

Shari'ah Court in Thailand: Between Inspiration and Challenge

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Abstract

Thailand is a multicultural society, blending Chinese, Indian and Malay cultures into a single state structure. Within it, however, there are stark contrasts as to what role religion, especially Islam, should play in identity formation and its articulation at different levels and different planes of life. This paper shall discuss the background of the Shari'ah court in Thailand and the problems that have been encountered through the years. Shari'ah court in Thailand commonly exists inside the ambit of the Thai judicial court system. In fact, the Shari'ah court in Thailand is an ideal Islamic court that explicitly displays the difference between state courts. The establishment of the Shari'ah court was intended to provide an alternative platform for the Muslim people in Thailand in the field of adjudication. In this paper, the author seeks to highlight the position of the Shari'ah court in the south from the point of view of the Thai judicial system and the decision of Dato' Yuthithams (Muslim judges). This paper will also explore recent developments in Shari'ah court which is applicable in the Malay-Muslim speaking provinces namely, Patani, Narathiwat, Yala and Satul provinces regarding cases decided by the Dato' Yuthitham, and its jurisdiction in the matter of matrimonial disputes for the Malay Muslims.

Keywords: Shari'ah court, Dato' Yuthitham, Thai court jurisdiction, Islamic family law.

Introduction

Although Thailand is a Buddhist country, the Shari'ah court was introduced in Ayuthaya Dynasty, but its roles were limited. The Shari'ah Court in Thailand is the symbol of the position of Islamic law and the power of the Muslims in Thailand. It has a long history in the Thai legal system. Talking about Shari'ah Court in Thailand one must trace it back to the position of the first Muslim arbitration in the Court of the Department of the Right Harbour during the reign of the *Pracau Songtham* (1602-1627). There are 3 courts namely; Court of *Krom Tha Klang*, the court of *Krom Tha Sai* and Court of *Krom Tha Kwa*. As for Court of *Krom Tha Kwa* is owned by "Shaykh al-Islam." Whenever there arose a dispute amongst the Muslims, the case would be entrusted to the person who has had a piece of special knowledge of Islamic law.

The first Muslim arbitrator of Court of *Krom Tha Kwa* was *Chao Phraya Sheikh Ahmad Rattana Rajesti*, of Persian descent. When there was a dispute amongst the Muslims, Shaykh Ahmad, acted on behalf of the king, and became an Islamic arbitrator in the Court of *Krom Tha Kwa*. Another important area of arbitration was marriage. It was reported that when a Muslim trader intended to marry a local girl, the latter had to convert to Islam. Thus the marriage would then be conducted in accordance with the Islamic law. The products of such unions became part of the new and expanding Muslim communities in Thailand. From these examples, it can be inferred that the Islamic law existed independently as a regulating force within the Muslim Community. It grew and developed side by side with the culture of the Thai Buddhist people who lived in the city of Ayuthaya. This development was considered a new development in the history of the Siamese Legal System whereby the Siamese kings recognized and allowed the Islamic law to be applied and implemented freely in the capital within the small department. Furthermore, it shows that Siamese kings at that time were very concerned about the Islamic personal law for Muslims who lived in and around the Ayuthaya.

The Position of the Shari'ah Court and Islamic law in Thailand

The Kingdom of Thailand, unlike any other Asian country, has never been colonized by western powers. Malay states such as Kelantan, Kedah and Perak which are neighbouring states of Narathiwat, Yala and Satul provinces at that time were colonized by British. This colonization was undoubtedly affected indirectly by the application of Islamic law in the four southern provinces of Thailand. Moreover, the position of the religious court in those regions depended greatly upon the policy and the administrative system of the Thai government. With regard to the position of the Islamic law in Thailand especially in those four provinces of the Kingdom, it could be divided into three separate dynasties¹ namely; (a) Sukhothai Dynasty,² (b) Ayutthaya Dynasty³ and earlier period of Rattanakosin Dynasty.⁴

¹This is based on Thai history which is normally traced back to Sukhothai period (1238-1378), Ayutthaya period (1350-1767), Thonburi period (1767-1782) and Rattanakosin period 1782 till present day.

²Sukhothai was considered as the first capital of Thailand, started from 1238 until 1378. See Syamananda, R. 1973. *A History of Thailand*. Bangkok: Chulalongkorn University Press. p. 63.

³Ayutthaya was considered as the second capital of Thailand after Sukhothai, started from 1350 until 1767. See *ibid.*,

⁴At present Bangkok is the capital.

A. The Position of the Shari'ah Court and Islamic Law during the Sukhothai Dynasty (1238-1378)⁵

The Siamese Kingdom of Sukhothai claimed that the Kingdom of Patani was considered a vassal state to the Sukhothai Kingdom.⁶ The Siamese king did not ever interfere with the Administration of Islamic Law in the south. Therefore, the rulers of Patani at that time could freely implement Islamic law on their subjects by establishing the Islamic religious institutions with a view to apply Islamic law in its totality. Freedom was given to those principalities to administer their own affairs. Moreover, there were several contributing factors that enabled the Islamic law to be implemented smoothly in the Kingdom of Patani. Firstly, the Kingdom of Patani was considered as a part and parcel of the Malay Peninsula which fell to the Islamic influence brought by the Muslim traders who came from India and Arabia.⁷ Therefore, it can be inferred that, the Patani Kingdom was influenced by Islam like other Malay states in the peninsula, such as Malacca, Pahang, Kedah, Kelantan, Terengganu and Johor.

