, maqasid al-syari'ah and case approaches, drawing on two court decisions. The findings show that requiring a judicial death verdict (al-maut al-hukmi) before any distribution leaves the whole estate suspended and harms the economic rights of living heirs, because the Compilation of Islamic Law (KHI) only suspends the joint property of a missing spouse (Article 96(2)) and Supreme Court Circular (SEMA) No. 1 of 2022 only addresses deposit at the execution stage. As a novelty, the study reconstructs the classical precautionary rules (al-aqallu, al-yaqin, al-mawqūf) into a procedure applicable under Article 5(1) of Law No. 48 of 2009 and Article 229 KHI: present heirs receive their certain minimum share, while the share of the missing heir is suspended and entrusted to the court deposit register or Baitul Mal Aceh. The mechanism applies only where the testator's death is certain and the missing person is an heir. Through the lens of wealth protection (*hifz al-mal*), it secures the missing heir's ownership and eases the financial stagnation of families.

Abstrak
Hukum kewarisan Islam bertumpu pada kepastian bahwa ahli waris masih hidup saat pewaris meninggal. Di Aceh, konflik bersenjata dan tsunami 2004 meninggalkan banyak orang hilang (*mafqud*) yang statusnya tidak pasti, sehingga memicu sengketa dan stagnasi pembagian harta peninggalan. Penelitian ini merumuskan formulasi teknis dan kedudukan hukum pembagian bersyarat (al-qismah al-mu'allaqah) dalam penyelesaian sengketa waris dengan ahli waris yang hilang di Mahkamah *Syar'iyah* Aceh. Dengan metode kualitatif yuridis-empiris (sosio-legal), penelitian ini memadukan pendekatan konseptual, maqasid al-syari'ah, dan kasus melalui analisis dua putusan pengadilan. Hasilnya menunjukkan bahwa praktik yang mensyaratkan putusan kematian yudisial (al-maut al-hukmi) sebelum pembagian membuat seluruh harta tertahan dan mencederai hak ekonomi ahli waris yang hidup, karena Kompilasi Hukum Islam (KHI) hanya mengatur penangguhan harta bersama pasangan yang hilang (Pasal 96 ayat (2)) dan SEMA No. 1 Tahun 2022 hanya mengatur penitipan pada tahap eksekusi. Sebagai kebaruan, penelitian ini merekonstruksi kaidah kehati-hatian klasik (al-aqallu, al-

yaqin, al-mawqūf) menjadi prosedur yang dapat diterapkan berdasarkan Pasal 5 ayat (1) UU No. 48 Tahun 2009 dan Pasal 229 KHI: ahli waris yang hadir menerima bagian minimal yang pasti, sedangkan bagian ahli waris yang hilang ditangguhkan dan dititipkan pada register penitipan pengadilan atau Baitul Mal Aceh. Mekanisme ini hanya berlaku apabila kematian pewaris telah pasti dan yang hilang adalah ahli waris. Melalui perspektif pelindungan harta (*hifz al-mal*), mekanisme ini mengamankan kepemilikan ahli waris yang hilang dan mengurai stagnasi keuangan keluarga terdampak.

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INTRODUCTION

The problem of inheritance in Islam is always based on legal certainty; one of the aspects is the certainty of whether the heirs are still alive when the testator dies. However, in social life, cases of *mafqud* often arise, namely, someone who disappears without their whereabouts being known, so it is not clear whether they are still alive or have died. The problem of *Mafqud* in the law of inheritance causes legal uncertainty, which causes the exclusion of those who have the right to receive an inheritance; thus, it can cause the freezing, damage, or dispute over the property. Especially in Aceh Province, this phenomenon has very complex social and historical backgrounds. Mass loss of people has occurred as a result of armed conflict (DOM-Military Operations Area), an earthquake and tsunami disaster in 2004, as well as the impact of land excavations for toll road projects that have recently often hindered the process of inheritance distribution and compensation settlements.[1]

The scale of loss in Aceh explains why cases of missing persons recur in inheritance practice. Official sources record the 2004 earthquake and tsunami differently: the Aceh–Nias Rehabilitation and Reconstruction Agency (BRR) reported approximately 130,000 deaths and 37,000 missing persons, whereas the National Disaster Management Agency (BNPB) recorded 166,080 deaths and 6,245 missing persons. The discrepancy may reflect differences in recording and verification methods, yet both sources indicate that a very large number of families were left uncertain about the fate of their relatives. The armed conflict added to this burden, as the Aceh Truth and Reconciliation Commission (KKR Aceh) documented 1,958 persons declared missing among the human rights violations it verified. More recently, the Sigli–Banda Aceh (Sibanceh) toll road project involved the acquisition of more than 3,000 land parcels, with the State Asset Management Agency (LMAN) recording financing for 3,031 parcels. Where the original owner had died and the heirs were missing or untraceable, the land acquisition committee under the National Land Agency (BPN) resorted to consignment, depositing the compensation at the local District Court. The exact number of such cases is not recorded centrally; it is recorded dynamically by the District Courts and by Baitul Mal, which is authorized to manage land without clear heirs.

[1]Anggun Mareta and Dedy Sumardi, "Eksistensi Mafqud Dalam Hukum Islam Dan Hukum Positif Indonesia: Implikasi Terhadap Hak Waris Dan Perkawinan," *Jurnal Hukum Samudra Keadilan* 20, no. 1 (2025): 17–30, https://doi.org/https://doi.org/10.33059/jhsk.v20i1.11312.

In Indonesia, the Compilation of Islamic Law (KHI), issued by Presidential Instruction No. 1 of 1991, which is used as the main reference in trials at the Religious Courts, defines an heir as a person who, at the time of the testator's death, is related to the testator by blood or marriage, is Muslim and is not barred by law (Article 171 letter c), yet turns out to contain a legal vacuum (*rechtvacuum*) specifically regarding how to distribute inheritance involving heirs who cannot be found. KHI only sets standard rules regarding inheritance, without providing direct technical instructions on how to resolve problems when heirs cannot be contacted or are missing.

