

## **THE INSTITUTION OF THE DATO'YUTITHAM (QĀḌĪ) IN THAILAND\***

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### **ABSTRAK**

*Kajian ini membicarakan institusi Qāḍī dalam sejarah pentadbiran undang-undang Islam di Thailand khususnya di kawasan majoriti penduduk Islam di selatan Thailand. Penjawat Qāḍī dikenali sebagai Dato'Yutitham yang disiamkan istilah Qāḍī ini. Tumpuan kajian ini terarah kepada survival institusi ini yang pernah dibubarkan dan kemudian dihidupkan kembali dengan hambatan peruntukan bidang kuasa, perlantikan dan peruntukan kewangan yang jauh ketinggalan jika dibandingkan dengan institusi kehakiman sivil Thailand.*

### **Introduction**

This study discusses on the development of the institution of *Dato'Yutitham* in Thailand. In this paper, historical overview of the establishment of the *Dato'Yutitham* institution in Southern Thailand will be presented. Besides, the discussion will also focus on the initiation of the *Dato'Yutitham* institution in Satun province where it is regarded as a 'late-comer' to Southern Thailand, as compared to the other three southern provinces, under the *Rule of 1901*. Meanwhile, the study will be focusing on the abrogation and

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reintroduction of the institution of the *Dato'Yutitham* which resulted from the abrogation of the application of Islamic law in 1943. In order to examine the problems faced by the institution of the *Dato'Yutitham*, the study will be highlighting the qualifications, procedural appointment, the status, the salary promotion and the jurisdiction of the *Dato'Yutitham*. Prior to the discussion on these essential issues, we begin our discussion on the institution of the *Qadi* according to the Islamic judicial system in order to provide means of comparison with the present practice of Islamic family law and inheritance in the Buddhist majority land, Thailand. In this regard, the qualifications, jurisdiction and the ethics of the *Qadi* will be discussed and the views of the Muslim jurists will be highlighted .

### Qualification Of The Qadi Under Islamic Law

Before mentioning the qualification of the *Dato'Yutitham* based on Thai law, it is proper and essential to have a glimpse at the qualifications of the *Qāḍī* of the Shari'ah Court under classical Islamic law. In this connection, Imam al-Nawawi states the following qualifications of a *Qāḍī*: Muslim, obtained the age of majority, sane, free, male, of irreproachable character, sound of hearing, sight and speech, educated and enjoying a certain degree of authority in matters of law.<sup>1</sup> These qualifications need to be discussed in the light of the view of the Muslim jurists.

#### *i. He must be a Muslim*

The Muslim jurists are unanimous that a *Qāḍī* must be a Muslim. Non-Muslims, therefore, cannot be appointed as *Qāḍī* for deciding cases which involve a Muslim party.<sup>2</sup> This is based on the Qur'anic verse the translation of which reads to the effect:

*And never will Allah grant to the unbelievers a way (to triumph) over the Believers<sup>3</sup>*

From the above Qur'anic verse, it is obvious that non-Muslims are not allowed to hold the office of *Qāḍī*. This is because Allah does not grant supremacy to the non-believer over Muslims. Another reason for such prohibition is that the *Qadi* is required

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<sup>1</sup> Imam al-Nawāwī (2001), *Minḥāj et ṭālibīn: A manual of Muhammadan law according to the school of Shāfi'ī*. Trans. L.W.C. Van Den Berg. Delhi: Adam Publishers, p. 500.

<sup>2</sup> Al-Mawardī (1960), *Al-Aḥkām al-Sulṭāniyyah*. Cairo: Muṣṭafā al-Bābī al-Ḥalabī, p. 65.

<sup>3</sup> Al-Nisā' (4: 141).

to firmly apply the divine laws on the basis of his integrity to Islam while the non-Muslim does not have such important requirements.<sup>4</sup> The Hanafī school, however, opines that a non-Muslim can be appointed as a *Qadi* to decide cases in which non-Muslims are involved.<sup>5</sup>

ii. *He must have attained the age of majority (Baligh)*

It is important to note that Islamic law does not impose a minimum age for the qualification of *Qāḍī* as did by modern law. According to Modern law, the minimum age of a judge is generally prescribed at the age of 25 years old.<sup>6</sup> What is most important is that the person to be appointed as *Qāḍī* must have attained the age of majority, having mental maturity and complete capacity. The person is regarded as having the said qualifications if he can recognise what is necessary and he can distinguish what is possible. Moreover, he can differentiate what is beneficial from what is harmful.<sup>7</sup>

iii. *The Qāḍī must be a male*

The majority of Muslim jurists are of the opinion that the post of *Qāḍī* is merely restricted to the male.<sup>8</sup> They base their view on the Qur'anic verse, the translation of which reads as follows:

1. *Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means.<sup>9</sup>*
2. *And they (women) have rights (over their husbands as regards living expenses) similar (to those of their husbands) over them (as regards obedience and respect) to what is reasonable, but men have a degree (responsibility) over them. And Allah is All-Mighty, All-Wise.<sup>10</sup>*

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<sup>4</sup> Nasir Ibn 'Aqīl (1986), *Al-Qāḍā' fī 'Ahdī 'Umar ibn al-Khaṭṭab*. Jiddah: Dār al-Madanī, p. 205.

<sup>5</sup> *Ibid.*

<sup>6</sup> See Section 26(2), *the Judicial Official Act of 2000*.

<sup>7</sup> 'Abd al-Karīm Zaydān (1982), *Nidhām al-Qāḍā' fī al-Syarī'ah al-Islāmiyyah*. Amman: Maktabat al-Bashā'ir, p. 25.

<sup>8</sup> Al-Baghāwī (1354H.), *Syarḥ al-Sunnah*. Bayrut: Al-Maktab al-Şādir, Beirut, vol. 10, p. 76-77.

<sup>9</sup> Al-Nisā' (4: 34).

<sup>10</sup> Al-Baqarah (2:228).

The majority also quote the Hadith of the Prophet which stated that “no tribe shall prosper which has entrusted its affairs to a woman”<sup>11</sup> Their view has also been supported by the fact that no single woman was appointed to the office of *Qāḍī* during the lifetime of the Prophet and his successors.<sup>12</sup>

Another basis for the majority opinion in limiting the office of the *Qāḍī* to men is that the *Qāḍī* is needed to cooperate with the male jurists, witnesses and parties. According to the Islamic principle, women are forbidden to interrelate with men who are not their *mahram*. For this reason, women cannot be appointed as *Qāḍī*.<sup>13</sup>

Abu Hanifah, however, holds the view that a woman can be appointed as a *Qāḍī* since she possesses the qualifications of a witness but she cannot adjudicate on *hudud* and *qisas* cases.<sup>14</sup> Accordingly, a woman can be appointed as a *Qāḍī* in cases where her testimony is legally admissible in a court of law.

Al-Tabari and Ibn Hazm are of the opinion that the woman is entitled to be appointed as a *Qāḍī* to decide all cases since she is legally entitled to issue *fatwa*.<sup>15</sup> Based on this view, it can be concluded that the authority of a *Qāḍī* is not valid unless he or she possesses the qualifications necessary to be a witness. In other words, in order to become a *Qāḍī*, a woman should also possess the necessary qualifications to be a witness.

#### *iv. He must be of irreproachable character*

A person who will be appointed to occupy the office of *Qāḍī* must be one of irreproachable character. In other words, it can be stated that he should maintain his justness, fairness, impartiality, equity and integrity. This qualification is recognised by the majority of Muslim jurists, namely the Mālīkī, Shāfi‘ī, Hanbalī schools and a group of the Hanafī school.<sup>16</sup>

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<sup>11</sup> Al-Baghāwī, *Sharḥ al-Sunnah*, p. 76-77.

<sup>12</sup> Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol. 10, p. 390.

<sup>13</sup> *Ibid.*

<sup>14</sup> Al-Kasānī, *Badā’i’ al-Ṣanā’i’*, vol. 7, p. 3.

<sup>15</sup> Ibn Qudāmah, *Al-Mughnī*, vol. 9, p. 30; Ibn Ḥazm, *Al-Muḥallā*. Bayrut: Al-Maktab al-Tijārī, vol. 9, p. 363-429.

<sup>16</sup> Al-Mawardī (1391H.), *Adāb al-Qāḍī*. Baghdad: Maṭba‘at al-Irshād; Ibn Qudāmah, *Al-Mughnī*. vol. 9, p.40.