The second factor was contributed to a hierarchy of the religious authority that played a significant role in preserving Islam. The Sultan of Patani Kingdom, as ecclesiastical head would then appoint a *muftî* (jurist consult) as his religious counselors. Under the *muftî* there was a *qâdî* who acts as an Islamic judge of the district. At the same time, the *qâdî* will act as religious adviser to the district head. At the district level, there were *imâm*, *khâtib* and *bilâl* of the various mosques in the district.⁸ All of them were responsible for enforcing Islamic law and settling marriage, divorce and inheritance disputes. This classification indicated the difference in the responsibilities and functions of the *sulîm*, *muftî*, *qâdî*, *imâm*, *khâtib*, and *bilâl* in the implementation of the Islamic Law in the Kingdom of Patani. This religious hierarchy shows that a Sultan was the highest state official in the Kingdom. Nevertheless, he could not overrule *fatwâ* or religious ruling issued by a *muftî*.⁹ In this period the Islamic law was regarded as the law of the Kingdom while the Siamese Kings in the Sukhothai recognized the law that was implemented by the Muslim rulers in the respective localities and it shows that Islamic law had become law of the land for the Kingdom of Patani.

⁵Sukhothai dynasty is lasted about 140 years. There were 6 kings ruled the dynasty. The famous king in this period was King *Khunsi Inthrahit* who managed to overthrow the Khmer power and established the first Thai Kingdom by the name of *Sukhothai* to the north of Chiangmai and King *Khun Ram Khamhaeng* who introduced the Theravada school of Buddhism to his country. See Piyaparn, B. 1995. *Prawasart Thai (Thai History)*, Bangkok: O.S. Printing House, pp. 59-62; and War Shaw, S. 1973. *Southeast Asia Emerges*. California: A Diablo Press, pp. 29-30.

⁶Suwannathat-Pian, K. 1988. *Thai-Malay Relations: Traditional Intra-Regional Relation from the Seventeenth to the Early-Twentieth Centuries*. New York: Oxford University Press. p. 161.

⁷Jusoh, H. 1991. *The Position of Islamic Law in the Malaysian Constitution with Special Reference to the Conversion Case in Family Law*, Kuala Lumpur: Dewan Bahasa Dan Pustaka. p. 1.

⁸Che Man, W.K. 1990. *Muslims Separatism: The Moros of Southern Philippines and the Malay of Southern Thailand*. Singapore: Oxford University Press. pp. 40 - 41.

⁹Ibid.

B. The Position of the Shari'ah Court and Islamic Law during the Ayutthaya Dynasty (1350-1767)¹⁰

The status of being a vassal state to the Siamese king continued until the reign of Ayutthaya Dynasty. According to Surin Pitsuwan the Kingdom of Patani was considered a vassal state to Bangkok since 1782. However, neither the King nor the Governor had ever tried to interfere with the region's matters.¹¹ This includes matters relating to religion and customs of the Muslims in the south. In other words, during the period of Sukhothai and Ayutthaya, there was no interference by the Siamese King to introduce Siamese Legal System into Patani legal administration. However, during the reign of Ayutthaya dynasty, the position of Shari'ah Court and Islamic law was further divided into two stages firstly, the position of Islamic law in the Kingdom of Patani and secondly the position of the Shari'ah Court and Islamic law in the city of Ayutthaya itself.

(i) The Position of Shari'ah Court and Islamic Law in the Kingdom of Patani¹²

There was evidence showing that Islamic Criminal Law was also implemented besides the Islamic Family Law. Shaykh Muhammad Zayn al-FaïĒni¹³ who died in 1905, was asked to issue a *fatwa*¹⁴ concerning a husband who was accused of committing *zinÉ*.¹⁵ The problem relating to the above-mentioned issue reads as follows:

There was a wife who makes a claim before a judge that she wishes to divorce her husband by *faskh*,¹⁶ because her husband was accused of committing *zina*. The judge thereupon, summoned the husband to appear before the court. After the husband had appeared before the court, the judge made an investigation and asked the husband

¹⁰The Ayutthaya dynasty lasted about 400 years. This dynasty was centered on an island in the Chao Phraya River. There were 34 kings ruled the dynasty. See War Shaw, S. 1973. *Southeast Asia Emerges*, California: A Diablo Press. pp. 30-31.

¹¹Pitsuwan, S. 1982. *Islam and Malay Nationalism : A case study of the Malay-Muslim of Southern Thailand*, PhD thesis, Cambridge : Harvard University.p.119

¹² It is believed that the kingdom of Patani was officially declared as an Islamic state in 1457; Che Man, W.K .1990. *Muslims Separatism*, *ibid.*, pp. 32-33.

¹³ His full name is Shaykh Wan Aïmad bin Wan Muhammad Zayn bin Wan MustafÉ al-MalÉyÉwÉ al-FaïĒni. It was believed that his ancestor was a famous preacher who had come from xāramaut, Yemen. He was a student of Shaykh DawÉd al-FaïĒni. See al-FaïĒni, A.F. 2001. *NŪlamÉÑ Besar dari Patani*, Bangi: Universiti Kebangsaan Malaysia. p. 55.

¹⁴ It is to be noted that *fatwÉ* can be loosely translated as a religious ruling. *Fatwa* in Thailand previously issued by the Islamic Religious Committee Council and *tok gurus*. However, at the present *fatwa* can only be issued by *Shaykh al-IslÉm* which is commonly known by the Thai people as *Chula Rajmontri*. The position of *fatwa* in Thailand is not a statutorily regulated like in Malaysia, where the feature and status of *fatwa* are statutorily regulated. Thus the meaning and status of *fatwa* have to take into account provisions of governing statutes. See Shuaib, F.S. 2003. *Powers and Jurisdiction of Shariah Court in Malaysia*, Kuala Lumpur: Malayan Law Journal Bhd., p.44.

¹⁵ *ZinÉ* means sexual intercourse between a man and a woman not married to each other. It is immaterial whether it is adultery (where the participants are married people) or fornication (when they are unmarried). Islam regards in any case as a great sin. See I. Doi, A.R. 2002. *Woman in ShariÑah (Islamic Law)*, UK. ÛÉha Publishers Ltd., p.117.