The term *rechtvacuum* is used here in a limited and verifiable sense, based on three provisions: (i) the only provision of KHI that mentions judicial death is Article 96(2), which suspends the joint property of a missing spouse until death is established, actually or judicially, by a decision of the Religious Court, and it does not cover inheritance shares; (ii) the Civil Code regulates absence (*afwezigheid*) but does not address Islamic inheritance shares; and (iii) SEMA No. 1 of 2022 provides for the deposit of the share of an untraceable heir, but at the execution stage, after the heirs' entitlements have been determined. To the best of the author's knowledge, there is therefore no operational rule for the distribution stage while the status of the missing heir is still undetermined. So far, the working method in the field relies on requests for declarations of death by judges at the Religious Court based on the principle of the best interests of the parties. However, the process of proving that a person has passed away and the issuing a verdict (*al-maut al-hukmi*) takes years, impacting the economic rights of other heirs who are still living and in need.[2] In Aceh, such disputes between Muslims fall within the jurisdiction of the Mahkamah *Syar'iyah*, which is part of the religious court system and has authority over family law (*ahwal al-syakhsiyah*), civil matters (*muamalah*) and criminal matters (*jinayah*) based on Islamic law.

Discussion of the legal resolution of *mafqud* has been widely studied by scholars over the last five years; in general, the direction of current research can be divided into three main clusters. First, the research group focuses on marital status and the waiting period for the wife of a *mafqud*.[3] Second, the study group analyzed legal certainty regarding the right to inherit the property of an absent wife, based on the validity of the court's decision regarding the absence.[4] Third, research offers a normative method for property ownership through the concept of mauquf status; there are still gaps in conceptual and empirical research that have not been examined.[5]

Previous research only described the freezing of assets in general without providing technical settlement instruments in the form of a temporary method for dividing the wealth before the death verdict was issued by the judge. Apart from that, there has been no research that actually

[2]Agung Widya Yudhistira and Agung Widya Yudhistira, "Akibat Hukum Orang Hilang (Mafqud) Terhadap Harta Benda Dan Penyelesaian Kewarisan Dalam Islam," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 10, no. 2 (November 30, 2021): 131–45, https://doi.org/10.28946/rpt.v10i2.1229.

[3]Indrawan Nurtaba, M Taib Hunsouw, and Nurfitri Yanlua, "Marriage Status of Wife and Mafqud Husband: Dialectics of Fikh Four Schools and Positive Legal Transformation in Indonesia With A Digital-Forensic Perspective," *Al-Muqaranah* 3, no. 2 (2025): 21–33, https://doi.org/https://doi.org/10.33477/am.v3i2.13409.

[4]Muhammad Fa'iq Widyadana, "Analisis Kepastian Hukum Dalam Pembagian Warisan Terkait Ahli Waris Yang Ditetapkan Afwezigheid Oleh Pengadilan," *Doktrin: Jurnal Dunia Ilmu Hukum Dan Politik* 4, no. 3 (July 2, 2026): 40–53, https://doi.org/10.59581/doktrin.v4i3.6356.

[5]Muhibbussabry Muhibbussabry, "Hak Waris Mafqud (Orang Hilang) Dan Penyelesaian Dengan Metode Mauquf (Penangguhan)," *An-Natiq Jurnal Kajian Islam Interdisipliner* 4, no. 1 (2024): 80–92, https://doi.org/https://doi.org/10.33474/an-natiq.v4i1.21409.

discusses this in practice within the jurisdiction of the Aceh Syar'iah Court.[6] In the context of inheritance law, changes in social and socio-cultural conditions can be factors that need to be considered in applying the law fairly and providing benefits, without forgetting the basic principles of inheritance law in Islam.[7]

Based on these disparities, the innovation of this research clearly lies in the reconstruction of the concept of classical jurisprudence, namely the mechanism for conditional distribution of assets (*al-qismah al-mu'allaqah*) for *mafqud* heirs, which was adapted to the positive legal system at the Aceh *Syar'iyah* Court. This alternative mechanism is analyzed using the *Maqasid al-Syari'ah* approach, especially in terms of the protection of property (*Hifz al-mal*).

This research aims to formulate and determine the legal conditional distribution mechanism for resolving *mafqud* inheritance disputes at the Aceh *Syar'iyah* Court. The main argument or statement presented in this article is that the conditional distribution mechanism is not just a distribution tool based on mathematical calculations, but is a real form of *Hifz al-Mal*, which aims to protect the economic rights of all heirs present without taking the rights of absent heirs in a fair, quick, and responsive manner. To prove this argument, this research uses a qualitative approach with a juridical-empirical (sosiolegal) method, which is based on legal analysis and practices that occur at the Aceh *Syar'iyah* Court.

RESEARCH METHODS

This study is a type of sociolegal research of the juridical empirical kind that combines legal text analysis in a prescriptive manner with the analysis of legal practice as reflected in court decisions.[8] The term juridical-empirical is used here in the sense that law is studied both as a norm (statutes, KHI and fiqh) and as a practice (court decisions and the reasoning of judges): the juridical component is the prescriptive analysis of texts, and the empirical component is the examination, through the court decisions analysed, of how those texts operate in the Aceh *Syar'iyah* Court, which is what makes the design socio-legal. This type of study was chosen because the goal is to examine not only the absence of positive law but also how the law is applied in people's lives. There are three main approaches used. First, the conceptual approach is used to analyze the idea of *mafqud*, the *istiṣḥāb* principle, as well as the concept of conditional distribution (*al-qismah al-mu'allaqah*).[9] Second, the *maqasid* approach is applied to evaluate and align the determination of the distribution of wealth within the framework of property protection (*hifz al-mal*).[10] Third, the case approach is carried out by examining the verdict documents of the

[6]Sarah, Syamsul, and Abdul Jafar, "Warisan Mafqud Dan Orang Mati Bersama Menurut Imam Mazhab Dan Hukum Islam Di Indonesia," *Shar-E : Jurnal Kajian Ekonomi Hukum Syariah* 10, no. 2 (July 31, 2024): 145–62, https://doi.org/10.37567/shar-e.v10i2.3108.

