

## **THE POSITION OF ISLAMIC LAW IN THE FOUR SOUTHERN BORDER PROVINCES OF THAILAND\***

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### **Abstrak**

*Kertas kerja ini membahaskan pelaksanaan undang-undang Islam di Thailand, khususnya di empat wilayah Melayu Selatan Thailand, melalui institusi Qadi yang lebih dikenali sebagai institusi Dato' Yutitham. Beberapa persoalan dasar dikemukakan dalam kajian ini yang mendapati bahawa bidang kuasa yang diberikan kepada institusi Qadi ini hanya terbatas kepada pelaksanaan undang-undang keluarga dan pusaka Islam di kalangan penduduk Islam di selatan Thailand. Isu perlantikan dan kelayakan seseorang Qadi juga dikemukakan dalam kajian ini.*

### **INTRODUCTION**

Thailand is a democratic country with the king as Head of the State.<sup>1</sup> There are many provisions in the revised Constitution of the Kingdom of Thailand, 1997 that provides the principles of democracy such as the protection of rights and liberties of the people,<sup>2</sup> public participation in government, decentralization and local government. The National laws of the country are applied to the Muslims in Thailand in addition to the fact that

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<sup>1</sup> See Section 2, Constitution of the Kingdom of Thailand, 1997.

<sup>2</sup> See Chapter III, Constitution of the Kingdom of Thailand, 1997.

the government considers Islamic law as a special law for the Muslims in the southern part of the country. This paper attempts to investigate the position of Islamic Law (*Shari'ah*) in Thailand legal system in order to reveal the extent to which the Thai government has recognized the law of the Muslims in the dominated southern provinces known as the four southern border provinces of Thailand.

## HISTORICAL OVERVIEW

Thailand legal system is based on various legal systems. Each with its own patterns: the traditional legal system and the western legal system. With regard to the Islamic legal system, it has been applied in Thailand since the first arrival of the Muslim traders from Persia, India, and the Malay Peninsula during the Ayuthaya dynasty.<sup>3</sup> It is reported that *Pracau Songtham* (1602-1627) of Ayuthaya Dynasty who impressed with the achievements of the Persian traders, had appointed Shaykh Ahmad, a Persian Muslim trader to become the king's adviser<sup>4</sup> with regard to the Muslims affairs in *Ayuthaya*.<sup>5</sup>

The administration of the Muslims affairs in *Ayuthaya* was regulated by these mostly foreign Persian traders. When there was a dispute amongst the Muslims, Shaykh Ahmad, acted on behalf of the king, became an Islamic arbitrator in *sarn krom tha kwa*.<sup>6</sup> Another important area of arbitration was marriage. When a Muslim trader

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<sup>3</sup> Ayuthaya was considered as the second dynasty in the history of Siam (now Thailand). There were four dynasties with regard to the history of Thailand namely, Sukhothai Dynasty (1238-1378), Ayudhya Dynasty (1350-1767), Thonburi Dynasty (1767-1782), and Rattanakosin Dynasty (1782- till present).

<sup>4</sup> This appointment was lasted until the reign of King *Pra Chao Prasat Thong* of Ayuthaya Dynasty (1602-1655). He is the first *Chularajmontri* of Thailand which is equivalent to Shaykh al-Islam who carried the title of *Chao Phraya Sheikh Ahmad Rattana Rajesti*. At present the Thai king has already appointed 17 persons to be *Churajmontri* (*Shaykh al-Islam*). They were considered as the highest leaders of the Muslims in Thailand having its responsibilities in responding between the government officials and the Muslim Communities. See Swa Vilaiwan (2001), *Chularajmontri*. Bangkok: Chareun Phon, pp. 28-29. See also Imtiyaz Yusuf (1998), "Islam and Democracy in Thailand: Reforming the Office of Chularajmontri/Shaiikh al-Islam". *Journal of Islamic studies* 9: 2, pp. 277-98; Bukhari Bin Raman (1978), *Islamic Law*. Bangkok: Ramkhamheang University Press, p. 56.

<sup>5</sup> Den Tohmina (1997), *Shariah Court*. [S.l.]: [S.n.], p. 7. See also Prayurasak Jalayanateja (1998), *Muslim in Thailand*. Bangkok: The Foundation of Islamic Center of Thailand, p. 13.

<sup>6</sup> It means "Court in the Department of (Right) Harbor".

intended to marry with a local girl, the latter had to convert into Islam. Thus the marriage would then be conducted according to 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*.