¹⁶ It is a kind of dissolution of marriage which is usually instituted by the wife. However, under the Principle of Islamic Family law and law of inheritance code 1941(it will be cited as the code) provides that either the husband or wife may institute a judicial decree by *faskĲ*. See the code article 110.

to pronounce *ĪalÉq*. The husband declined to pronounce an *ĪalÉq* as requested by the wife.¹⁷

The wife then asked Shaykh AĪmad the following questions:

May I divorce my husband by *faskh*? The wife further asked the judge. “Was there any strong opinion of *ÑulamÉÑ* to support my question?” The wife continued by saying that if there was no strong opinions of *ÑulamÉÑ*. “Could you inform me the weaker one?” Shaykh AĪmad kept silent. The wife then informed Shaykh AĪmad that when a man who has already married and committed *zina* his blood will not be protected, therefore the ruler must order to stone him to death. After hearing the complaints made by the wife, Shaykh AĪmad told the woman that “I am not so sure whether Muslim rulers could implement such punishments. Owing to the fact that the infidel kings had ruled the country. Whereas the Muslim rulers were weak and they were unable to fight the infidel kings. Moreover, the Siamese Kings were stronger than Muslim rulers.”¹⁸

From the above-mentioned incident, it can be inferred that both the Islamic Family Law and the Islamic Criminal law were implemented in this kingdom, because the above-mentioned legal ruling was concerned with the punishments for adultery committed by a married man which fall under the ambit of the Islamic Criminal law.

(ii) The Position of the Shari’ah Court and Islamic Law in the city of Ayutthaya

With regard to the application of the Islamic Law around the city of Ayutthaya, it was reported that the Muslim traders who came from Persia, India and Malay Peninsula were allowed to practice the Islamic personal law on marriage, divorce and inheritance. During this period the Islamic personal law on marriage, divorce and inheritance were officially recognized and introduced by the Siamese King in the court of *Krom tha kwa*¹⁹ of Ayutthaya. The rationale behind allowing the Islamic Family Law to be implemented there was because this department was solely dealing with the Muslim traders who had made initial trading contacts with the Ayutthaya and most of them were Muslims who came from Persia, India and Arabia. Thus, to administer the Islamic personal law case more effectively within the Department, a Muslim named Shaykh Ahmad Qomi (1543-1631)²⁰ from Persia was officially appointed by King Songtham (1602-1627) of Ayutthaya

¹⁷In Islamic law the husband may release marriage tie by two ways a) the pronouncing the word *ĪalÉq* and b) by delegating his power to his wife. This kind of dissolution of marriage is called *tafwÊl al-ĪalÉq*.

¹⁸ Shaykh Wan AĪmad bin MuĪammad Zain bin MustafÉ al-FaĪEnÊ, *KitÉb al-FatÉwÉ al-FaĪĒniyyah*, edited by Hj. Wan Mohd ShaghÊr Ñabdullah. 1999. Kuala Lumpur: Khazanat FaĪĒniyyah, pp. 121-122.

¹⁹ It is a Thai word; it means a Court of the Right Harbour Department. It can try and hear case involving the family law and its related issues.

²⁰ He was later appointed by King Phra Chao Songtham of Ayutthaya Dynasty until the reign of King Phra Chao Prasat Thong of Ayutthaya Dynasty (1602 - 1655 A.D.) to become the first *Chula Rajmontri* of Thailand which is equivalent to Shaykh al-Islam, carries a title of Chao Phraya Shaykh AĪmad Ratana Rajsesthi. Since then Thailand had appointed 17 persons to be *Chularajmuntris*. They were considered as the highest leaders of Muslims in Thailand having its responsibilities to liaise between the government officials and Muslim Communities. The current Chularajmontri is a locally educated Muslim scholar, Sawad Sumalayasak. Formerly Democrat PM for a Bangkok constituency, he was elected on 16 October 1997 and confirmed in office by King Bhumibol Adulyadej on 5 November 1997. See Yusuf, M. 1998. ‘Islam and Democracy in Thailand: Reforming the office of Chularajmontri/Shaiikh al-Islam’, *Journal of Islamic Studies* 9: 2, p. 286; Vilaiwan, S. 2001. *Chularajmontri*, Bangkok: Chareun Phon. pp. 28-29; Raman, B.1978.

Dynasty to serve as the King's adviser and Islamic arbitrator in the department.²¹ As for other two courts, court of *krom tha klang* and *krom tha saai*²² the Thai law would be applied. This development was considered by the Thai historians as a new development in the history of the Siamese Legal System whereby the Siamese Kings recognized the Shari'ah Court and allowed the Islamic Family Law to be applied and implemented freely in the capital within the small department.

C. The Position of the Shari'ah Court and Islamic Law during the Rattanakosin Dynasty, 1782 until present day

In this period, the position of the Shari'ah Court and Islamic Law have undergone into 2 stages. Firstly, the position of the Shari'ah Court and Islamic Law in Thailand during the reign of King Chulalongkorn (Rama V) (1868-1910), Chakri Dynasty²³ and secondly, the position of the Shari'ah Court and Islamic Law after the abolishment of the application of the Islamic family law and Islamic law of inheritance in the four southern provinces.

(i) The Position of the Shari'ah Court and Islamic Law in Thailand during the reign of King Chulalongkorn (Rama V) (1868-1910) Dynasty

In this period, the King Chulalongkorn (Rama V) (1868 -1910) of Bangkok had taken many measures to ensure that the Patani Kingdom would be annexed into the Siamese state. This was achieved when the Anglo-Siamese Treaty was signed in 1909.²⁴ By virtue of this treaty, the Siamese Administration was gradually introduced in the Kingdom of Patani which caused the application of the Islamic Criminal Law ceased to be applied. In return the king allowed the Islamic family law to be implemented with the supervision of the central government. This treaty eventually made the Kingdom of Patani became part and parcel of Siamese's state. This interference over the Legal Administration of the Kingdom of Patani could clearly be seen when the Bangkok government issued the Royal Decree (1902) which *inter alia*, provides:

Khambanyai Krabuan Wicha Kotmai Islam (Series of Lectures on IslÉmic Law), Bangkok: Ramkhamhaeng University Press. p. 56;

²¹ Tohmina, D. 1997. *Shari'ah Court*, n.p., n.pp. p. 7; Jalayanateja, P. 1998. *Muslims in Thailand*, Bangkok: The Foundation of Islamic Centre of Thailand. p. 13.