[7]Raja Ritonga, Aulia Rezi, and Asril Fauzi, "Transformasi Sosial Dan Hubungannya Dengan Pembagian Harta Warisan Menurut Perspektif Hukum Islam," *QISTHOSIA : Jurnal Syariah Dan Hukum* 4, no. 2 (2023): 166–77, https://doi.org/10.46870/jhki.v4i2.718.

[8]T. Rasyidin, Munawir, and Bella Dalila, "Pendampingan Hukum Korban Pemerkosaan: Perlindungan Terhadap Pendidikan Perempuan," *Jurisprudensi: Jurnal Ilmu Hukum* 2, no. 1 (June 30, 2025): 75–85, https://doi.org/10.70193/jurisprudensi.v2i01.04.

[9]Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017).

[10]Muhammad Baiquni Syihab, "Telaah Kritis Pemikiran Jasser Auda Dalam Buku 'Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach,'" *AN NUR: Jurnal Studi Islam* 15, no. 1 (June 29, 2023): 114–36, https://doi.org/10.37252/annur.v15i1.455.

Aceh *Syar'iyah* Court that relate to the delay or execution of inheritance involving missing heirs.[11]

The data source are divided into two types, namely primary data and secondary data. Primary data comes from real facts at the Aceh *Syar'iyah* Court, which were collected through the study of court decision documents concerning *mafqud* inheritance stagnation. Two decisions were analysed, selected purposively by three criteria: (i) issued by a Mahkamah *Syar'iyah* in Aceh; (ii) concerning the declaration of death of a missing person (*mafqud*), alone or together with the determination of heirs; and (iii) available in the Supreme Court Decisions Directory. They are Decision No. 286/Pdt.P/2020/MS.Bna of the Banda Aceh *Syar'iyah* Court (15 December 2020) and Decision No. 0066/Pdt.P/2017/MS.Cag of the Calang *Syar'iyah* Court (23 August 2017), both first-instance petitions in civil-religious matters, covering the period 2017–2020. Because the sample is small, the decisions are treated as illustrative cases for analysing judicial reasoning rather than as statistically representative. Meanwhile, secondary data include recognized legal sources, such as the text of the Koran, hadith, the Compilation of Islamic Law (KHI), statutes and regulations (Law No. 48 of 2009, Law No. 11 of 2006, SEMA No. 1 of 2022 and Qanun Aceh No. 10 of 2018), fiqh books from the four main schools of thought, as well as trusted scientific journal articles.[12]

Data collection was operationalized through document study, namely by searching for and collecting references and legal documents to gather regulations, copies of Aceh *Syar'iyah* Court decisions, and classical jurisprudence teachings.

All collected data were then analyzed in a descriptively and qualitatively through three structured stages. The first stage is to reduce the data, namely, choosing and grouping the decision documents as well as the fiqh arguments that are closely related to the suspension mechanisms of the heirs. Each decision was coded in a matrix with six fields: the petition, the parties, the legal basis cited, the fiqh reasoning, the treatment of the estate, and the outcome; fiqh arguments were coded by principle (e.g., *istiṣḥāb*, *al-aqallu*, *al-mawqūf*). Furthemore, there is the presentation of data or data display, where the ideal concept of conditional distribution is critically examined against the facts found in the decisions of the Aceh *Syar'iyah* Court, using the *hifz al-mal* analysis tool. The last stage is making conclusions, where researchers are structuring new legal provisions into mechanisms that are conditional, fair, and responsive for use in court. Conclusions were verified by returning to the text of the decisions.

RESULTS AND DISCUSSION

A. Reality Of *Mafqud* And Dynamic Of Legal Discovery At The Aceh *Syari'ah* Court

Inheritance issues involving missing persons (*mafqud*) in Aceh have very specific and complex historical and social roots.[13] In fact, the *mafqud* case in Aceh is not just a theory, but a real phenomenon that is a remaining part of two large events: armed conflicts during a military

[11]Lexy J Moleong, "Metodologi Penelitian Kualitatif (Edisi Terbaru)," *Bandung: PT Remaja Rosdakarya*, 2021.

[12]John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage publications, 2016).

[13]Mareta and Sumardi, "Eksistensi Mafqud Dalam Hukum Islam Dan Hukum Positif Indonesia: Implikasi Terhadap Hak Waris Dan Perkawinan."

operation period in the operational area (DOM) and the earthquake disaster in 2004.[14] Thousands of people have not been found (BRR and BNPB recorded between 6,245 and 37,000 missing persons for the tsunami, and KKR Aceh recorded 1,958 for the conflict period, as noted in the Introduction), leaving families and inheritance assets (*tirkah*) whose ownership status is unclear.[15] This dynamic has occurred again in recent years, especially in the land acquisition process for the Sigli Banda Aceh (Sibanceh) National Strategic Toll Road Project, which has given rise to various legal problems related to proving land rights and determining heirs. In practice, heirs with *mafqud* status can delay payment or compensation or the completion of land administration until there is legal certainty regarding the status of these heirs.[16] In practice, heirs with *mafqud* status can delay the payment of compensation or the completion of land administration until there is legal certainty regarding the status of these heirs.[17]