However, there is a report from al-'Asim that a *Qāḍī* need not necessarily be a person of irreproachable character.<sup>17</sup> A section of the Mālikī school supported this view. However, a person of good character is preferable.<sup>18</sup> Imam Abū Hanīfah holds the view that a dissolute person can be appointed as *Qāḍī*.<sup>19</sup> On the contrary, Imam Shāfi'ī argues that such a person cannot be appointed as *Qāḍī*. This is because he is incompetent to give evidence.<sup>20</sup>

v. *He must be of sound hearing, sight and speech*

The majority of Muslim jurists are unanimous that a *Qāḍī* must have full sense of hearing, sight and speech. In other words, the *Qāḍī* is required to have complete hearing and sight in order to find the facts of the case brought before the court by investigating all relevant evidence and also to hear the testimony given by the witnesses. Whereas, the qualification of having a complete faculty of speech is to interrogate the litigants and witnesses in order to ascertain the proof of the case.<sup>21</sup> However, if a *Qāḍī* possesses these qualifications at the time of his appointment and later becomes defective, his decree is still regarded valid, but he can be discharged from the post.<sup>22</sup>

vi. *He must be educated and have knowledge of Islamic law*

The majority of the Muslim jurists are of the opinion that the *Qāḍī* must be educated and have knowledge of Islamic law.<sup>23</sup> Shāfi'ī, Mālikī, Hanbali and a section of the Hanafi school hold the view that a learned person with knowledge of Islamic law can be appointed to the office of *Qāḍī*.<sup>24</sup> This means that a judge must be knowledgeable in all branches related to the Qur'ān, the *sunnah*, *ijma'* and analogical reasoning and other sources of law.

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<sup>17</sup> Ibn Qudāmah, *al-Mughnī*, vol. 9, p. 381.

<sup>18</sup> Ibn Abī al-Ḍamm (1984), *Kitāb Adāb al-Qadā'*. Baghdad: Al-Irshād, p. 133.

<sup>19</sup> Al-Kasānī, *Badā'ī 'al-Ṣanā'ī*, vol. 7, p. 454.

<sup>20</sup> Ibn Qudāmah, *al-Mughnī*, vol. 9, p. 381-382; Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 385.

<sup>21</sup> Ibn Qudāmah, *al-Mughnī*, vol. 9, p. 40; Al-Mawardī, *Adāb al-Qadī*, vol. 1, p. 622.

<sup>22</sup> Ibn Rushd (1970), *Bidāyat al-Mujtahid*. Qāhirah: Maktabat al-Azhariyyah, vol. 2, p. 494; al-Dusuqī, *Hashiyat al-Dasuqī 'alā al-Sharḥ al-Kabīr*. Qāhirah: Mustafā al-Ḥalabī, vol. 4, p. 130.

<sup>23</sup> Ibn Qudāmah, *Al-Mughnī*, vol. 9, p. 41; Al-Mawardī, *Adāb al-Qadī*, vol. 1, p. 636.

<sup>24</sup> Ibn 'Abidīn (1966), *Radd al-Mukhtār*. Qāhirah: Mustafā al-Ḥalabī, vol. 4, p. 365; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, p. 456.

## Jurisdiction Of The *Qāḍī*

The jurisdiction of the *Qāḍī* covers all cases related to *hudud*, *qisas*, *diyat* and *ta'zir*. Moreover, it is also within the jurisdiction of the *Qāḍī* to deliberate on all cases relating to personal law, transactions, criminal law etc.,<sup>25</sup> In this respect, al-Mawardi and Abu Ya'la identify the jurisdiction of the *Qāḍī* as follows:<sup>26</sup>

1. Deciding cases and settling disputes.
2. Preserving the rights of those whose rights have been infringed upon according to the rules of the Sharī'ah.
3. Protection and supervision of the property and interests of lunatics, minors, bankrupts, orphans and incompetent persons who are under the care of guardians.
4. Supervision of donated property (*waqf*).
5. Disposition of wills according to the terms stipulated in the document to the extent that is permissible by the Sharī'ah.
6. Solemnising the marriage for women who have no guardians or when their guardians refuse to give them away in marriage provided the parties are compatible (*Kufu*).
7. Imposition of punishment on the offender for the crime against the rights of Allah (*hāqq Allah*). Prosecution may take place without the request of the aggrieved party. However, in case the rights of person have been infringed, it will depend on the aggrieved party as to whether to sue the offender or not.
8. Supervision of public roads and buildings, removing any building or any extension of a building which obstructs public streets.
9. Examination of witnesses who fulfil the requirements set by the Sharī'ah. He can also reject the witnesses whose requirements are not fulfilled as set by the Sharī'ah.
10. Passing judgement impartially regardless of whether the defendant is from among the strong or the weak and the noble or the lowly.

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<sup>25</sup> Mahmud Saedon (1990), *Kadi: Perlantikan, Perlucutan dan Bidang Kuasa*. Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 88-89.

<sup>26</sup> Al-Mawardī, *Adāb al-Qāḍī*, vol. 1, p. 70; Abu Ya'la al-Farrā' (1974), *Al-Aḥkām al-Sulṭaniyyah*. Jakarta: Maktabat Aḥmad bin Said, p. 65-66.

From the above, it is observed that the jurisdiction of the *Qāḍī* is very wide and covers all categories of cases.<sup>27</sup>

### Ethics Of The *Qāḍī (Adāb Al-Qāḍī)*

The primary function of the *Qāḍī* is to maintain justice. Consequently, it is important for him to avoid all deeds which can create doubt in his judgement and to maintain his good personality. In this connection, the *Qāḍī* should strictly observe the ethics laid down in the Islamic judicial system to ensure his transparency in performing the important function of maintaining justice. The ethics of the *Qāḍī* as discussed by Muslim jurists can be stated as follows:

1. The *Qāḍī* must abstain from all actions and deeds which will destroy the dignity of the court such as buying, selling and joking during the sitting in the court.<sup>28</sup>
2. The *Qāḍī* must not accept an invitation to any feast except a general one.<sup>29</sup> The *Qāḍī* is not recommended to respond to the specific invitation which is personally made for him or an invitation in which the number of invitees is limited.<sup>30</sup> This is due to the fact that if the *Qāḍī* accepts such a specific invitation, the people will be doubtful as to his performance of his duties. However, he can accept an open invitation in which he is not the main aim of the invitation. This is because common people will be invited without discriminating their positions and status.<sup>31</sup>
3. A *Qāḍī* should avoid accepting a gift which is given to him as a help with no request from him.<sup>32</sup> Accepting a gift from a party involved in a dispute is prohibited regardless of whether the offering party is one of his own relatives or a foreigner.<sup>33</sup> This is due to the fact that the giver may seek his assistance

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<sup>27</sup> Ibn 'Abidīn, *Radd al-Mukhtār*, vol. 4, pp. 375-376; Al-Mawardī, *Adāb al-Qāḍī*, vol. 1, p. 197-198 & 248; Ibn Qudāmah, *al-Mughnī*, vol. 9, pp. 442-443.

<sup>28</sup> Al-Qarnalī (1974), *Qawānīn al-Aḥkām al-Sharī'ah*. Bayrut: [S.N.], p. 324.

<sup>29</sup> Al-Mawardī, *Adāb al-Qāḍī*, vol. 1, p. 244; Al-Shirazī, *al-Muhadhdhab*. Qāhīrah: Mustafā al-Ḥalabī, vol. 2, p. 292-292; Ibn Qudāmah, *al-Mughnī*, vol. 9, p. 405-406.

<sup>30</sup> Ibn 'Abidīn, *Radd al-Mukhtār*, vol. 4, p. 374.

<sup>31</sup> Al-Sarakhsī, *Al-Mabsūṭ*, vol. 16, p. 81.

<sup>32</sup> Al-Khassāf (1979), *Sharḥ Adāb al-Qāḍī*. Baghdad: Dār al-'Arabiyyah Li al-tiba'ah, vol.4, p. 111.

<sup>33</sup> *Ibid.*

or arouse his hostility in some matter. However, if the gift is presented by the person who is not involved in the disputed case, this can be determined in two circumstances. First, the *Qāḍī* can accept a moderately priced gift from his close friend or his own relative should such a gift be normal for him before being appointed as *Qāḍī*. Second, a *Qāḍī* should not accept any gift which he had not accepted before being appointed as a *Qāḍī*.<sup>34</sup> In this connection, Imam al-Mawardi is of the opinion that the *Qāḍī* cannot accept a gift from a person who is likely to be involved in the disputed case in the future.<sup>35</sup>

4. A *Qāḍī* should avoid accepting bribery. This is because taking bribery is not only part of the prohibited acts particularly when dealing with the administration of justice but it is also well established in the Qur'an translation of which reads as follows:

*And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully.*<sup>36</sup>

In a relevant *hadith*, the Prophet said to the effect that:

*"Allah curses the bribers and the receiver of the bribe for the sake of judgement".*<sup>37</sup>

Based on the above authorities, all Muslim jurists had come to the agreement that accepting bribery is prohibited.<sup>38</sup>

5. A *Qadi* should not issue a *fatwa*. The majority of Muslim jurists maintain that the *Qadi* should not issue a *fatwa* for the particular case which is likely to be brought before the court. This is because issuing *fatwa* in a such case will dilute his credibility. Moreover, the process of giving *fatwa* is distinct from that of giving judgement in the court. In this regard, the *fatwa* is regarded

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<sup>34</sup> Awad Ibrāhim Najib, p. 270.