²² Both of them are Thai words, the former means the Department of Middle Harbour and the latter means the Department of Left Harbour.

²³ It is interesting to be noted that rulers of the Chakri Dynasty consist of 9 persons. They are as follows: 1. King Rama I (Phra Puttha Yodfa Chulalok (1782 –1809) 2. King Rama II (Phra Puttha Leola Nophalai) (1809-1824) 3. King Rama III (Nang Klao) (1824 -1851) 4. King Mongkut (Rama IV) (1851-1864) 5. King Chulalongkorn (Rama V) (1868 -1910) 6. King Vajiravudh (Rama VI) (1910 -1925) 7. King Prajadhipok (Rama VII) (1925 –1934) 8. King Ananda Mahidol (Rama VIII) (1934 -1946) 9. King Bhumibol Adulyadej (Rama IX) (1946 - present.). See Russell F. Moore, R. F. 1975. *Thailand, Malaysia, Singapore: People, Places, History*. New York: *Thai-American Publishers*. p. 119; The Chakri Monarchs and the Thai People. 1982. *A special Relationship*, Bangkok: Chuan Printing Press Ltd., pp. ii-iii.

²⁴ Among the contents of this treaty was the transfer of the Siamese suzerainty over Kedah, Kelantan, Trengganu, Perlis, and the islands of Langkawi from Siam to Great Britain. The British, in return, recognized extraterritorial rights in Siam and acknowledged Siamese sovereignty over the Malay provinces of Patani, Bangnara (Narathiwat), Saiburi, Yala, and Satul. See W.K. Che Man. 1985. "Patani: From Sovereign Sultanate to Subnation (private)", *Journal of Institute of Muslim Minority Affairs*. Vol.6. January. p. 123.

...no law shall be passed unless by specific royal consent.²⁵

According to Surin Pitsuwan, the intention of the King Chulalongkorn (Rama) V (1868-1910) was to enact a single legal system applicable to the whole country.²⁶ Thus, it can be inferred that the implication of the Royal Decree (1902) would apparently, affect the application of the Islamic Law in the former provinces of Patani kingdom in the future. In order to maintain a good relationship between the Muslims in the south and the government, King Chulalongkorn (Rama V) has promulgated the Rule of the Administration in the Seven Principalities B.E. 2444 (1902). The most important provision of the rule was section 32 which *inter alia* provides:

The Criminal Code and Civil Code shall be applied to Thai citizens except in civil cases concerning husbands and wives, and inheritance cases in which both parties are Muslims or a Muslim is a defendant, in such cases, the Islamic law shall be applied.

There are a few points that should be remembered with reference to the position of the Islamic family law in Thailand. Firstly, subject to this rule, the application of the Islamic Law was applicable only within those seven areas in the south. There were Patani, Nongchik, Yaring, Saiburi, Yala, Raman and Ra'ngae.²⁷ These Seven Principalities were later abolished and combined into four provinces. However, the Islamic Law is still applicable in those four provinces. Secondly, the Islamic family law under this rule referred only to Islamic Law on marriage, divorce and inheritance only. With respect to other branches of the Islamic Law, for instance the Islamic Criminal Law and the Islamic Law of Transaction were not covered by this rule. Thirdly, under this act the litigant is given right to appeal if they were dissatisfied with the decision of the Provincial courts.²⁸

(ii) The position of the Shari'ah Court and Islamic Law in Thailand after the Abolishment of the Rule of the Administration in the Seven Principalities B.E. 2444 (1902)

In 1938 when the Field Marshall Phibul Songkhram (hereinafter referred to as P. Songkhram) an ultra-nationalist became the Prime Minister, the Islamic Family Law as well as the position of *Dato' Yuthitham* (Muslim Judges) in the Religious Court in those four regions were abolished²⁹ altogether and were replaced with the "Emergency Decree Amending the Act Promulgating the Provisions of Book V and VI of the Civil and Commercial Code of 1943." This Emergency Decree provides *inter alia*, all citizens are subject to the Thai Law irrespective of their origins and beliefs. As a result, the Muslim litigants have lost their venue to take their cases for the trial. As A. Forbes rightly pointed out that:

...Shari'a (Shari'ah) law was set aside in favour of the Thai Buddhist law of marriage and inheritance.³⁰

²⁵ Hirayato, U. n. d, *Paendin Thai: Changwat Chai Daen Paktai (Thailand: Southern Border Provinces)*, Bangkok: Local Administration Department of Interior. p. 28.

²⁶ Ibid., p. 28.

²⁷ Suwannathat-Pian-Pian, K. 1988. *Thai-Malay Relations*, ibid., p. 79.

²⁸ See Ministry of Justice Order, Letter No: 30 / 4353 Dated on 24th September B.E. 2460.

²⁹ Peter G. Gowing. 1990. "Moros and Khaek: the Problem of Muslim Minorities in the Philippines and Thailand", in: Ahmad Ibrahim, Yasmin Hussain (eds.), *Reading on Islam in Southeast Asia*. Singapore: ISEAS, pp. 183-184.

³⁰ Andrew Forbes. 1982. "Thailand Muslim Minorities: Assimilation, Succession or Coexistence?" in *Asia Survey*. Vol. 22, No: ii, pp. 1056-1073.

Because of that situation the Muslims in the south were deprived of their rights to practice their religion under the Thai Constitution. Nevertheless, the religious leaders in the village for instance *imam* and religious teachers still carried out their responsibilities in enforcing the Islamic law privately such as conducting marriage, divorce and settling inheritance disputes in their respective villages. It appears that this decree apparently contradicts to the basic concept of the freedom of religion as guaranteed by the Thai Constitution, 1997, article 38 of the said constitution provides:

A person shall enjoy full liberty to profess a religion, a religious sect or creed, and observe religious precepts or exercise a form of worship in accordance with his or her belief provided that it is not contrary to his or her civic duties, public order or good morals.