In facing this situation, the method of adjudicating cases at *Syar'iyah* (MS) courts in various regions of Aceh has usually followed formal channels and prioritized procedures. The judge usually requests an official decision regarding death (*al-maut al-hukmi*) first before the assets left behind can be completely distributed to the heirs. This prcatice is legally understandable because the Compilation of Islamic Law (KHI) has a legal vacuum and does not have direct rules regarding the distribution of assets if there are missing heirs.[18] However, sociologically and economically, this practice of total delay causes very serious legal problems. Waiting for the process of proving that a person is no longer alive until the court gives a death sentence takes years.[19] During this waiting period, the inherited assets cannot be used, remain idle without generating benefits, and actually harm the heirs who really need the money for their living needs.[20]

Both decisions were issued as petitions (permohonan) at first instance, and neither concerns a contested estate; the facts below are taken from the operative orders published in the Supreme Court Decisions Directory. In the decision of the Banda Aceh *Syar'iyah* Court Number 286/Pdt.P/2020/MS.Bna, the panel of judges considered the case based on the fiqh doctrine regarding *mafqud*. This shows that determining *mafqud* status is not only related to aspects of jurisprudence but also to the need for legal certainty regarding whether a person is still alive or dead before the inheritance legal process is regulated.[21] Meanwhile, the Calang *Syar'iyah* Court

[14]Sulaiman Tripa, *Diplomasi Bencana: Lessons Learned Dari Aceh* (Bandar Publishing, 2024).

[15]Taqwaddin Taqwaddin et al., "Penyelesaian Tanah Korban Tsunami Yang Tidak Ada Dan/Atau Tidak Diketahui Ahli Warisnya," *Jurnal Media Hukum* 19, no. 2 (2012), https://doi.org/https://doi.org/10.18196/jmh.v19i2.104.

[16]O V A Uswatun Nadia, "Status Kepemilikan Dan Penguasaan Tanah Yang Tidak Ada Ahli Waris Pasca Tsunami Di Aceh (Studi Kasus Di Kabupaten Aceh Besar)" (Universitas Gadjah Mada, 2021).

[17]Mareta and Sumardi, "Eksistensi Mafqud Dalam Hukum Islam Dan Hukum Positif Indonesia: Implikasi Terhadap Hak Waris Dan Perkawinan."

[18]Muhibbussabry, "Hak Waris Mafqud (Orang Hilang) Dan Penyelesaian Dengan Metode Mauquf (Penangguhan)."

[19]Fajar Sugianto, Denny Ardhi Wibowo, and Tomy Michael, "Kedudukan Instruksi Presiden Republik Indonesia Nomor 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam Dalam Sistem Hukum Kewarisan Indonesia," *Jurnal Aktual Justice* 5, no. 1 (June 8, 2020): 19–37, https://doi.org/10.47329/aktualjustice.v5i1.518.

[20]Sarah, Syamsul, and Abdul Jafar, "Warisan Mafqud Dan Orang Mati Bersama Menurut Imam Mazhab Dan Hukum Islam Di Indonesia."

[21]Hamda Sulfinadia et al., "Interpreting Mafqūd in Modern Courts: The Influence of Classical Fiqh Schools on Judicial Ijtihad in Indonesia," *Justicia Islamica* 23, no. 1 (2026): 119–50, https://doi.org/https://doi.org/10.21154/justicia.v23i1.9694.

decision Number 0066/Pdt.P/2017/MS.Cag shows the same approach, namely by making the determination of the legal status of *mafqud* a condition for determining the heirs. This finding shows that the justice system is still based on clarity of personal status, not on temporary protection mechanisms for inherited assets.[22] Table 1 provides a comparative summary of the two judicial decisions and identifies the aspects requiring further verification through an examination of their full texts.

Table 1. Analysis of the decisions of the Aceh *Syar'iyah* Courts

Aspect	Decision No. 286/Pdt.P/2020/MS.Bna (Banda Aceh)	Decision No. 0066/Pdt.P/2017/MS.Cag (Calang)
Court, date and type of case	Banda Aceh *Syar'iyah* Court; decided 15 December 2020 (registered 8 December 2020); civil-religious matter, first instance; keyword "Lain-lain"	Calang *Syar'iyah* Court; decided 23 August 2017 (registered 2 August 2017); civil-religious matter, first instance; keyword "P3HP/Penetapan Ahli Waris".
Petition and parties	Petition by a wife (the *Pemohon*) concerning her husband, H.A.A., who is the missing person.	Petition by the biological children (sons) of the deceased N. binti M.A., as her heirs; the missing person (*mafqud*) is M. bin U., the biological father of the petitioners.
Operative order (*amar*)	(1) Grants the petition; (2) declares by law that the petitioner's husband has died, with all legal consequences; (3) costs of Rp206,000.	(1) Grants the petition; (2) declares M. bin U. dead because he was *mafqud*; (3) declares N. binti M.A. dead on 26 June 2017 in Gampong Padang Datar, Krueng Sabee, Aceh Jaya; (4) determines her heirs as three sons (children of M. bin U.); (5) costs of Rp171,000.
Legal reasoning of the panel	As described by the author, the panel considered the case on the basis of the fiqh doctrine on *mafqud* and treated the determination of status as necessary before the inheritance process is regulated.	The operative order states that death is declared "because of *mafqud*"; the missing person is not listed among the heirs, so his status was settled before the heirs were determined.
Fiqh principles applied	Maxim identified by the author: *dar'u al-mafāsid muqaddamun 'alā jalb al-maṣāliḥ* (preventing harm takes precedence over securing benefit).	Maxim identified by the author: *dar'u al-mafāsid muqaddamun 'alā jalb al-maṣāliḥ* (preventing harm takes precedence over securing benefit).
Relationship with KHI and statutes	According to the author's observation, judges of the *Syar'iyah* Courts commonly refer to KHI and the Civil Code (BW) in petitions of this kind. KHI contains no rule on distribution while an heir is missing.	According to the author's observation, judges of the *Syar'iyah* Courts commonly refer to KHI and the Civil Code (BW) in petitions of this kind. KHI contains no rule on distribution while an heir is missing.
Treatment of the estate pending status	The operative order contains no order on the estate.	Status of the missing person, death of N. and heirs are settled in one order; the operative order contains no order on interim protection of the estate.
Context of missing persons in the	2004 tsunami: BRR reported approximately 130,000 deaths and 37,000 missing persons, while BNPB recorded 166,080 deaths and 6,245 missing persons. Armed conflict: KKR Aceh documented 1,958 missing persons. Sibanceh toll road: more than 3,000 land parcels	