The position of the Islamic law in the Patani<sup>7</sup> Kingdom can be explained in the following manner. Historically, Patani is reported to adopt Islam since the end of the 15th century. Prior to Islam, Hinduism and Buddhism were the religions of the Patani inhabitants. The Islamization of Patani was carried out by the Pasai Muslims who came to Patani to conduct trade in the Patani seaport. Shaykh Sa'id, from Pasai was asked by the Patani King, *Phraya Tu Nakpa* to cure his skin disease. The King promised, in the present of his ministers, officers and subjects, that he would embrace Islam if his skin disease was cured. However, the King failed to keep his promise after the disease was cured. When he was afflicted by the same disease for the third time, he had later on embraced Islam after he was cured and was renamed by Shaykh Sa'id as *Sultan Isma'il Shah Zillullah Fil-Alam*.<sup>8</sup>

After the conquest of the Muslim Patani by the Siamese Monarch in 1789, Muslim communities had organized themselves as the administrative units of the Thai Kingdom while retaining the Muslim character of Patani. It was reported that there was a hierarchy of religious authority that played a significant role in preaching and preserving Islam. As the ecclesiastical head, the Sultan of Patani appointed a *mufti* as his religious counselor. Under the supervision of the *mufti*, there was a *qadi* who acts as an Islamic judge of the district as well as the religious adviser to the district head. At the district level, there were the *imam*, *khatib* and *bilal* of the various mosques in the districts. This classification demonstrated the differences in the responsibilities and the functions of the *sultan*, *mufti*, *qadi*, *imam*, *khatib*, and *bilal* in the implementation of Islamic law in the kingdom.<sup>9</sup>

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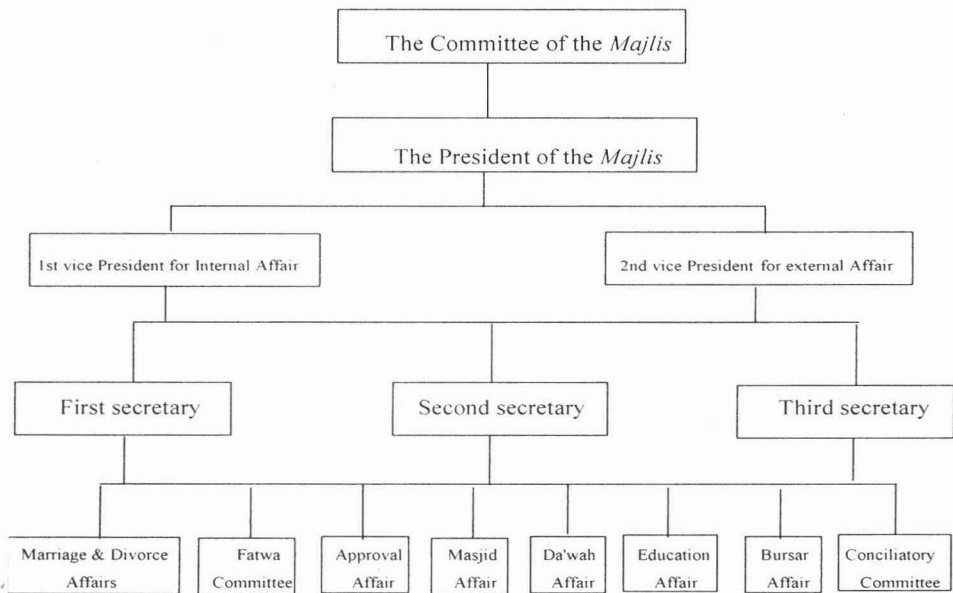
<sup>7</sup> The word Pattani with double "t" is transliterated from the Thai spelling. It is officially referred to a southern border province of the Thai Kingdom, whereas the word "Patani" with one "t" is the Malay version indicated the Malay city-state. In this paper, the word Patani will be employed. See W.K. Che Man (1990), *Muslim Separatism: The Moros of Southern Philippines and the Malay of Southern Thailand*. Singapore: Oxford University Press, pp. 40-41.

<sup>8</sup> A. Bangnara (1977), *Fatani Dahulu dan Sekarang*. Patani: Penal Penyelidikan Angkatan al-Fatani, p. 34.

<sup>9</sup> W.K. Che Man (1990), *op.cit.*, pp. 40-41.