<sup>35</sup> Al-Mawardī, *Adāb al-Qāḍī*, vol. 1, p.75.

<sup>36</sup> Al-Baqarah (2: 188).

<sup>37</sup> Al-Bayhaqī, *Al-Sunan al-Kubra*, vol. 10, p. 139.

<sup>38</sup> Al-Saraksī, *Al-Mabsūṭ*, vol. 16, p. 67; Al-Shirazī, *Al-Muhadhdhab*, vol. 2, p. 374; Al-Khaṭīb al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 392.

as a general mandate which is not binding on any party. On the contrary, the judgement of the court is binding on the party concerned.<sup>39</sup>

As far as the ethics of the *Qāḍī* while hearing the case are concerned, the Muslim jurists to some extent are unanimous that the following are necessary:

1. A *Qāḍī* must not be influenced by the situation surrounding him or surrender to the pressure thrown upon him in deciding the case.<sup>40</sup> This is based on the Qur'anic verses the translation of which reads as follows:

*And whenever you give your word (i.e. judge between men or give evidence), say the truth even if a near relative is concerned.*<sup>41</sup>

*Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice.*<sup>42</sup>

*And if you judge, judge with justice between them. Verily, Allah loves those who act justly.*<sup>43</sup>

From the above Qur'anic rulings, it is clear to us that to maintain justice is the most important objective of the Islamic judicial system. This means that a *Qadi*, who takes the responsibility to maintain justice, must be a just person who has good character and honourable ethics. This is to guarantee justice for the people.

2. When a *Qāḍī* hesitates to give a decision in a case, it is suggested that he should postpone his decision. In such a case, he should consult with the jurists.<sup>44</sup> This practice is prescribed in al-Qur'an the translation of which read as follows:

*And those who answer the Call of their Lord (i.e. to believe that He is the only One Lord (Allah), and to worship none but Him Alone), and perform Al-Salat (Iqamat-al-Salat), and who (conduct) their affairs by mutual consultation, and who spend of what We have bestowed on them.*<sup>45</sup>

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<sup>39</sup> Abd al-Karīm Zaydān, *Nidhām al-Qaḍā' fī al-Sharī'ah al-Islāmiyyah*, p. 243.

<sup>40</sup> *Ibid*, p. 22.

<sup>41</sup> Al-An'ām (6: 152).

<sup>42</sup> Al-Nisā' (5: 58).

<sup>43</sup> Al-Ma'idah (6: 42).

<sup>44</sup> Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 391; Al-Sarakhsī, *al-Mabsūt*, vol. 16, p. 84; Ibn 'Abidīn, *Radd al-Mukhtār*, vol. 4, p. 366.

<sup>45</sup> Al-Shurā (42:38).

Moreover, consultation is also the practice of the Prophet and the companion.<sup>46</sup>

3. A *Qāḍī* should not give a judgement when he is angry, or hungry, or in a state of excessive satiety or when he is in any physical state likely to trouble his mind.<sup>47</sup> According to some scholars, such situations may diminish the intellect and understanding of the person affected by them. From this it follows that whenever a *Qāḍī* suffers from a mental upset which impairs his reasoning powers and fair judgement, he should abstain from making a decision. However, if he passes a decree the judgement is valid.<sup>48</sup>

4. A *Qāḍī* should show equal regard to all the parties.<sup>49</sup> He should listen to their respective pleading without giving any sign of approbation or of blame.<sup>50</sup> It is stated in the *Majella* that a *Qāḍī* is an officer for justice between the parties. Therefore, if one of the parties is from a noble background and the other from the common people, it is necessary that he makes both parties sit down at the time of the trial and observes perfect equality and justice in the transactions connected with the trial, such as indicating or referring to or speaking to them.<sup>51</sup>

5. A *Qāḍī* should not prolong the proceedings of the case. When there is no necessity, the *Qāḍī* should not delay the proceedings of the case.<sup>52</sup> This is because delaying the proceeding will jeopardise justice and will also create uncertainty. According to the Islamic law principle, when a *Qāḍī* is satisfied with all the steps of the proceeding he should, without delay, pass the final judgement.<sup>53</sup> The jurists, however, opine that the proceedings of the case can be delayed if there are some concrete reasons, for instance, the *Qāḍī* needs time to investigate the credibility of a witness. The delay of the proceedings can also be allowed at the request of both parties.<sup>54</sup>

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<sup>46</sup> Ibn Qudāmah, vol. 9, p. 396; Al-Mawardī, vol. 1, p. 256,259.

<sup>47</sup> Al-Sharbinī, *Mughnī al-Muḥtāj*, vol. 4, p. 391; Al-Mawardī, vol. 1, pp. 212-218; Al-Ramlī, *Nihayat al-Muḥtāj*, vol. 6, p. 253; Ibn Qudāmah, vol. 9, p. 401, Al-Kasānī, vol. 16, p. 9.

<sup>48</sup> Al-Mawardī, vol. 1, p. 218; Al-Sharbinī, *Mughnī al-Muḥtāj*, vol. 4, p. 39; Al-Ramlī, vol. 6, p. 354.

<sup>49</sup> Al-Nawāwī, *Minhāj al-Ṭālibīn*, p. 506; Al-Sharbinī, *Mughnī al-Muḥtāj*, vol. 4, p. 400; Al-Mawardī, vol. 1, p. 250; Ibn Qudāmah, vol. 9, p. 441.

<sup>50</sup> Ibn ‘Abidīn, vol.4, p. 375; Al-Sarakhsī, vol. 16, p. 61.

<sup>51</sup> The *Mejella*, Art. 1799.

<sup>52</sup> Muḥammad Salam Madkur (1964), *Al-Qaḍā’ fī al-Islām*. Qāhira: Dār al-Nahdah al-Arabiyyah, p. 51.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

6. A *Qāḍī* should hold the sittings of the court in some spacious and open court where the audience may attend to witness the proceedings of the case. This is to provide the opportunity for the public to observe the performance of the *Qadi* in the proceeding. Thus, a *Qāḍī* may sit openly in a mosque or other public place. According to the Hanafī,<sup>55</sup> Mālikī and Hanbalī<sup>56</sup> schools, the mosque could be used as a court. However, the Shāfi'ī school maintains that it is forbidden to hold a sitting in a mosque because all classes of people would attend the sitting such as polytheists and women during their monthly courses.<sup>57</sup> This view is more preferable to the researcher.

7. A *Qāḍī* should employ a legally trained *katib* (clerk)<sup>58</sup> to record the full written statement of the parties in the suits along with defence statement and relevant matters. It is also commendable for the *Qāḍī* to employ an officer to give him further information as to the character of the *shuhud* (witnesses) and *hajib* (court-usher).<sup>59</sup>

8. A *Qāḍī* should compromise between the parties before passing his judgement. When a case is between relations and there is the expectation that the two parties are inclined to compromise, the *Qāḍī* should advise them to compromise.<sup>60</sup> If they are not willing, the *Qāḍī* presiding over the case may proceed with the trial.<sup>61</sup>

9. It is to be recommended that the *Qāḍī* should, upon the request, deliver to the plaintiff the minutes of all the proceedings in the court together with a copy of the judgement delivered in his favour. According to some jurists, this is even compulsory.<sup>62</sup> It is also commendable that the proceedings and the judgements should be duplicated in two copies, one for the successful litigant and the other to be kept in the archives of the court.<sup>63</sup> On this particular point, the *Mejella* prescribes that after the judge has completed the trial, he makes known to the parties what they are required to do by the judgement, and prepares a written judgement containing the orders and decision

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<sup>55</sup> Ibn 'Abidīn, vol.4, p. 372; Al-Kasānī, vol. 16, p. 13.

<sup>56</sup> Ibn Qudāmah, vol. 9, pp. 388-389; Ibn 'Abidīn, vol. 4, p. 372; Al-Mawardī, vol. 1, p. 206.

<sup>57</sup> Al-Mawardī, vol. 1, p. 205; Al-Ramlī, vol.4, p. 253.