[22]Sarah, Syamsul, and Abdul Jafar, "Warisan Mafqud Dan Orang Mati Bersama Menurut Imam Mazhab Dan Hukum Islam Di Indonesia."

jurisdiction (official data)	acquired (LMAN financing for 3,031 parcels). These figures show the scale from which petitions on missing persons arise; they do not describe the facts of the two decisions.	
Interim mechanism in comparable practice (for comparison)	In land acquisition, compensation owed to owners whose heirs are missing or untraceable is consigned at the District Court, and Baitul Mal is authorized to manage land without clear heirs. In the two decisions analysed, no equivalent interim mechanism for the estate appears in the operative orders.	
Legal gap shown	Status is addressed; interim distribution and protection of the estate are not.	Status and heirs are addressed; interim distribution and protection of the estate are not.

Three observations follow from the two decisions. First, the legal gap: the operative orders settle the status of the missing person (and, in Calang, the heirs) but contain no order on what happens to the estate in the meantime, because KHI offers no rule on that point (Article 96(2) covers only joint property) and SEMA No. 1 of 2022 operates at the execution stage. Second, the two decisions differ in kind, which is useful for the argument: in Banda Aceh the missing person is the spouse of the petitioner, a case in which a declaration of death remains necessary; in Calang the missing person is the biological father of the petitioners and, apparently, the husband of the deceased N., and thus a potential heir of her estate, which is exactly the situation in which conditional division could operate, yet the order settled his status first. Third, the dynamics of legal discovery: the panels used fiqh doctrine to fill the gap by requiring that status be determined first, which is a legitimate act of legal discovery (*rechtsvinding*), but the discovery stopped at status and did not extend to interim protection of the estate. The contribution of this study to the interim resolution of the estate of a missing person lies in taking that legal discovery one step further: while status is uncertain, the certain share of the present heirs can be released and the share of the missing heir protected, as set out in the next section.

B. Reconstruction of conditional division (*al-qismah al-mu'allaqah*) as a solution to the legal dealock.

To overcome legal obstacles (*rechtvacuum*) that occur due to total delays, this research offers an approach by rebuilding a conditional distribution mechanism (*al-qismah al-mu'allaqah*) adapted from classical jurisprudence teachings into the Indonesian positive legal system.[23] Operationally, this mechanism does not lock all the assets left by the deceased person. On the other hand, the assets are immediately divided when the heir dies by dividing them proportionally. The heirs who are present receive a minimum share (*al-aqallu*), which is definitely their right (*al-yaqin*) , without considering whether the lost sibling (*mafqud*) is still alive or dead.[24] Meanwhile, the maximum portion that may belong to the *mafqud* is set aside and postponed first (*al-mawquf*).[25]

The normative basis of the mechanism lies in the classical treatment of heirs whose status is uncertain. Jurists approach the share of such an heir through the presumption of continued life (*istiṣḥāb al-ḥayāh*) and the rule that certainty is not removed by doubt (*al-yaqīn lā yazūl bi al-*

[23]Ministry of Awqaf and Islamic Affairs, Kuwait, *Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaitiyyah* (Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyyah, 2006).

[24]Al-Khatib al-Shirbini, *Mughni Al-Muhtaj Ila Ma'rifat Alfaz Al-Minhaj* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1994).

[25]Ibn Qudamah, *Al-Mughni* (Riyadh: Dar 'Alam al-Kutub, 1997).

shakk). Under the approach of the majority of jurists, the portion that may belong to the missing heir is not distributed to others but suspended, while the Hanafi school limits the presumption to the protection of the missing person's own property.[26] This study builds on the precautionary approach of the majority because it protects both sides. In calculation, the estate is computed twice, once assuming that the missing heir is alive and once assuming that he is dead; each present heir receives the smaller of the two results (*al-aqallu*), which is the share that is certain for him in both situations (*al-yaqin*); and the remainder is suspended (*al-mawqūf*) until the status is clarified. The maxim *dar'u al-mafāsid muqaddamun 'alā jalb al-maṣāliḥ* explains why this design is preferable to either extreme: a total freeze prevents the harm of a wrongful distribution to the missing heir but causes hardship to the present heirs, while a full distribution does the opposite; conditional division prevents both harms by releasing only what is certain and suspending what is doubtful.