At the district level, there were *imāms* whose function as judges in solving and settling certain disputes, as they conducted sessions on the verandah of the mosque or in their homes. If they could not settle the problem, they would refer to the Islamic Religious Committee Council (IRCC). This practice can still be seen until today. Below is the organizational structure of the Narathiwat Islamic Religious Committee Council (NIRCC).

**Figure 1**  
The Organizational Structure of  
the Narathiwat Islamic Religious Committee Council (NIRCC)



Source: Report on the Narathiwat Islamic Religious Committee Council (NIRCC)

## THE SHARI'AH COURT IN THE LEGAL SYSTEM OF THAILAND

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 Muslim arbitration in the Court of the Department of the Right Harbor during the reign of the *Pracau Songtham* (1602-1627). Whenever there arose a dispute amongst the Muslims, the case would be entrusted to the person who has had a special knowledge on Islamic law. As a result, *Pracau Songtham* allowed the establishment of *Sarn*

*Krom Tha Kwa* in order to try and hear cases including matrimonial cases of the Muslims who lived in the city of *Ayuthaya* and in the seven principalities of Southern Thailand, such as Pattani, Nongchick, Yaring, Saiburi, Yala, Raman and Ragae.<sup>10</sup>

During the reign of King Chulalongkorn or Rama V (1868-1910), the Rule of Administration in the Seven Principalities 1902 was enacted and a special court for the Muslims was set up as part of the Provincial Court. This rule remains until today and section 32 of the rule provides that:

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

Having the special courts existed alongside the Provincial Courts, it was criticized by many Muslim intellectuals in the past. According to them, the special court should be independent and the Muslim judges should be given full authority to hear and try Muslims' cases. In 1909, the Anglo-Siamese Treaty was signed. By virtue of this treaty, the Siamese form of administration was gradually integrated in the Kingdom of Patani. The Kingdom of Patani was incorporated as part of the Thai Buddhist state. Following the incorporation of Patani as part of the Thai Buddhist country, the Thai government then issued the Royal Decree which, *inter alia*, stated that:

No law shall be passed unless by specific royal consent<sup>11</sup>

In 1938, the Islamic law and the special court were abolished by the autocratic Prime Minister Field Marshall Phibul Songkhram who ruled Thailand from 1938-1944 by replacing with the Emergency Decree Amending.<sup>12</sup> This emergency decree provides,

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<sup>10</sup> These seven principalities known as *Khet Jet Huamuang* were set up in 1815. However, in 1906, they were combined into four provinces namely Patani, Yala, Saiburi and Ra-nge. And again in 1933, these four provinces were recombined into only three provinces which last long until today. They are, namely, Pattani, Yala and Narathiwat. See Tej Bunnag (1977), *The Provincial Administration of Siam 1892-1915: The Ministry of the Interior under Prince Damrong Rajanubhab*. Kuala Lumpur: Oxford University Press.

<sup>11</sup> Uthai Hirayanto (n.d.), *Pandin Thai: Changwat Chai Daen Paktai (Thailand: Southern Border Provinces)*. Bangkok: Local Administration Department of Interior, p. 28. See also Surin Pitsuwan (1985), *Islam and Malay Nationalism: A Case Study of the Malay-Muslim of Southern Thailand*. Bangkok: Thai Kadi Research Institute, Thammasat University.

*inter alia*, all citizens are subjected to the Thai civil law irrespective of their origins or religions. The following Phibul Songkram's rise to power, the *Shari'ah* law governing Muslim marriage and inheritance rights was set aside in favour of the Thai Buddhist law of marriage and inheritance.<sup>13</sup>

In fact, the abolition of the Islamic law in Thailand had no doubt created a confrontation between the Muslim leaders and the government and it contradicts with the Thai Constitution.<sup>14</sup> In order to appease this volatile situation, the government has introduced the new act on the application of the Islamic law in the four Muslim dominated provinces of Pattani, Narathiwat, Yala and Satul. This act was enacted in 2486 B.E. (1946).<sup>15</sup> Section 3 of the act provides that:

Islamic family law and inheritance shall be applied in the Court of the First Instance in Pattani, Narathiwat, Yala, and Satul where Muslims are both the plaintiff and the defendants or a Muslims files the request in non-contentious cases.

Hence, by virtue of this act, the Muslims who lived in the four border provinces of Thailand were once more again allowed to apply Islamic law as previously practiced.