Besides that it would tarnish the position of the Majesty the King where His Majesty, the King is the upholder and the patron of all religions. Moreover, His Majesty the King always takes part actively in promoting the understanding between the majority of Thais and minority groups especially peoples in those regions.³¹ The abolishment of the application of the Islamic Law in those regions is no doubt would create a confrontation between the government and the local Muslim leaders. Thus, to appease the feelings of the Muslim in the south, the government reintroduced a new act namely the “Act on the application of the Islamic Law in Patani, Narathiwat, Yala and Satul, Act of B.E. 2489 (1946).”³² This Act is very concise and brief because it only consists of six sections. By virtue of this Act, the Muslims who are living in those four regions are again allowed to apply the Islamic Law on marriage, divorce and inheritance. In other words, they were exempted from the Thai Civil and Commercial Law Code, 1935 book V. Section 3 of the Act 1946 provides to the effect that:

Islamic Family Law and Inheritance shall be applied instead of the provisions of the Civil and Commercial Code, 1935 in the case where the plaintiff and defendant are Muslims.³³

However, in criminal cases they are still subject to the Thai Criminal Code (TCC)

The Hierarchy of the Courts in Thailand and the proposed *SharĒÑah* Court

According to the Law of Organization of Court of Justice, 1934, the Thai courts are divided into the Court of First Instance, the Court of Appeal and the Supreme Court. At present there are about 140 Courts of First Instance throughout the Kingdom. In Bangkok Metropolis, they are, for example, the Civil Court, the Criminal Court, the Juvenile and Family Court, the Central Labour Court and the Central Tax Court, including *Kwaeng* Courts which have jurisdiction over minor civil cases and criminal cases with maximum punishment of imprisonment not exceeding 3 years or fine not exceeding 60,000 Baht.³⁴

Cases on family issues and inheritance of Muslims in the four southern border provinces of Thailand are tried by the Provincial Courts (PC) which is under the Jurisdiction of the Court of First

³¹ The National Identity Board. 1995. Thailand in the 90s, the office of the Prime Minister, Kingdom of Thailand. p. 70; Peter G. Gowing. 1975. *Moros and Khek*, *ibid.*, pp.180-92.

³² It is to be noted that this act was issued on 3rd December, B.E. 2498 (1946).

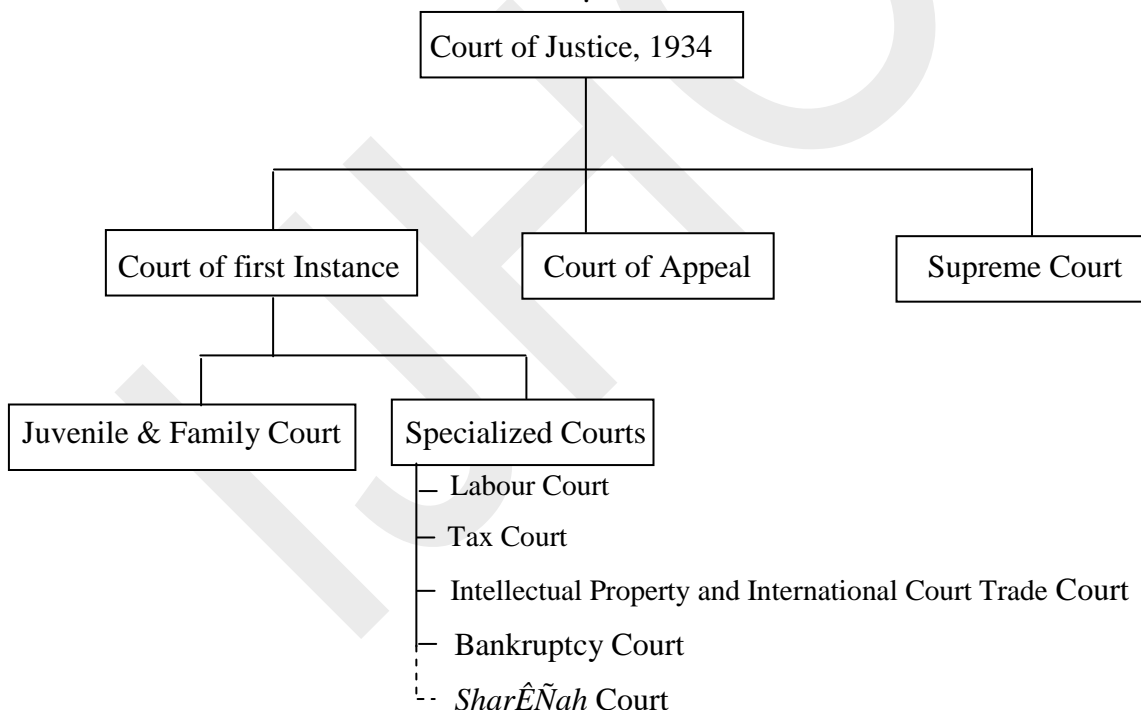
³³ See Section 3 (1) of the Application of Islamic Law in Patani, Narathiwat, Yala, and Satul of 1946.

³⁴ See Government and Politics-Judiciary and Justice Administration, <http://sunsite.au.ac.th/thailand/government/judi.html>. Baht is Thai currency 20 Baht is currently equal to 1 Dollar Singapore dollar.

Instance. The Jurisdiction of the Provincial Courts of Pattani, Narathiwat, Yala and Satul are extended to hear and try Islamic Law cases. The law provides that the Provincial Court must decide cases by two judges. However, in the Islamic Law they are assisted by two *Dato' Yuthithams*.