The mechanism is relevant to Indonesian positive law in four ways. First, KHI Article 96(2) already accepts suspension until death is established, actually or judicially, by a Religious Court decision, although only for joint property; the proposal extends the same logic of suspension to the share of an heir by analogy. Second, Article 5(1) of Law No. 48 of 2009 obliges judges to explore, follow and understand the legal values and sense of justice that live in society, Article 10(1) forbids a court to refuse a case on the ground that the law is absent or unclear, and Article 229 KHI repeats the duty to heed living legal values.[27] Third, SEMA No. 1 of 2022 accepts that the share of an untraceable heir is to be separated and deposited rather than distributed to others or left undetermined, and designates Baitul Mal for property in Aceh. Fourth, the authority of Baitul Mal to manage property whose owner is unknown rests on Qanun Aceh No. 10 of 2018 as amended by Qanun Aceh No. 3 of 2021.[28]

The mechanism is bounded so that it does not conflict with legal certainty. (a) It applies only when the death of the testator is certain and the missing person is an heir; where the missing person is the testator, the estate cannot be opened before *al-maut al-hukmi* is declared. (b) The identity and entitlement of the missing heir must be established by the court after reasonable efforts to locate him, such as a public announcement. (c) The distribution is made by a court order (*penetapan*) that fixes the shares of the present heirs, the suspended share and the custodian, so that no heir acts unilaterally. (d) The suspended share remains the potential property of the missing heir and is returned to him if he appears. (e) If the missing heir is later declared dead, the court sets the date of death: if he is deemed to have survived the testator, the suspended share passes to his own heirs; if not, it goes to the other heirs of the testator.

These findings indicate a difference between official legal provisions and the need for legal protection for abandoned assets. From a procedural law perspective, the method used by the judge does provide clarity regarding the status of *mafqud*. However, from the perspective of legal benefits and the protection of owneship rights (*hifz al-mal*), there is no mechanism that

[26] Ibn Qudamah, *Al-Mughni*; al-Shirbini, *Mughni Al-Muhtaj*; al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, on *istiṣḥāb al-ḥayāh* and the share of the missing heir.

[27] Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman, Arts. 5(1) and 10(1); Kompilasi Hukum Islam, Art. 229.

[28] Qanun Aceh Nomor 10 Tahun 2018 tentang Baitul Mal, as amended by Qanun Aceh Nomor 3 Tahun 2021.

allows heirs to get the share that is definitely their right without having to wait for the annoucement of death. This gap in the mechanism is the reason why the conditional distribution model (*al-qismah al-mu'allaqah*) needs to be reconstructed, as suggested in this research.

To make it easier for the mapping between ongoing legal practice with law reconstruction offered, please see the details of the dispute indicator in Table 2 below:

Table 2. Comparison of judical practice excisions and reconstruction (*al-qismah al-mu'allaqah*)

analysis indicator	current judiicial practice (total procrastination)	the legal reconstruction offered (parole distribution)
the iverall status of inheritance	freezing, stagnant, and can't be transferred until out of the death verdict (*al-maut al-hukmi*).	it's directly distributed partly without having to wait for years of dead evidence.
protection of the heirs present	economic rights are neglected and abandoned because inherited capital assets are held hostage by *mafqud* status.	economic rights are fulfilled immediately through the disbursement of the minimum portion (*al-aqallu*) that is their absolute right.
heir protection *mafqud*	there is a risk of being controlled unilaterally by other heirs if the family is determined to divide the assets between their hands.	fully protected in a suspension post supervised by the state or trusted institution.
real case impact (sibanceh toll road compensation)	consignment funds settle in the bank, triggering internal family conflict due to financial needs.	the heirs' existing portion of funds can be immediately disbursed, toll road land disputes are resolved, and the family's economic wheels continue to run.
dimention *hifz al-mal* (maqashid)	only oriented towards the formal aspects of proof, ignoring the economic benefits of the living family.	oriented towards substantive benefits: keeping the value of assets productive and saving the family economy.

To be easier to understand, here is an explanation of the conditional distribution mechanism (*al-qismah al-mu'allaqah*) offered, with the order of its implementation (Figure 1).

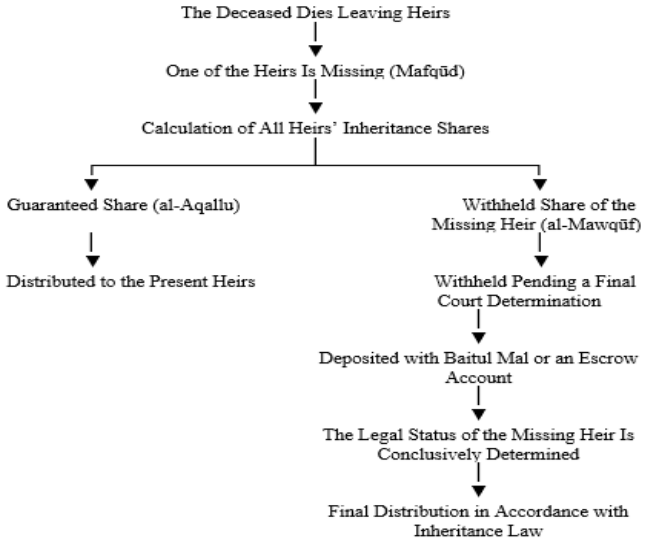


Figure 1. Reconstruction flow of conditional inheritance distribution (al-qismah al-mu'allaqah) for a missing heir (mafqūd) at the Aceh *Syar'iyah* Court

In the local context of Aceh, this conditional distribution mechanism has a very supportive institutional system to be implemented by the *Syar'iyah* Court. Assets that have *al-mawqūf* status (*mafqud* portion) are not allowed to be neglected; however, this study suggests that, based on the judge's decision in the *Syar'iyah* Court, the property is entrusted to Baitul Mal Aceh or other institutions designated as guardians (trustees), consistent with SEMA No. 1 of 2022, which designates Baitul Mal for the property of untraceable heirs in Aceh, and there is clarity regarding the *mafqud* status. As a regional institution that is already recognized by qanun (Qanun Aceh No. 10 of 2018 as amended by Qanun Aceh No. 3 of 2021), Baitul Mal has the power and ability to act as a guardian or curator of property belonging to someone whose existence is unknown. For money, the circular provides for deposit in the court's register. Another alternative proposed here is to keep the funds at a local *Syar'iyah* bank in Aceh through a special account that is used to accommodate funds (*escrow account*), subject to the conditions stated in the discussion of the *tahsiniyyat* level below.