### **THE ROLES AND QUALIFICATIONS OF THE *DATO' YUTHITHAM* IN THE PROVINCIAL COURTS**

In order to further assimilate the Muslims into the Thai polity, the office of the *Dato' Yuthitham* was introduced. According to the Rule of the Administration in the seven principalities of 1902, the title of the Muslim judge was called "*tok kali*".<sup>16</sup> This title was first employed by the Thai government to refer to a Muslim judge. In 1917 the Ministry of justice has changed the title of the '*tok kali*' to *Dato' Yuthitham*.<sup>17</sup> The

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<sup>12</sup> Act Promulgating the Provision of Book V and VI of the Civil and Commercial Code of 1943. For further details on the Thai administration during Field Marchal Phibul Songkram, see Kobkua Suwannathat-Pian (1995), *Thailand's Durable Premier: Phibun through Three Decades 1932-1957*. Kuala Lumpur: Oxford University Press.

<sup>13</sup> Andrew Forbes (1982), "Thailand Muslim Minorities: Assimilation, Succession or Coexistence?" *Asia Survey* 22: 2, pp. 1056-1073

<sup>14</sup> See Sections 5, 9 and section 38 of the Constitution of the Kingdom of Thailand, 1997.

<sup>15</sup> This act was issued on 3<sup>rd</sup> December 2489 B. E. (1946).

<sup>16</sup> A letter issued by the Ministry of Justice No: 30/4353 dated 24<sup>th</sup> September 1917.

term “*Yuthitham*” is a Thai word which means justice whereas the word “*Dato*” is a Malay word which is referring to a venerable person. However, the Malay Muslims in the south usually call the Muslim judges as “*tok kadi*”

The common duty of the *Dato’ Yuthitham* is to give advice to the Thai civil judges on family and inheritance cases involving Muslims, but the final judgment would be delivered by the Thai judges. The qualifications of the *Dato’ Yuthitham* are as follows:

1. He must be well-versed in the Quran particularly the verses dealing with marriage and inheritance.<sup>18</sup>
2. He must be able to converse in the Thai language fluently and received education at least the secondary school level.<sup>19</sup>
3. He shall not be less than 30 years old.<sup>20</sup>

Those qualifications as proposed by the government suggested that the *Dato’ Yuthitham* could not carry out their function as an ordinary judge for it does not reflect the ability of becoming a judge. As a result, the applicants had lost their confidence if their cases were tried by the *Dato’ Yuthithams* since those qualifications as stated above do not meet with the actual qualification that has been set in the Holy Qur’an. Besides, the *Dato’ Yuthithams* had received a different treatment in term of appointment, dismissal, promotion of position and their salary. The appointment and dismissal of a judge is usually made by His Majesty King,<sup>21</sup> subjected to the consent by the judicial committee.<sup>22</sup> However the appointment and the dismissal of the *Dato’ Yuthithams* are made by the Minister of Justice<sup>23</sup> since the title of the *Dato’ Yuthitham* is less important as compared to the Thai civil judge.

With regard to the Role of the *Dato’ Yuthitham*, as explained above, it is provided in section 32 of the Rule of Administration in the Seven Principalities 1902, which, *inter alia*, stated that:

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<sup>17</sup> Datok Aziz Benhawan (1988), “The Education and Training of Shariah Judges and Lawyers”. Paper presented at the 5<sup>th</sup> SEAS Conference, Singapore, 26-28 February, 1988, p. 2. See also Datok Aziz Benhawan (1990), “Kadhi di Selatan Thai”, *Shariah Law Journal*, pp. 65-72.

<sup>18</sup> See Section 44 (2) of the Judicial Officer Act 1934.

<sup>19</sup> Section 44.

<sup>20</sup> Section 44 (1). See also <http://www.judiciary.go.th/eng/thejudiciary.htm>.

<sup>21</sup> See Section 192, Constitution of the Kingdom of Thailand, 1997.

<sup>22</sup> Ibid. First para. of 193.

<sup>23</sup> See Section 44 of Judicial Officer Act 1978.

<sup>24</sup> See Section 193, second para of the Constitution of The Kingdom of Thailand, 1997.

The Criminal Code and the Civil Code shall be applied except in civil cases concerning husbands and wives, and inheritance in which Muslim are both the plaintiff and the defendant, or only a defendant, in such a case, the Islamic law shall be applied and decided by the *Dato' Yuthitham* who has knowledge of the *Qur'an* and enjoys the respect of the people.