According to what has been mentioned above, it becomes clear that the *SharĒÑah* court, as understood by many people in the south is non-existent. Because the *Dato Yuthitham* has no liberty to decide the Muslims' cases. Moreover, it is not proper to establish *SharĒÑah* court under the Provincial courts since it will effect the present hierarchy of the court. As a matter of fact, in the Provincial Courts there are two more important courts, the Juvenile and Family Court as well as the Specialized Courts. There are four specialized courts in Thailand, namely the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court. A judge in the specialized courts is appointed from the judges who possess competent knowledge in their respective matters.

Since the government has recognized the special courts under the Provincial Courts, the *SharĒÑah* Court for Muslims in Thailand can also be categorized as a special court in order to open a room for a person who possesses a competent knowledge in the Islamic law to become a judge. More importantly, since Thailand is a Democratic Country, the establishment of the *SharĒÑah* Court is deemed necessary for the Muslims in this country.



Jurisdiction of the Provincial Courts with reference to Shari'ah Court

Shari'ah Court was annexed to the Provincial Courts. With regard to the jurisdiction³⁵ of the Provincial Courts in the four southern border provinces of Thailand with respect to the application

³⁵ It is to be noted that the word Jurisdiction in legal context means the power and authority of a court to hear, try and decide a case as contrary to the location, which is the place where the action must be instituted and tried. Generally, it is conferred by law and cannot be conferred by the consent of the parties or by their failure to object to the lack of it.

of the Islamic Family Law and Law of Inheritance is stated in the Act of Promulgating the Application of the Islamic Law in Patani, Narathiwat, Yala and Satul B.E. 2489 (1946). Section 3 of the act provides to the effect that:

Islamic Law on Family and Inheritance shall apply to the cases in the court of first instance³⁶ in Patani, Narathiwat, Yala and Satul where Muslims are both plaintiffs and defendants filing the request in non-contentious case.

From the above quoted article shows that the Court of First Instance, namely the Provincial Courts in those four provinces has limited jurisdictions to hear and try all actions and proceedings concerning marriage, divorce and inheritance in which the parties are Muslims living in those four southern provinces only.

With regard to the Muslims who live outside those four Southern Provinces they are exempted from this Act. This practice somehow may cause injustice towards the Muslims who live in other provinces of Thailand³⁷ since the Muslims in Thailand by virtue of article 38 of Constitution of the Kingdom of Thailand, 1997 may live and stay throughout the Kingdom. In other words, this Act tends to limit or restrict the place for the Muslims to live in the Kingdom³⁸ whereas Muslims who reside outside the Southern Four Provinces of Thailand are deprived of these privileges. An example can be seen in the Narathiwat Provincial court case of Santiphap Sing Haad v. Jamilah Sing Haad.³⁹ The applicant was born in Songkhla Province. He was a police officer at Klong-ngae Police Station in Sadao District, Songkhla Province. After serving several years at Klong-ngai Police Station, he was transferred to the Narathiwat Police Station.

In Narathiwat, the applicant married to Miss Jamilah according to Islamic Law and registered his marriage according to the Thai Civil and Commercial law Code, 1935 at the office of registrar in the Narathiwat District Office (NDO). The parties later decided to live together as a husband and wife in the District of Tanjongmas, Ra'ngae, and Narathiwat province. On 1st November, 1992, they had a baby. In 1996 the husband had pronounced a *talaq* against her wife

However, according to Thai Civil Procedure Code, article 2 (2) states to the effect that the action is not allowed to be instituted unless it is proven that the action was under the jurisdiction of that court. See Constitution of Justice Court Act, article 14 (2) provides the Provincial Courts have its jurisdiction according to the Act on establishing the Provincial Courts. Generally speaking, the Provincial Courts have the authority to hear and try cases throughout the province.

³⁶ It is significant to be noted here that according to the hierarchy of the Thai Courts of Justice they are classified into 3 levels; a) Sarn Chan Tun (the Court of First Instance), b) Sarn Uthon (the Court of Appeal) and c) Sarn Dika (the Supreme Court). With respect to the Court of First instance, it is categorized as a provincial court. Every province has one Provincial Court.

³⁷ Somswasdi, V. 1997. *Family Law*, Bangkok: Kobfai Publishing Work.p. 20; Southeast, A. 1987. *Shari'ah and Codification*, *ibid.*, p. 144; the decision of the Thai Supreme Court No : 102 / B.E. 2517 (1974). In this decision the court held that though the parties were Muslims and they were disputed over inheritance but the case was occurred outside the four border provinces. Thus, Islamic Law can not be applied because it was contrary to the article 3 of the act.

³⁸ *Ibid.*

³⁹ Narathiwat Provincial Court, Civil Suit No: 5 / B.E. 2539 (1996). There are some applicants whose permanent residence in the four border provinces of southern Thailand but they are reluctant to be abiding by Islamic law. They simply ask the court to apply Thai Civil and Commercial Law Code in stead of Islamic Law; see a decided case of Masare Waemada v. Prasit Waemada, Patani Provincial Court, Civil Suit No: 390 / B.E. 2534 (2000).

and registered his *ĪalÉq* at the Office of Registrar in the NDOO.⁴⁰ In 1999, the applicant had filed a suit against her wife and claimed custody over his daughter.

During the trial the question of court's jurisdiction was raised, whether the Narathiwat provincial court had jurisdiction to hear and try the applicant's case, owing to the fact that the applicant had lived outside the four southern provinces of Thailand. The learned *Dato' Yuthitham* of the Narathiwat Provincial Court was in the opinion that since the applicant was born in Songkhla province, therefore he can not hear and try the case. Thus the Thai Civil and Commercial Law Code, 1935 shall be applied. In this case *Dato' Yuthitham* relied on section 3 and 4 of the Act Promulgating the Application of Islamic Law in Patani, Narathiwat, Yala and Satul B.E. 2489 (1946) which states the Islamic Personal law shall be applied in the court of first instance in the four provinces where the parties are Muslims or a Muslim files the request in non-contentious cases. In addition, *Dato' Yuthitham* relied on section 4 of the Act, 1946 that provides *inter alia* that in deciding the marital disputes as stated in section 3, *Dato' Yuthitham* shall sit on the bench to form a quorum with the Thai Civil judge. Thus, from the court's judgment it is observed that the Provincial courts in the Southern Four Border Provinces of Thailand is very concerned with the residence of the parties before deciding cases. Moreover, the parties shall be a permanent resident in the four border provinces.