<sup>58</sup> Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 389; Ibn Qudāmah, vol. 9, p. 406; Al-Dusuqī, vol.4, p. 138; Al-Kasānī, vol. 16, p. 12.

<sup>59</sup> Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 388-389; Al-Dusuqī, vol.4, p. 138.

<sup>60</sup> Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 401; Al-Dusuqī, vol. 4, p. 152; Al-Kasānī, vol.16, p. 13.

<sup>61</sup> The *Mejella*, Art. 1826.

<sup>62</sup> Al-Sharbinī, *Mughnī al-Muhtāj*, vol. 4, p. 394-395.

<sup>63</sup> *Ibid.*

together with its reasons and causes, and he gives a copy to the person in whose favour the judgment is given and, if necessary, also to the person against whom the judgement is given.<sup>64</sup>

From the above discussion, it is obvious that the ethics of *Qāḍī* laid down in the Islamic judicial system are aimed at ensuring justice for the parties of the case.

### The Development Of The Institution Of Dato' Yutitham (Qāḍī) In Thailand

The institution of the *Dato' Yutitham*<sup>65</sup> was initially established in 1901 when Islamic Family Law and Inheritance was first applied in the Malay principalities through the *Rule of 1901*. Article 32 of this rule states that:

*The Criminal Code and Civil Code shall be applied except in civil cases concerning husbands and wives, and inheritance in which Muslims are both the plaintiff and the defendant, or only a defendant, in such cases, the Islamic law shall be applied and decided by Dato' Qāḍī who has knowledge of the Qur 'ān and enjoys the respect of the people.*<sup>66</sup>

The discussion shows that Muslim cases on family and inheritance would be decided by the *Dato' Qāḍī* who needed only a minimum qualification that is to be knowledgeable of the Qur'an. Although the provision did not specifically identify a certain field of knowledge, it is believed that the person, who would be appointed to the post of *Dato' Qāḍī*, should be knowledgeable in Islamic law. In addition, he should be trustworthy and well respected by the people.

Based on the above provision, the government of that time appointed persons who were believed to be knowledgeable in the Qur'an to be *Dato' Qāḍī* to decide Muslim cases on family and inheritance. One *Dato' Qāḍī* was appointed for each principality.<sup>67</sup> Later, it appeared that Muslims were not satisfied with the performance of some *Dato' Qāḍī* due to their inadequacy in Islamic law knowledge.<sup>68</sup> Consequently, the government issued new regulations which appeared in the letter of the Interior Ministry

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<sup>64</sup> The Mejjella, Art. 1927.

<sup>65</sup> In the beginning, the Muslim judge was called "*Dato' Qāḍī*". However, this title was later changed to "*Dato' Yutitham*".

<sup>66</sup> Section 32, *the Rules of Administration in the Seven Principalities of 1901*.

<sup>67</sup> Narong Siriphacana (n.d.), *Kwam Pen Ma Khong Kot Mai Islam lae Dato' Yutitham (The Development of Islamic Law and Dato' Yutitham)*. Bangkok: [S.N.], p. 48.

<sup>68</sup> *Ibid*.



sent to the Commissioner of Nakorn Sri Thammaraj Region. Its content was written as follows:

*Whereas His Majesty the King wishes that the people who uphold the Islamic religion should enjoy justice and facility in their judicial affairs with respect to marital and inheritance cases, which are deemed to be connected with their religion.*

*His Majesty the King hereby orders that the following procedure be followed in the deliberation of the Islamic courts:*

1. *Each governor (of the Malay provincial) shall select Dato' Haji (ones who had performed the pilgrimage) who have knowledge of the Qur'ān and enjoy the respect of the people in the province and appoint them Dato' Qāḍī. The number is left to the discretion of the governor, but not less than 6 persons. They would sit and deliberate on civil cases pertaining to Islam, i.e., cases concerning inheritance and marriage. But the selection must be approved by the Governor General of the region...*
2. *When both parties to the lawsuit are Muslims, or only the defendant is a Muslim, file their complaint to the ordinary courts, the parties shall be ordered to select the Dato' Qāḍīs, from the panel already established, to deliberate and give their judgement in accordance with the Islamic religion and customary practices.*
3. *If there is more than one Dato' Qāḍī and the opinions differ, the Dato' Qāḍī shall elect one of them as their chairman of the panel, the opinion of the majority is the final judgement.*
4. *The Dato' Qāḍī shall examine the cases and if witnesses are needed in the deliberation, the courts must facilitate the calling of the witnesses. The witnesses who respond to the call shall be sworn in by the Dato' Qāḍī in accordance with Islam. As for the compensation for the witnesses, if Islam or the customs do not require, it shall be set in accordance to the law of evidence of 1895.*
5. *When the Dato' Qāḍīs complete their deliberation and give their judgement, the Thai judges of the ordinary courts in the region confirm the judgement (of the Dato' Qāḍī). As for the compensation for the parties, or the fines or the fees, the To' Qadi shall determine them according to the Islamic law or the customary practices.*
6. *When the Thai judges confirm the final judgement given by the Dato' Qāḍī, the plaintiff shall not appeal against the decision except in the cases where the Thai judges does not confirm such a judgement and pass their own judgement which is at variance with the Dato' Qāḍīs. In the latter case, the plaintiff or the defendant shall appeal to the Governors in Residence.<sup>69</sup>*

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<sup>69</sup> Letter of the Great Seal, Ministry of Interior, 7/9669 dated 10 December 1903.

The above regulation clearly demonstrates that the *Dato' Qāḍī* shall be appointed from among the *Dato' Haji* who had performed the pilgrimage to Mecca in Saudi Arabia. It can be seen that the regulation did not limit the maximum number of *To' Qāḍī* to be appointed in each principality but it was left to the discretion of the governor. However, the minimum number of *Dato' Qāḍī* was prescribed that they should not be less than six persons.

The imposition of the *Dato' Qāḍī's* requirement of being a *Dato' Haji* clearly shows the fact that the authorities did not realise how the Islamic legal system operated and how the religious leaders performed their functions in the Muslim society.

Then, on 7 September 1903, the High Commissioner of the seven principalities sent a letter to the headquarters of Pattani, Nongchik, Yaring, Saiburi, Yala, Raman and Rangae the contents of which read as follows:

*Regarding the cases relating to husband and wife and inheritance of Islamic religion, Dato' Qāḍīs have agreed to comply with the Interior Ministry letter no 7/9669 dated 10 December 1902. Luang Borirak Phuben, a judge of the Regional Court of the seven principalities, has been assigned the responsibility for giving suggestions to Dato' Qāḍī relating to the procedure of trying the case. However, the problem still remained i.e. the Dato' Qāḍīs have different views on the case. In order to overcome this problem, the governor of Nakorn Sri Thammaraj Region has, therefore, proposed that there should be a meeting room for Dato' Qāḍī's in order to find a final conclusion on the case. Since Yaring and Nongchik do not have a Thai court, the Dato' Qāḍī's Court shall be placed at their headquarters. When the disputes occur in these two principalities, the plaintiff shall file the plaint at the Regional Court and he will be asked to select a Dato' Qāḍī either from his own principality or from the principality of the defendant. Then, the court shall invite the selected Dato' Qāḍīs to come to the headquarters of Nongchik or Yaring to decide the case.*

It was clearly highlighted in the above letter that the problem occurs where the *Dato' Qāḍī's* differed in certain cases and they could not reach a final agreement on them. This problem had caused a delay in the case's proceedings. In replying to the above proposal, the authorities provided a meeting room to be utilised by the *Dato' Qāḍī's* in seeking their consensus on the case.

The above discussion obviously shows that the institution of the *Dato' Yutitham (QADI)* had been initiated along with the application of Islamic Family Law and Inheritance in 1901 according to the *Rule of 1901*.