Juridically, the implementation of the conditional distribution cannot be considered a form of the legal discovery function (*rechtsvinding*) by the judge in filling regulatory gaps.[29] In the religious justice system, judges are obliged to find, follow, and understand the legal values and sense of justice that exist in society, as explained previously.[30] Therefore, for the people of Aceh, who value the principles of benefit and protection of family rights, the mechanism for dividing inheritance assets with conditions can be considered a form of legal ijtihad by the judge, aimed at avoiding losses due to the indefinite freezing of inheritance, which can take an excessively long time. This is supported by Article 5, paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, and reitearated in Article 229 of the Compilation of Islamic Law.[31]

C. Analysis of *maqasid al-syari'ah*: realizing *hifz al-mal* in the jurisprudence of the *Syar'iyah* Court

The reconstruction of the inheritance distribution mechanism for *mafqud* heirs at the Aceh *Syar'iyah* Court not only aims to resolve technical problems in the distribution of inheritance but is also a way to implement the objectives of *Syar'iyah* (*maqasid al-syari'ah*), especially to protect assets (*hifz al-mal*).[32] From a maqasid perspective, protecting property does not only mean maintaining ownership, but also ensuring that the property can be used fairly and benefically, and that it does not harm the parties who have rights to the property.[33] Based on the hierarchy of interests, this conditional distribution mechanism is considered capable of protecting assets at the *ḍaruriyyat* level, while also helping to maintain benefits at the *hajiyyat* and *tahsiniyyat* levels.[34] Following al-Syatibi, *ḍaruriyyat* are the interests without which religious and worldly life collapses, *hajiyyat* are the interests whose absence causes hardship but not collapse, and

[29]Agi Attaubah Hidayat et al., "Penemuan Hukum Oleh Hakim Di Indonesia: Dasar, Metode, Serta Implikasinya Terhadap Kepastian Dan Keadilan Hukum," *Legalite : Jurnal Perundang Undangan Dan Hukum Pidana Islam* 10, no. 1 (February 27, 2025): 123–40, https://doi.org/10.32505/legalite.v10i1.9770.

[30]Pandu Dewanto, "Rekonstruksi Pertimbangan Hakim Terhadap Putusan Sengketa Perdata Berbasis Nilai Keadilan," *Jurnal Ius Constituendum* 5, no. 2 (October 22, 2020): 303–24, https://doi.org/10.26623/jic.v5i2.2307.

[31]Siti Afifah Solehah Afifah, Abdul Kadir Sabaruddin, and Musthafa, "Konsep Hibah Bersyarat Sebagai Pencegahan Terjadinya Sengketa Waris Di Pengadilan Agama," *Indonesian Journal of Law and Justice* 3, no. 2 (December 23, 2025): 10, https://doi.org/10.47134/ijlj.v3i2.5258.

[32]Syihab, "Telaah Kritis Pemikiran Jasser Auda Dalam Buku 'Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach.'"

[33]Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami Wa-Adillatuh* (Dar Al-Fikr Al-Mouaser, 1989).

[34]Raka M Rakhan Abrar Yudhistira, "Dampak Vasektomi Terhadap Keluarga Dalam Tinjauan Hifz Nasl Menurut Imam Al-Syatibi" (Universitas Muhammadiyah Malang, 2025), https://doi.org/https://doi.org/10.38035/jim.v4i3.

taḥsiniyyat are the interests that perfect the quality of life and conduct. In this article each level is tied to a measurable indicator (Table 3), so that the claims can be assessed rather than only asserted.

The level of *darūriyyāt* (protection of absolute rights and ownership)

At the level of ḍaruriyyat, the conditional distribution mechanism ensures the protection of ownership rights (*hifz al-mal*) for every heir, including those with the status of *mafqud*. This study suggests that the share of wealth that is the potential right of *mafqud* (*al-mawqūf*) is not shared with other heirs but rather delayed and managed by the party appointed by the court, such as Baitul Mal Aceh or other institutions that have the authority to comply with the provisions of the legislation. With this mechanism, *mafqud*'s right remains protected so that no party can control it arbitrarily. This prevents accumulation of wealth or a dispute between the heirs if one day the person appears again or there is legal certainty regarding his status.[35] The legal status of *al-mawqūf* needs to be stated precisely. The suspended share is neither the property of the other heirs nor ownerless property; it remains the potential property of the missing heir, and what is suspended is the right to dispose of it, not the ownership. The custodian therefore holds it as a trust (*amānah*): it may keep, record and report, but it may not distribute, consume or transfer the share without a court order, and it is liable only for negligence in safekeeping. The role of Baitul Mal Aceh is accordingly protective rather than proprietary: on the court's order it receives the suspended property, records it, safeguards it and returns it, relying on SEMA No. 1 of 2022 and Qanun Aceh No. 10 of 2018 as amended by Qanun Aceh No. 3 of 2021. The authority of the judge is also limited. The judge acts on a petition by a *penetapan*; the judge may fix the shares and order the deposit but may not allocate the suspended share to anyone until the status of the missing heir is determined; and legal discovery under Article 5(1) of Law No. 48 of 2009 may fill a gap but may not contradict a provision such as Article 171 letter c KHI on who is an heir.