If the parties cease to be a Muslim or becomes *murtad* or apostate, they shall also be deprived of their rights to apply Islamic law under the Act, 1946. To illustrate the point above, there was a court judgment of the Yala Provincial court. In case of Abd. Hamid Chema v. Saibua @ Khobusoh khamklai.⁴¹ The plaintiff was married in 1978. Before getting married, the plaintiff had asked the defendant to embrace Islam. The defendant later decided to convert to Islam in front of the *imÉm* in the village. After they got married the parties opened a hair saloon in Yala.

In December, 1994 the plaintiff found that the defendant was having an affair with a man. Knowing the facts, the plaintiff advised the defendant to stop the relationship but the defendant ignored the plaintiff's advice. On the contrary, the defendant asked the plaintiff to divide a jointly acquired property according to the Thai Civil and Commercial Law Code, 1935 by claiming that she was no longer faithful to Islam. The defendant insisted in front of the plaintiff that she swears an oath before Lord Buddha's statute. The issue in this case was whether the defendant still remained a Muslim when it was proven that she taken an oath before Lord Buddha's statute. She made a confession before the court that “*if I am a liar, may my Lord Buddha curse me within three or seven days.*”

Upon hearing the defendant's confession, the learned *Dato' Yuthitham* of the Yala Provincial Court was in the opinion that the defendant's action demonstrated that she was no longer a Muslim and therefore, the parties were not allowed to apply the Islamic Law. The same principle was applied in the case of Chavivan To'Dir v. Abdullateh To' Dir.⁴² The parties were married

⁴⁰ See a divorce certificate registration No: 307.4 / B.E. 2539 (1996).

⁴¹ Yala Provincial Court, Civil Suit No: 302 / B.E. 2529 (1986).

⁴² Yala Provincial Court, Civil Suit No: 271 / B.E. 2540 (1997). It is interesting to mention here that the numbers of *murtad* case in the four southern provinces is increasing day by day compared with other provinces of Thailand. This is due to the fact that the new converts were not well prepared to embrace Islam. Some of them embraced Islam because they just want to get married and when conflicts occurred in the family, some of them declared in the public that he or

according to the Islamic law. The marriage took place in front of two witnesses, Niyada Samaya and Deurashi Sama-ae. The parties had registered the marriage according to the Thai Civil and Commercial Law Code, 1935 on 18 August, 1989 at the office of the registrar in the Yala District Office. In December, 1989 the defendant pronounced a triple divorce against his wife and left his wife. The wife later filed a suit against her husband claiming that her husband has deserted her for more than one year without giving any maintenance. At the trial, the wife told the court that she had taken an oath before Buddha's statute by admitting that she was no longer a Muslim. After hearing the defendant's confession, the court ruled that this case no longer fall under the ambit of the Islamic family law. Hence, *Dato' Yuthitham* shall not sit on the bench to form a quorum in order to hear and try the case with the Thai civil judge.

Looking at the court's judgment in both cases, it may be concluded that the court will strictly interpret and apply the Act, 1946 without looking at the effects of the judgment towards the interest of the disputed parties. It might be noted that since the code recognizes the dissolution of marriage by the operation of law on the ground of apostasy as the code stipulates *inter alia*, that:

...where either parties, husband or wife becomes apostate, the marriage shall be dissolved immediately.⁴³

The effect of dissolution on the ground of apostasy is irrevocable and the parties can not remarry forever.⁴⁴ It is a *Dato' Yuthitham's* duty to hear and try the case and order the marriage to be dissolved by the order of the court rather than to dismiss the applicant's case without resorting to the provisions in the code.

The decision of *Dato' Yuthitham* (Muslim judges)

As far as *Dato' Yuthitham's* decision is concerned, his decision is final⁴⁵ and no appeals are allowed as it was stated in the Act on the application of the Islamic Law in Patani, Narathiwat, Yala and Satul, Act of B.E. 2489 (1946). Most of the local academicians considered this act as an unusual act where its provision gives an absolute power in the hand of *Dato' Yuthithams*. This means that the disputed parties are deprived of their fundamental rights under the Thai constitution to make an appeal to the higher court.

The Act 1946 has caused many Muslims in the south to express their dissatisfaction since before this act came into effect, they were given the right to make an appeal if they are dissatisfied with *Dato' Yuthitham's* decision.⁴⁶ However, after the 1946 Act is being implemented a few appeal cases are allowed to be heard on the procedural law but not on the substantive law namely

she was no longer a Muslim. After that they will ask the civil court to divide his or her joint acquired property. Friday Talk delivered by Ahmad Abdullah, on 13th December, 2002 at al-Masjid al-Jami' Li al-Falah, Cherang Nibung, District of Pekara, Patani Province, Thailand.

⁴³ The Code, article 126.

⁴⁴ Ibid.

⁴⁵ Section 4 clause 3 of the Act. It is interesting to note here that under this Act the *Dato' Yuthitham* is not in position to give judgment but his real function is to advise and assist Thai judge in deciding Islamic Law. In practice in order to honour the position of the *Dato' Yuthitham*, he will be sitting together with the Thai civil judge and the decision would be delivered by the Thai civil Judge based on the *Dato' Yuthithams'* advice.