## **The Initiation Of The Institution Of Dato' Yutitham In Satun**

As has been mentioned earlier, the Satun province at the beginning was not incorporated into the *Rule of 1901*. However, since the majority of its population are Muslims, the government under King Rama VI made an order to include Satun to be governed by the *Rule of 1901* as well. The order was issued in the letter of the Justice Ministry no 30/4353 dated 24 September 1917 which had been sent by Maha Ammat Aek Chou Phraya Aphai Racha Maha Yutitham, the then Minister of Justice, to the Lieutenant General Phraya Surin Racha, the then Governor of Phuket Region. The details of the order were written as follows:

*His Majesty the King has made an order that due to the majority population of Satun being Muslims and he wishes to equally maintain all religions in the country, which is deemed to be the major task of the Dynasty, this Act should, therefore, be enacted. The Act prescribes that when the Muslims dispute on civil matters relating to husband and wife and inheritance, the court shall try and decide such cases in accordance with Islamic law. The appointment of Dato' Qāḍī, who will decide the cases according to Islamic law, should be further maintained. However, the procedural appointment of Dato' Qāḍī for the Satun province shall be rendered according to the following procedures:*

- 1. Dato' Qāḍī who will apply Al-Qur'ān in deciding the case, must enjoy the respect of Muslim people in the province and be of mature age so as to command respect. Moreover, he has to be well-versed in the Qur'ān and must be loyal to the King and dedicated to the affairs of the Sovereign. The appointment of Dato' Qāḍī must be approved by the King.*
- 2. From this day onward, this judicial position shall be called "Dato' Yutitham" who has a specific duty of applying Al-Qur'ān to civil cases relating to Islamic customs. This position could be equally compared with the judge of Magistrates Court according to section 25 of Law of Organisation for the Court of Justice.*
- 3. The power of the Dato' Yutitham shall be restricted only to trying the case where the Muslims dispute on civil matters relating to husband and wife and inheritance. Regarding deciding the case, the signatures of two Dato' Yutithams or one Dato' Yutitham together with one Thai judge must be sought, otherwise the judgement shall not be completed. The party to the case, however, can appeal and petition respectively according to the law"*

From the above rule, the consent of the King must be obtained for the *Dato' Qāḍī* to be appointed. Meanwhile, under the administration of King Rama V, such an appointment only needed the approval of the Governor General of the region. It is believed that with this requirement, the *Dato' Qāḍī* became further integrated into the Thai state power structure affirming the principle that justice was administered in the name of the Sovereign. The official title also was changed from *Dato' Qāḍī* to a Malay-Thai compound term *Dato' Yutitham*, the "Venerable Justice". Only two *Dato' Yutithams* were needed to give a decision on civil cases relating to marriage and inheritance. This was meant to avoid differences of opinion among the Muslim judges as in the previous reign.

It can also be seen from the rule that the authorities imposed another requirement which prescribes that the *Dato' Yutitham* should be loyal to the king and his government which is regarded by the Muslims as an unusual addition to the qualifications. It was also commanded that the decisions of the *Dato' Qāḍī* were to become effective only after being sanctioned by the authorities.<sup>70</sup> This could be seen as interfering with Islamic law which the government had promised to avoid.

### **Abolition And Reintroduction Of The Institution Of The *Dato' Yutitham***

In 1943, the institution of the *Dato' Yutitham* was abolished. This was the result of the abolition of the application of Islamic Family Law and Inheritance in the four southernmost provinces. However, the institution of the *Dato' Yutitham* was reestablished with the introduction of the *Act of 1946* which was also known as the *Application of Islamic law in Pattani, Narathiwat, Yala and Satun Provinces Act of 1946*. Nevertheless, the operational system remained the same as stipulated under the *Rule of 1901*. This is obvious since the new Act does not provide details about the requirements of the *Dato' Yutitham*. In fact, the previous requirements as prescribed under the *Rule of 1901* are still followed.

#### *Qualifications Of The Dato Yutitham*

Comparative discussion will be made by examining *Dato' Yutitham's* qualifications under both the *Rule of 1901* and the present *Act of 1946*.

#### 1. Qualifications of the *Dato' Yutitham* under the *Rule of 1901*

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<sup>70</sup> Ministry of Justice No. 30/4353.

For the qualifications of the *Dato'Yutitham* as laid down by the *Rule of 1901*, the study will emphasize four regulations. These regulations are the *Rule of 1901* itself, the letter of the Great Seal of the Ministry of the Interior, no. 7/9669, an Order of the Ministry of Justice no. 30/4353 and the *Judicial Official Act*.

### I. Rule of 1901

As mentioned earlier, the institution of the *Dato'Yutitham* or *Dato'Qāḍī* was established along with the introduction of Islamic Family Law and Inheritance in 1901 through the *Rule of 1901*. According to section 32 of this rule, the *Dato'Yutitham* or *Dato'Qāḍī* is only required to be knowledgeable in the Qur'ān and enjoy the respect of the people. With these two major qualifications, Muslim men can be appointed as *Dato'Qāḍī* to try and decide Muslim cases on family and inheritance. However, this rule is totally silent on the age of *Dato'Qāḍī*. Nevertheless, it is believed that the person who will be appointed as *Dato'Qāḍī* should not only have reached the age of majority but should also be of mature age as required by Islamic Law. This is to ensure his mental maturity and complete capacity in administering justice.

### II. Letter of the Great Seal of the Ministry of the Interior, No. 7/9669

*The Letter of the Great Seal of the Ministry of the Interior no. 7/9669 dated December 10, 1902 had laid down another qualification of the Dato'Yutitham i.e., he shall be the one who had performed the pilgrimage and known as Dato' Haji. This qualification was regarded as an additional qualification to the Rule of 1901. As explained earlier, the imposition of this qualification shows that the government misunderstood the operation of the Islamic legal system and the performance of religious leaders in the society. In other words, the government should realise that it is not necessary for the Dato'Qāḍī to be appointed from those who had performed pilgrimage. This is because a person who has not yet performed the pilgrimage might also be appointed as Dato'Qadi if he is knowledgeable in Islamic law.*

### III. Order of the Ministry of Justice No. 30/4353

*As previously stated, an Order of the Ministry of Justice no. 30/4353 was issued mainly to include Satun province under the Rule of 1901. However, the qualifications of the Dato'Yutitham were also stated in this order. It was stated that apart from being well-versed in the Qur'an and enjoying the respect of the people, the Dato'Yutitham should also be of mature age and should be loyal to the King and his government. The latter qualification was regarded by the Muslims as an unusual addition to the qualification of the Dato'Yutitham.*

*It is important to observe that the above order did not mention the previous qualification of the Dato'Yutitham as prescribed in the Letter of the Great Seal of the Ministry of the Interior, No. 7/9669 i.e. he must be a Dato' Haji or the one who had performed the pilgrimage. Thus, this qualification no longer survived under this order.*

#### IV. The Judicial Official Act

After the introduction of the second *Judicial Official Act* in 1934, the post of *Dato'Yutitham* has been firstly recognized as the judicial officer.<sup>71</sup> This Act had clearly prescribed the qualifications of *Dato'Yutitham*. It was stipulated that besides being well-versed in the Qur'an that enable him to try and decide the Muslim cases on family and inheritance and enjoy the respect of the people, *Dato'Yutitham* must be at least at the age of 25 years old.<sup>72</sup> It is the first time that the minimum age of *Dato'Yutitham* has been clearly imposed by the law. Following this Act, there are other *Judicial Official Acts*, i.e. *the Judicial Official Act of 1936, the Judicial Official Act of 1939 and the Judicial Official Act of 1942*, which had prescribed the qualifications of *Dato'Yutitham*. However, they were similar to what had been prescribed in *the Judicial Official Act of 1934*.

#### 2. *Qualifications of Dato'Yutitham According the Present Act of 1946*

As has been stated earlier, the abolition of the application of Islamic Family Law and Inheritance in 1943 also resulted in the abolition of the *Dato'Yutitham's* institution. However, following the reintroduction of Islamic Family Law and Inheritance in 1946, the institution of the *Dato'Yutitham* was also re-established to play an essential role in the administration of Islamic Family Law and Inheritance in Southern Thailand. Consequently, the qualifications of the *Dato'Yutitham* were again laid down in the *Judicial Official Act*. The first *Judicial Official Act* which prescribes the post of *Dato'Yutitham* after the reintroduction of Islamic Family Law and Inheritance in 1946 is *the Judicial Official Act of 1954*. According to this Act, apart from being well-versed in Islamic law and having a minimum age of 25, the *Dato'Yutitham* must also be proficient in Thai.<sup>73</sup> The Act did not mention the reason for imposing this requirement. However, it is believed that the reason for this qualification is that the proficiency of the *Dato'Yutitham* in Thai is needed for associating with the Civil Judges who do not know Malay.

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<sup>71</sup> The first *Judicial Official Act* which had been promulgated in 1928 did not mention the post of *Dato'Yutitham*.

<sup>72</sup> Section 36, *the Judicial Official Act of 1934*.

<sup>73</sup> Section 36 (3), *the Judicial Official Act of 1954*.