The level of *hajiyyat* (eliminating family economic difficulties)

At the level of hajiyyat, the conditional distribution mechanism functions to eliminate difficulties (*raf' al-haraj*) experienced by heirs whose existence is certain. Delaying the distribution of all inherited assets until a decision is made regarding the *mafqud*'s death can cause economic problems, especially if the inherited assets are the only source of family income. Therefore, through conditional distribution, the heirs who have been determined can immediately receive the smallest portion to which they are legally entitled, while the portion that is still being debated is postponed until there is legal certainty. Thus, the *mafqud*'s rights remain protected without ignoring the urgent needs of the other heirs.[36] This level is assessed by the time lag between the death of the testator and the release of the present heirs' shares, compared with the time needed for *al-maut al-hukmi*, and by whether the urgent needs of the heirs can be met (Table 3).

Level of *tahsiniyyat* (productive managements of assets)

At the tahsiniyyat level, the conditional distribution mechanism is aimed at creating more effective and productive management of inheritance. This research suggests that the portion of assets that have *al-mawqūf* status should not be left wasted or unused, but should be placed in a custody mechanism determined by the court, either through Baitul Mal Aceh or *Syar'iyah* financial institutions (*escrow account*) as a holding account, in accordance with applicable legal regulations or futher adjustments in the future. If possible according to law, these assets can be managed using *Syar'iyah* instruments that are safe and low-risk so that their economic value is

[35]Ministry of Awqaf and Islamic Affairs, Kuwait, *Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaitiyyah*.

[36]Syihab, "Telaah Kritis Pemikiran Jasser Auda Dalam Buku 'Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach.'"

maintained until there is a legal decision with permanent force regarding *mafqud* status. It must be stated clearly which parts rest on existing law and which are proposals. Money may already be deposited in the court's deposit register, and other property placed with Baitul Mal Aceh, under SEMA No. 1 of 2022. Placing the suspended money in a Sharia bank account, or in any productive instrument, goes beyond that circular: it is a proposal de lege ferenda that should be carried out only on an express court order, in an institution operating under Qanun Aceh No. 11 of 2018 and Law No. 21 of 2008, and in a capital-protected form such as a *wadīʿah* savings account, so that the principal is not exposed to speculation. Without such an order, the duty of the custodian remains safekeeping. Thus, this mechanism not only maintains a person's ownership rights but also encourages more efficient use and management of assets in accordance with the objectives set by *maqasid al-syari'ah*.[37]

Table 3. Measurable indicators of *hifz al-mal* at each level

Level	Interest protected	Operational indicators	Anchor
Daruriyyat	Ownership of the missing heir and the certain share of the present heirs	(1) A court order fixes the *al-aqallu* shares and the suspended share (yes/no); (2) the suspended share is deposited with a recorded custodian within the period set in the order; (3) the order provides for return if the missing heir appears	KHI Art. 171(c); SEMA No. 1 of 2022; Qanun Aceh No. 10 of 2018
hajiyyat	Relief from hardship (*rafʿ al-ḥaraj*) of the present heirs	(1) Time lag between the death of the testator and release of the present heirs' shares, compared with the time to *al-maut al-hukmi*; (2) share released as a percentage of the estate; (3) urgent needs met (education, health, housing) as reported by heirs or judges	Court decisions (Table 1)
Tahsiniyyat	Quality of the management of the suspended assets	(1) Value of the suspended asset preserved, compared with inflation over the same period; (2) placement in a Sharia-compliant, capital-protected instrument, on court authorization; (3) periodic report by the custodian to the court	Qanun Aceh No. 11 of 2018; Law No. 21 of 2008; the principle of *amānah*

CONCLUSION

This study draws three findings. First, in the decisions analysed, the Aceh *Syar'iyah* Court makes the determination of the status of the missing person a precondition for distributing the estate, so the whole estate remains suspended and the economic rights of the living heirs are harmed; this reflects a gap in Islamic inheritance law as applied in Indonesia, since KHI only regulates the suspension of a missing spouse's joint property (Article 96(2)) and SEMA No. 1 of 2022 only addresses deposit at the execution stage. Second, the conditional distribution mechanism (*al-qismah al-mu'allaqah*), built on the classical rules of *al-aqallu*, *al-yaqin* and *al-mawqūf*, can be applied through legal discovery (*rechtsvinding*) by the judge under Article 5(1) of Law No. 48 of 2009 and Article 229 KHI, within defined limits: the death of the testator must be certain, the missing person must be an heir, and the distribution must be fixed by a court order. Third, assessed through *maqasid al-syari'ah*, the mechanism protects the ownership of the missing heir (*daruriyyat*), relieves the hardship of the present heirs (*hajiyyat*) and, where the law allows, enables prudent management of the suspended assets so that their value is preserved (*tahsiniyyat*).

[37]Wahbah al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu* (Damascus: Dar al-Fikr, 2007).

The theoretical contribution of this study is an operational reading of the classical precautionary rule within Islamic inheritance law, with a defined scope, calculation method, custodian and indicators of assessment. The practical contribution is a procedure that the judges of the Aceh *Syar'iyah* Court and Baitul Mal Aceh can follow to release the certain share of the present heirs while keeping the share of the missing heir safe.

These are findings of the study. The following are recommendations that go beyond the findings. First, the Aceh *Syar'iyah* Court may consider applying conditional distribution in petitions involving a missing heir, relying on SEMA No. 1 of 2022 and Article 5(1) of Law No. 48 of 2009, with a court order that fixes the shares, the suspended share and the custodian. Second, Baitul Mal Aceh may prepare internal procedures for receiving, recording, safeguarding and returning suspended property under Qanun Aceh No. 10 of 2018 as amended by Qanun Aceh No. 3 of 2021. Third, any placement of suspended money in Sharia financial institutions should first be regulated, for example by a Supreme Court regulation or circular coordinated with the competent authorities under Qanun Aceh No. 11 of 2018, because the existing legal basis covers deposit and safekeeping only. The findings are limited to two first-instance decisions (Banda Aceh, 2020; Calang, 2017) so further research with a wider sample of decisions from other *Syar'iyah* Courts in Aceh is needed.

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