⁴⁶ Siripachana, N.1975. *Kwam Pen Ma*, ibid., pp. 84-85.

the Islamic Law.⁴⁷ This is because according to this Act *Dato' Yuthitham* has an absolute power to apply only the Islamic Law.⁴⁸ As for the procedural law, it is under the discretion of the Thai Civil Judge. In case the appeals are allowed, the normal practice is that the Court of Appeal will reaffirm *Dato' Yuthitham's* decision or order *Dato' Yuthitham* to review his decision. The rationale behind this practice was to maintain and to preserve the harmony among Muslim society in the south.⁴⁹ The second reason was that most of the Islamic Law cases involved very small claims.⁵⁰ As a result, the appeals are not entertained and the appeal that involves Islamic family cases depends entirely on the political consideration than the interest of the applicants. Act on the application of the Islamic Law in Patani, Narathiwat, Yala and Satul, Act of B.E. 2489 (1946), prevents the Muslim litigants to appeal to a higher court. Article 4 clause 3 of the act provides, *inter alia*:

The decision of *Dato' Yuthitham* to Islamic law is final.⁵¹

The legal effect of this is that the Muslims in the south are deprived of their rights to appeal to the higher court until today. Even though, there are several criticisms made by the Muslims in Thailand nothing could change the decision on the implementation of the act. In this connection, the secretary of the Central Islamic Committee of Thailand has observed that:

...In fact, a person who has been appointed to be a *Dato' Yuthitham* is only an ordinary person. Thus, in carrying out his duty as a judge there shall be a mistake. If he makes a wrong decision, the defendant would be responsible and he will never be given the right to defend his right. However, if this case is tried in the Court of Justice, the Thai Civil judge will allow the defendant to make an appeal. If that happens I think in future the right to appeal shall be given to the defendant, if it is proven that the decision of *Dato' Yuthitham* in the Islamic family law is wrongly given so that the justice would be upheld.⁵²

Despite the fact that *Dato' Yuthitham* is given privilege to apply the Islamic Law in the Provincial Courts, the Muslim litigants are prevented to appeal the decision of *Dato' Yuthitham* and this problem makes the applicants feel dissatisfied when their cases are tried and heard at the Shariah court .

⁴⁷The Ministry of Justice Order No: 30 / 4353 dated on 24 September, 1917; see also Khrua-Klin, P.R.1995. *Yoo Lak Kotmai Phra Thammanoon Sarn Yuthitham* (The concise on the Principle of Constitutional law of Justice Court), Bangkok: Nithitam Press.p. 31.

⁴⁸The Act Promulgating the Application of the Islamic Law in Patani, Narathiwat, Yala, and Satul B.E. 2489 (1946) Section 3 and 4; see also appeal cases and the decision of the Thai Supreme Court No: 1442 / B.E. 2541 (1998) of Mr. Haji Makta bin Haji Che Wuo v. Mr. Che Sama-ae Che Mama' and the decision of the Thai Supreme court No: 4807 / B.E. 2540 (1997) of Mdm. Haji Chew Ma'suka @ Hamasuka v. Mdm. Che Song Beraheng's case.

⁴⁹See decided cases of Ha'ma' Molo v. Pisoh Molo, Patani Provincial Court case, Civil Suit No: 510 / B.E.2536 (1993); Phitakbancha @ Semarnwong @ Abdullah v. Yuadee, Provincial Court case, Civil Suit No : 544 / B.E. 2540 (1997) and the decision of Thai Supreme Court No: 4807 / B.E. 2540 (1997) in case of Mdm Haji Che Wo Ma'suka @ Hama' Suka v. Mdm. Che Song Beraheng and the decision of the Thai Supreme Court No: 1442 / B.E. 2541(1998) in case of Mr. Haji Makta bin Haji Che Wuo v. Mr. Che Sama-ae Che Mama.

⁵⁰Interview with the Honourable Chief Judge of the Patani Provincial Court, Mr. Anusorn Sri-Meandt on 24th September, 2001 at the Patani Provincial Court.

⁵¹The correct English translation is the decision of the *Dato' Yuthitham* in Islamic law shall be final.

⁵²Burut Phat, K.P. 1981. *Thai Muslim*, Bangkok: Prea Pittaya. pp. 329 - 330.

Conclusion

From the discussion, we can conclude that during the reigns of Sukhothai and Ayutthaya dynasties the position of Islamic law and the attitude of the Siamese Kings towards Islamic law were flexible in the sense that the Siamese king will not interfere with all matters concerning religious affairs of the Muslims in the Muslim areas. In these two dynasties, it could be said that Islamic law namely; Islamic Family Law, Islamic Criminal Law and Islamic Law of Transaction were administered throughout the Patani kingdom. However, the application of the Islamic law in the Kingdom of Patani was interfered when the Siamese administration has tightened its grip in the Patani Kingdom in 1902. Consequently, the Muslim kingdom of Patani was governed by the Thai authority. This can be seen from the implication of the Royal proclamation of Bangkok's government administration in the southern provinces.

By these administrative regulations, it signaled the imposition of the Bangkok's rules over the Muslims' kingdom. It also provided for the appointment of a Siamese governor from Bangkok to the Muslims' area in place of Sultan's power. It resulted that traditional Islamic society, Islamic laws and Muslim's customary laws were to be replaced by the Thai civil law through this administrative regulation. At the same time, the Bangkok administration seemed to obstruct the implementation of Islamic law in the Muslim areas. Moreover, they were trying to narrow down the scope of the Islamic law and its application that has been accepted and recognized as a law for the Muslims in those four provinces.

This reception is eventually started with the promulgation of the act on the Application of the Islamic law in Patani, Narathiwat, Yala and Satul, 1946. By virtue of this act, *Dato' Yuthitham* was appointed as an advisor to the Thai civil judge in the Provincial courts in those four provinces. The unusual features of this act rested on the power of *Dato' Yuthithams viz*, their decisions became absolute, and no appeal is allowed. To give an advice to the Thai civil judge, *Dato' Yuthithams* consulted classical Islamic law textbooks. The Muslims are generally felt dissatisfied with the roles played by *Dato' Yuthitham* in the Provincial court whose function is an adviser to the Thai civil judge but not a full-fledged judge as required by Islam as they are also still suspicious about whether *Dato' Yuthitham* can effectively solve their disputes. Moreover, the lawyers who give advice to the applicants do not have adequate understandings about Islamic law.

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