It is, however, observed that the Act did not specify the degree of such proficiency. Consequently, in *the Judicial Official Act of 1978*, it was clearly prescribed that the *Dato' Yutitham* must at least obtain Thai primary school certificate.<sup>74</sup> This is to ensure the *Dato' Yutitham's* proficiency in Thai. Moreover, this Act also changed the age qualification of the *Dato' Yutitham* from 25 years old to 30 years old.<sup>75</sup>

The authorities, however, were still not satisfied with Thai primary school certificate level set for the qualification of the *Dato' Yutitham*. This is because they thought that the holder of such a certificate was unable to associate with Civil Judges who possess legal proficiency. Moreover, the *Dato' Yutithams* are required to refer to the Muslim Code written in Thai to decide the case. Accordingly, in 1985, *the Judicial Official Act of 1978* was amended by requiring that the *Dato' Yutitham* must at least obtained the Thai secondary school certificate.<sup>76</sup>

Although the authorities were always concerned about the proficiency of the *Dato' Yutitham* in Thai, they were apathetic about the essential qualifications of obtaining a Shari'ah degree. It was evidenced that the issue of the *Dato' Yutitham's* qualifications had also been discussed in the seminar held in 1982. Unfortunately, the majority of participants did not agree to lay down the requirement of obtaining of Shari'ah degree for the *Dato' Yutitham*. This is because they opined that to stipulate such a requirement seems to be unfair for those who are knowledgeable in Islamic law but have not obtained a Shari'ah degree.<sup>77</sup> They further asserted that to impose such a qualification would force the students, who wished to serve as *Dato' Yutithams* in the future, to go to study abroad since the Shari'ah programmed was not offered by any local university.<sup>78</sup> However, this serration cannot be accepted at the moment since the Shari'ah programmed is now offered by some local institutions.<sup>79</sup>

According to current law, the qualifications of the *Dato' Yutitham* have clearly been stated in *the Judicial Official Act of 2000*. The Act provides several requirements for the *Dato' Yutitham*. It is commanded to the effect that:<sup>80</sup>

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<sup>74</sup> Section 44 (4), *the Judicial Official Act of 1978*.

<sup>75</sup> Section 44 (2), *the Judicial Official Act of 1978*.

<sup>76</sup> Section 3, *the Judicial Official Act of 1978* (5<sup>th</sup> amendment).

<sup>77</sup> Justice Ministry, *The Seminar on the Application of Islamic Law in Pattani, Narathiwat, Yala and Satun*, p. 78.

<sup>78</sup> *Ibid.*

<sup>79</sup> The Shari'ah programme has been offered by both state and private institutions i.e. the College of Islamic Studies, Prince of Songkhla University and Yala Islamic University.

<sup>80</sup> Section 44, *the Judicial Official Act of 2000*.



(a) Beside looking into the character and personality of the candidate, it is also required that the *Dato 'Yutitham* must have the following qualifications:

- (1) he must be a natural-born citizen of Thailand;
- (2) he must not have a bad character;
- (3) he must not be a bankrupt;
- (4) he must not be an official who has been suspended or dismissed from his post according to this Act or other laws;
- (5) he must not have been punished by being dismissed from the post;
- (6) he must not have been imprisoned by final judgment except for the deed of negligence or a petty offence; and
- (7) he must not be an incompetent or quasi-incompetent person or a person who has a body or mind which is not suitable for the post of judicial official or a person who is affected by the diseases mentioned in the Rules of Judicial Commission for the Justice Court.

It is essential to note that these qualifications are similar to those which have been prescribed for the Civil Judge.<sup>81</sup>

- (a) The age factor is taken into consideration in that the *Dato 'Yutitham* must be 30 years and above.
- (b) He must be knowledgeable in Islamic law and can decide cases on family and inheritance.
- (c) He must be proficient in Thai by having at least obtained the secondary school certificate.

It can be seen that the qualifications of the *Dato 'Yutitham* prescribed in the present *Judicial Official Act* are exactly the same to what had been prescribed by the previous *Judicial Official Act of 1978*.

After discussing the qualifications of the *Dato 'Yutitham*, it is observed that under the *Rule of 1901*, there were no exact qualifications for the *Dato 'Yutithams* except that they had to be well-versed in the Qur'an, enjoy public respect and be of a mature age so as to command respect. However, after the introduction of *Judicial Official Act of 1934*, the qualifications of the *Dato 'Yutitham* had been clearly prescribed but they were not very different from what had been mentioned in the previous rules. A new qualification can be seen in the factor of age which was laid down in the new Act that the *Dato 'Yutitham* must be at least 25 years old.

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<sup>81</sup> Section 26, *the Judicial Official Act of 2000*.



Under the *Act of 1946*, which presently governs the administration of Islamic Family Law and Inheritance, the qualifications of the *Dato'Yutitham* have been prescribed in several *Judicial Official Acts*. However, these qualifications are not very different from what had been prescribed under the *Rule of 1901*. The changes are only made in terms of the requirement of obtaining a Thai educational certificate to ensure the proficiency of the *Dato'Yutitham* and increasing the age of the candidate from 25 years old to 30 years old. However, the Act is silent on the qualification of obtaining the Shari'ah degree despite it being regarded as an essential requirement to ensure the efficiency of the *Dato'Yutitham* in deciding cases.

### **Procedural Appointment Of The *Dato'Yutitham***

As for the procedural appointment of the *Dato'Yutitham*, the study will focus on both before and after the introduction of *the Judicial Official Act*.

#### **1. Before the Introduction of Judicial Official Act**

Before the introduction of *the Judicial Official Act*, it was evidenced that there was no single law regulating the procedural appointment of the *Dato'Yutitham*. It appeared that the authority had simply appointed a single *Dato'Yutitham* in each principality without referring to any procedure.<sup>82</sup> Later on, the Letter of the Great Seal of the Interior Ministry no 7/9669 had assigned the power to the Raja of each principality to appoint the *Dato'Yutitham*. However, the procedure of appointment was not clearly mentioned. According to the Order of the Court of Justice no. 30/4353, the appointment of the *Dato'Yutitham* required the consent of the King.<sup>83</sup> Nevertheless, this order also did not impose any extensive procedure of appointing *Dato'Yutitham*.

It is, however, important to note that even though the procedural appointment of the *Dato'Yutitham* had not been prescribed in this period, in real practice, the *imams* of the mosques and Muslim scholars were invited to select the candidate to be appointed as the *Dato'Yutitham*. It is evidenced that in 1928 when the position of *Dato'Yutitham* in Satun province was vacant, Samuh Tisapibal (the governor of Phuket Region) and the governor of Satun province invited *imams* and Muslim scholars to elect the *Dato'Yutitham*. A name list of the elected candidates was submitted to the Chief Judge of the Regional Court for his approval and then a report was made to the Minister of Justice who is responsible for proposing to the King for his consent. Only

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<sup>82</sup> Narong Siriphachana, *ibid*, p. 48.

<sup>83</sup> Clause II, the Letter of Justice Ministry no. 30/4353 dated September 24, 1917.

after obtaining the King's consent would the *Dato'Yutitham* be officially appointed.<sup>84</sup> The same procedure had been applied in appointing the *Dato'Yutitham* of Narathiwat and Yala provinces in 1933.<sup>85</sup>

After the introduction of the second *Judicial Official Act of 1934*, the procedural appointment of the *Dato'Yutitham* was formally outlined.

## 2. After the Introduction of the Judicial Official Act of 1934

The procedural appointment of the *Dato'Yutitham* is first prescribed in *the Judicial Official Act of 1934*. The Act makes it clear that the Judicial Commissioner, after consulting the governor concerned, should provide a list of candidates who have fulfilled the requirements set by law and should then report to the Minister of Justice. As has been previously practiced, the approval of the Minister of Justice and the King's consent are essential for the appointment of the *Dato'Yutitham*.<sup>86</sup> The same procedure was prescribed in *the Judicial Official Act of 1936, the Judicial Official Act of 1939, the Judicial Official Act of 1942 and the Judicial Official Act of 1948*.

The procedure for appointing the *Dato'Yutitham* was, however, slightly changed in *the Judicial Official Act of 1946*. According to this Act, the King's consent in appointing the *Dato'Yutitham* was not necessary. The Act stated that in appointing the *Dato'Yutitham*, the Judicial Commissioner or the Chief Judge of the Regional Court should provide a list of candidates who had fulfilled the requirements set by law. Then, he had to report to the Minister of Justice whose approval had to be sought for the official appointment of the *Dato'Yutitham*.<sup>87</sup>

From the above rule, it can be seen that the appointment of the *Dato'Yutitham* could simply be made to anybody whom the Judicial Commissioner or Chief of Regional Court considered appropriate for the office of *Dato'Yutitham*. However, in actual practice, the previous procedure applied for appointing *Dato'Yutitham* was still adopted according to which the *imams* selected the qualified person. Then, the selected name would be proposed to the Ministry of Justice.<sup>88</sup> Here, it is obvious that the *imams* had

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<sup>84</sup> Narong Siripachana, *ibid*, p. 67-68.

<sup>85</sup> *Ibid*, p. 68-69.

<sup>86</sup> Section 23, *the Judicial Official Act of 1934*.

<sup>87</sup> Article 3, the Justice Ministerial Decree No. 5 (1979) regulated under *the Judicial Official Act of 1978*.

<sup>88</sup> Ismail Chik, *Prawat Kwam Penma Khong Dato'Yutitham, (The Development of Dato'Yutitham)*, unpublished materials, p. 28.

a major role in selecting the candidate to be appointed as the *Dato 'Yutitham* even though their power to do so was not conferred by any law.

The Act was further revised in 1978. According to this Act, the procedural appointment of the *Dato 'Yutitham* had been briefly prescribed. It was stated that the appointment of the *Dato 'Yutitham* should be ordered by the Minister of Justice through the consent of the Judicial Commissioner.<sup>89</sup> The Act further commanded that the procedure of appointing the *Dato 'Yutitham* should be outlined in the Ministerial Order after obtaining the consent of the Judicial Commissioner.<sup>90</sup> Here, it can be seen that the extensive procedure for appointing the *Dato 'Yutitham* had not been prescribed in *the Judicial Official Act of 1978* as in the previous Acts. Therefore, it is the duty of the Minister of Justice to regulate it in the Ministerial Order.

Based on section 44 of *the Judicial Official Act of 1978*, the Ministry of Justice had issued Order no. 5 (1979) to regulate the procedure of appointing the *Dato 'Yutitham*. It is interesting to note that the procedure for appointing the *Dato 'Yutitham*, which had been outlined in Ministerial Order no. 5, was similar to what had been prescribed in the previous *Judicial Official Act of 1954*. Thus, the *imams* still played an essential role in selecting the *Dato 'Yutitham*.<sup>91</sup>

Later on, Muslim scholars had criticized the way of appointing the *Dato 'Yutitham* by the *imams* of the mosque. This is because they wanted to avoid the candidates persuading the *imams* to elect them.<sup>92</sup> They further asserted that the judiciary post should not be competed as a political seat.<sup>93</sup> Their critique was welcomed by the authorities. Therefore, in the seminar held in 1982, there was a suggestion to amend the procedure of appointing the *Dato 'Yutitham* set by the Ministry of Justice Order no. 5. The seminar proposed that the candidates should undergo an examination in order to prove their capability in Islamic law knowledge on family and inheritance.<sup>94</sup>

The result of the seminar led to the amendment of the procedural appointment of the *Dato 'Yutitham* laid down in the Ministry of Justice Order no. 5. According to the new procedure, the candidates had to undergo the training which would be organized by

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<sup>89</sup> Section 44, *the Judicial Official Act of 1978*.

<sup>90</sup> *Ibid.*

<sup>91</sup> Justice Ministry, *The Seminar on the Application of Islamic Law in Pattani, Narathiwat, Yala and Satun*, 1982, p. 167.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, p. 78-79.

the committee<sup>95</sup> appointed by the Ministry of Justice. The training covers two major subjects namely Islamic Family Law and Inheritance and ethics of the judicial officer. After the training, the candidate would undergo a written and oral test organized by the said committee.<sup>96</sup>

It was stipulated that the list of candidates who passed the test would be submitted to the Ministry of Justice.<sup>97</sup> However, in actual practice, the name of the candidates who passed the test would be forwarded to the special committee which comprises the provincial governor concerned, the Chief Judge of the Regional Court, the chairman of the Provincial Islamic Commission concerned and the Chief Judge of the Provincial Court.<sup>98</sup> The one candidate who satisfies this committee will be appointed as *Dato'Yutitham* by the Ministry of Justice. Here, it can be seen that the highest scorer in the test is not fully guaranteed the post of *Dato'Yutitham*.

It is interesting to mention that the majority of the members of the above committee are non-Muslims. Thus, it can be simply said that the ultimate power of appointing *Dato'Yutitham* is still left in the hands of non-Muslims which obviously contradicts the principles of Islamic law.

After the separation of the Justice Court from the Ministry of Justice, the procedure of appointing the *Dato'Yutitham* was prescribed in the Order of Judicial Commission for Justice Court. However, the procedure still remained unchanged from what had been prescribed in the Ministry of Justice Order no. 5 issued according to *the Judicial Official Act of 1978*. Only some important distinctions can be seen between these two rules. The distinction is that the appointment of the *Dato'Yutitham* according to the Ministry Order no. 5 required the approval of the Minister of Justice after obtaining the consent of the Judicial Commission. Meanwhile, the present rule requires the approval of the Chief Judge of the Justice Court after getting the consent of the Judicial Commission. Moreover, the King's approval has also to be sought.<sup>99</sup>

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<sup>95</sup> The committee comprises incumbent *Dato'Yutithams*, the Chairman of the Provincial Commission concerned, a representative of the *Sheik al-Islam* Office (*Chularajmontri*), a Muslim scholar and a representative of the Justice Ministry.

<sup>96</sup> Clause II, Justice Ministerial Order no. 11(1984).

<sup>97</sup> *Ibid.*

<sup>98</sup> Apirat Madsai', *Dato'Yutitham* of Pattani Provincial Court, Narathiwat, Interview, 2<sup>nd</sup> November 2001.

<sup>99</sup> Section 26(2), *The Judicial Official Act of 2000*.

## **The Status Of The Dato' Yutitham**

As for the status of *Dato' Yutithams*, the study will examine their status of being Judicial Officials. In this connection, the discussion will determine whether or not the *Dato' Yutitham* is equally regarded as a Judicial Official compared to Civil Judges. To achieve this purpose, the promotion and rate of salary provided for the post of *Dato' Yutitham* will be highlighted.

### **1. The Status of the Dato' Yutitham as a Judicial Official**

Before the promulgation of the *Judicial Official Act of 1934*, the status of the *Dato' Yutitham* was uncertain. It is believed that in the beginning, *Dato' Yutitham* was not considered as a Judicial Official. There was no single law or regulation which identified the *Dato' Yutitham* as a Judicial Official like the Civil Judge. Even after the introduction of the first *Judicial Official Act of 1928*, the judiciary status of *Dato' Yutitham* was still silent. Section 6 of this Act only mentioned about the status of Civil Judges. However, after the introduction of the second *Judicial Official Act of 1934*, the post of *Dato' Yutitham* was clearly mentioned and officially recognized as being a Judicial Official like other Civil Judges. Section 5 of the Act had classified Judicial Officials into three categories; they are Ordinary Judicial Officials, Extraordinary Judicial Officials and *Dato' Yutithams*.<sup>100</sup> Since then, the *Dato' Yutitham* has been recognized as a Judicial Official.

Currently, the status of the *Dato' Yutitham* as a Judicial Official has been prescribed in section 6 of the *Judicial Official Act of 2000*. The Act states that:

***“ The Judicial Officials are as follows:***

- (1) The Judicial Officials who have the authority in trying and deciding the case including assistant judges and the officials who have been appointed and called by other names.*
- (2) Dato' Yutithams who have been appointed and given the authority and function in deciding the cases according to Islamic law.*
- (3) Other officials of the Justice Court who have the authority and function on the administration and have been appointed as officials according to the Administration of Justice Court Act.*

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<sup>100</sup> Section 5, *The Judicial Official Act of 1934*.

From the above discussion, it is clear that the post of *Dato'Yutitham* has been equally recognized as being a Judicial Officer like Civil Judges. However, their salary increments and jurisdiction are totally different.

## **2. The Promotion of the Dato'Yutitham**

The salary of *Dato'Yutithams* will be raised every year except for those who have already reached the ceiling set by law.<sup>101</sup> To give a clear picture, it is relevant to show the table of the differences in the salary rate of the Judicial Officials, both Civil Judges and *Dato'Yutithams*.

From the table of salaries and allowances allocated to the Judicial officials, it is clear that the position of the *Dato'Yutitham* is merely tantamount to that of a junior judge of the Court of First Instance. The salary of the *Dato'Yutitham* reaches a ceiling at 25,370 Baht plus an allowance of 7,900 Baht. This means that there would be no difference between *Dato'Yutithams* who hold the position for three years and those who are more senior. In order to enhance the status of *Dato'Yutithams*, it is, therefore, suggested that their salary should be raised at least to the same level as the Judges of the Court of First Instance. In other words, the rate of their salary should be raised to the level of 44,910 Baht plus an allowance of 23,300 Baht.<sup>102</sup>

### **The Jurisdiction of the Dato'Yutitham**

Regarding the jurisdiction of the *Dato'Yutitham*, the study will highlight both the *Rule of 1901* and the *Act of 1946* in order to compare and contrast the extent of the jurisdiction given to the *Dato'Yutitham* by these two rules.

#### **1. The Jurisdiction of the Dato'Yutitham or Dato'QADI Under the Rule of 1901**

Under the *Rule of 1901*, the *Dato'Yutitham* or *Dato'QADI* was given full authority in trying and deciding cases. Section 32 of the *Rule of 1901* stated to the effect that:

*The Criminal Code and Civil Code shall be applied except in civil cases concerning husbands and wives, and inheritance in which Muslims are both the plaintiff and the defendant, or only a defendant. In such cases, the Islamic law shall be applied and tried and decided*

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<sup>101</sup> Section 52, *The Judicial Official Act of 2000*.

<sup>102</sup> Nik Wan Ali Haji Nik Lah, *Dato'Yutitham* of the Narathiwat Provincial Court, Narathiwat, Interview, 2<sup>nd</sup> November 2001.

by a Dato 'QADI who has knowledge of the Qur'an and enjoys the respect of the people<sup>103</sup>

From the above provision, it is clear that the *Rule of 1901* had given full authority to the Dato 'Yutitham or Dato 'Qadi to try and decide the case. This was further supported by the Letter of the Great Seal of the Interior Ministry no.7/9669 which stated that:

**The Table of Salary and Allowances of Judicial Officials**

Level of court	Level of salary	Position	Salary	Allowance
Supreme Court	5	1. President of the Supreme Court	64,000	50,000
	4	1. Deputy President of the Supreme Court. 2. Senior Judge of the Supreme Court. Judges of the Supreme Court. 3. President of the Appeal Court. 4. President of the Regional Appeal Court. 5. Deputy President of the Appeal Court. 6. Deputy President of the Regional Appeal Court. 7. Senior Judges of the Appeal Court. 8. Senior Judges of the Regional Appeal Court. 9. Judges of the Appeal Court. 10. Judges of the Regional Appeal Court	62,000	42,500
Appeal Court	3	1. Deputy President of the Appeal Court. 2. Deputy President of the Regional Appeal Court. 3. Senior Judges of the Appeal Court. 4. Senior Judges of the Regional Appeal Court. 5. Judges of the Appeal Court. 6. Judges of the Regional Appeal Court. 7. Chief Judges of Court of First Instance.	59,090	41,500
			57, 190	30,000

<sup>103</sup> Section 32, *The Rule of Administration in the Seven Principalities of 1901*.

Level of court	Level of salary	Position	Salary	Allowance
		8. Chief Judge of Regional Court. 9. Deputy Chief Judges of Court of First Instance. 10. Senior Judges of Court of First Instance. 11. Judges of Court of First Instance.		
Court of First Instance	2	Judges of Court of First Instance	44,910 40,790 34,610 30,810 27,180	23,300
	1	Junior Judge of Court of First Instance.	25,370 23,570 21,800	7,900

**The Table of Salary of Assistant Judges**

Rate ( Baht/Month)
16,020
14,850

**The Table of Salary of Dato'Yutitham**

Rate ( Baht/Month)
25,370
23,570
21,800

**The Table of Allowances of Dato'Yutitham**

Rate ( Baht/Month)
7,900



*When both parties to litigation are Muslims, or only the defendant is a Muslim, file a complaint to the court, the parties shall be ordered to select the Dato 'QADIs from the panel already established to deliberate and give the judgment in accordance with the Islamic religion and customary practices.<sup>104</sup>*

The jurisdiction of the *Dato 'Yutitham* was further strengthened by the Letter of the High Commissioner of the seven principalities. This letter was sent to the headquarters of the seven principalities dated September 7, 1903 which assigned Luang Borirak Phuben, the then Chief Judge of the Regional Court to give suggestions relating to the procedure of trying the case to the *Dato 'Qadis*.<sup>105</sup> The letter clearly shows that the *Dato 'Yutithams* were responsible for trying and deciding, therefore, they had to be instructed by the Civil Judge concerning the proper procedure as set by law.

The authority of the *Dato 'Yutitham* can also be seen in the Order of the Ministry of Justice no. 30/4353. This rule stated that the *Dato 'Yutitham* should have the authority to apply the Qur'an in trying and deciding Muslim cases on family and inheritance.<sup>106</sup> Moreover, the full authority of the *Dato 'Yutitham* in the case proceedings was further recognized by several *Judicial Official Acts* which had been enacted during the *Rule of 1901*; they are the *Judicial Official Act of 1934*, the *Judicial Official Act of 1936*, the *Judicial Official Act of 1939* and the *Judicial Official Act of 1942* respectively.

From the above discussion, it is significant to state that under the *Rule of 1901*, the *Dato 'Yutitham* or *Dato 'Qadi* obtained full authority over the proceedings of the case without the interference of the Civil Judge. Here, it can be said that the administration of Islamic Family Law and Inheritance was fully controlled by the Muslim judge. Without the interference of a non-Muslim judge, there is no doubt that justice for Muslims on family and inheritance matters are fully maintained. Moreover, this phenomenon denotes that the Muslim judiciary had been fully administered by Muslim judges.

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<sup>104</sup> Clause II, the letter of the Great Seal, Interior Ministry, no. 7/9669 dated December 10, 1902.

<sup>105</sup> The Letter of the High Commissioner of the seven principalities sent to the headquarters of these seven principalities dated September 7, 1903

<sup>106</sup> Clause II, the Letter of Justice Ministry no.30/4353 dated September 24, 1917.

## 2. The Jurisdiction of the *Dato'Yutitham* Under the Act of 1946

At present, the authority of the *Dato'Yutitham* has been reduced to deciding the case only, while the authority of trying the case no longer belongs to the *Dato'Yutitham*. This limitation is clearly imposed in section 3 of the *Act of 1946* which required that the proceedings of Muslim cases should be jointly administered by a *Dato'Yutitham* and a Civil Judge.<sup>107</sup> It is further stated that the *Dato'Yutitham* has only the authority to decide the case according to Islamic law and countersign the file of judgement.<sup>108</sup> The Act finally stipulates that the decision of the *Dato'Yutitham* according to Islamic law is final.<sup>109</sup>

The above provision clearly demonstrates that the administration of Islamic Family Law and Inheritance is affected by the intervention of non-Muslim judges. Moreover, the jurisdiction of the *Dato'Yutitham* has been restricted to deciding the case only. Meanwhile, the authority of trying the case is left in the hands of the Civil Judge. Thus, *Dato'Yutithams* have no choice but to decide the case based on the facts found by the Civil Judge.

After discussing the jurisdiction of the *Dato'Yutitham* outlined by the *Rule of 1901* and the *Act of 1946*, it is obvious that the former rule had provided wider authority for the *Dato'Yutitham*, whereas the latter provides the *Dato'Yutitham* only the authority of deciding the case with the power of trying the case being conferred to the Civil Judge.

### Conclusion

The discussion has revealed four major problems faced by the institution of *Dato'Yutitham*. These major problems are related to the qualification, procedural appointment, status and jurisdiction of the *Dato'Yutitham*. As for the qualifications, it can be seen that the Act does not require that the person who wants to occupy the office of *Dato'Yutitham* must hold a Shari'ah degree which is regarded as the most important qualification for the post of *Dato'Yutitham*. Thus, it is suggested that the Shari'ah degree should be additionally imposed as a requirement for the candidate of *Dato'Yutitham*. This is to ensure the efficiency of those who have been nominated to

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<sup>107</sup> Section 3, *the Application of Islamic Law in Pattani, Narathiwat, Yala and Satun Provinces Act of 1946*.

<sup>108</sup> *Ibid*, Paragraph II.

<sup>109</sup> *Ibid*, Paragraph III.

the post of *Dato 'Yutitham*. With regard to the procedural appointment, it is observed that the highest scorer is not guaranteed the post. Thus, it is suggested that the candidate who passes the test with the top score should be appointed as *Dato 'Yutitham*. However, in case there is a need to reconsider his other qualifications, the views of a special committee in which Muslim members form the majority should be rendered.

In respect of status, even though *Dato 'Yutithams* are regarded as Judicial Officials similar to Civil Judges, their salary is only comparable to that of a junior judge of the Court of First Instance. Thus, it is suggested that the salary of the *Dato 'Yutitham* should be put on par with that of a judge of the Court of First Instance. Finally, in terms of the problem regarding jurisdiction, it is suggested that the *Dato 'Yutitham* should be given full authority to try and decide the case. In order to give the *Dato 'Yutitham* full authority to try and decide cases, it is indeed important and justifiable that the Shari'ah Court should be established.