While the salary and the promotion of an ordinary judge are subjected to the approval by the Judicial Committee,<sup>24</sup> the salary and the promotion of the *Dato' Yuthitham* depend on the consent by the Ministry of Justice.<sup>25</sup> This is due to the fact that the *Dato' Yuthitham* does not really qualify to be a judge whereby the qualifications for the *Dato' Yuthitham* are lower than the civil judge. The Thai civil judge, for example, has to pass the examination set by the Thai Bar Council whereas it is not required for the *Dato' Yuthitham*.

From what we can see above, it is proven that there is no proper Islamic Judicial system in the four southern border provinces of Thailand. Though there existed *Dato' Yuthitham*, but he is actually not a judge but an adviser to the judge. In other words, the *Dato' Yuthitham* is not a full-fledged judge. As a democratic country, the government of Thailand must consider these issues in attempting to upgrade the status of the *Dato' Yuthitham* in the four southern border provinces of Thailand.

## THE HIERARCHY OF THE COURTS IN THAILAND AND THE PROPOSED *SHARI'AH* COURT

According to the Law of the Organization of the Court of Justice 1934, the Thai courts are divided into the Court of the First Instance, the Court of Appeal and the Supreme Court. There are about 140 Courts of the First Instance throughout the Kingdom of Thailand. In Bangkok Metropolis, there 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.<sup>26</sup>

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<sup>25</sup> See Section 45 Judicial Officer Act, 1978.

<sup>26</sup> See Government and Politics-Judiciary and Justice Administration, in <http://sunsite.au.ac.th/thailand/government/judi.html>.

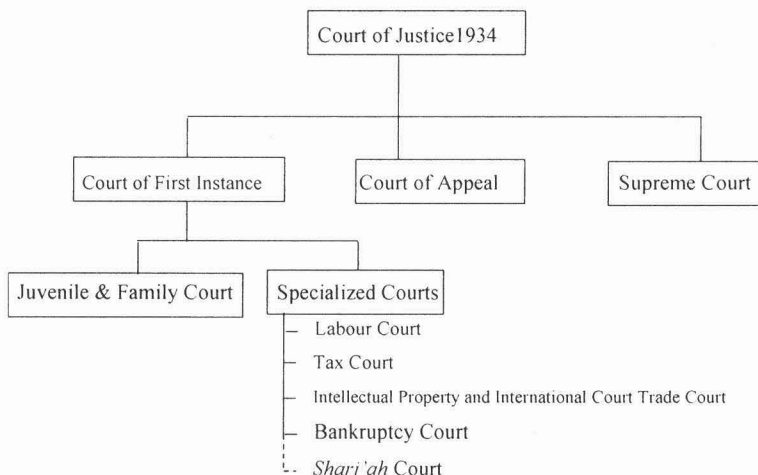


Cases on family issues and inheritance of the Muslims in the four southern border provinces of Thailand are tried by the Provincial Courts (PC) which is under the jurisdiction of the Court of the First Instance. The jurisdiction of the Provincial Courts of Pattani, Narathiwat, Yala and Satul are extended to hear and try Islamic law cases. The law provides that the Provincial Courts must decide cases by two judges. However, in the case of Islamic law they are assisted by two *Dato' Yuthithams*.

According to what has been mentioned above, it becomes clear that the *Shari'ah* Court, as understood by many people in the south is non-existent for the *Dato Yuthitham* has no liberty to decide the Muslims' cases. Moreover, it is not proper to establish *Shari'ah* Court under the Provincial courts since it will effect the present hierarchy of the court. As a matter of fact, the Provincial Courts have already had two more important courts, the Juvenile and Family Court as well as the Specialized Courts. In addition to that, 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. Judges in the Specialized Courts are 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 *Shari'ah* Court for the Muslims in Thailand can also be categorized as a special court in order to open a room for a Muslim 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 *Shari'ah* Court is deemed necessary for the Muslim community in this country.

Figure 2



## MAJLIS UGAMA ISLAM<sup>27</sup> AND THE PROVINCIAL COURTS<sup>28</sup>

As has been mentioned earlier, the *imam* of a respective mosque can hear and try simple cases involving the matrimonial disputes. When a person passed away, his or her remaining family would request assistance from the *imam* to give advice with regard to the distribution of the inheritance to the heirs.

When the *imam* faced difficulty in advising on certain disputes, he will then propose the case to the IRCC. However, the IRCC has not apparently set any rules on how to advise. In practice, the advice grew and developed to fulfill the requests from the Muslim community for assistance.<sup>29</sup> Research conducted in 1998 by the local doctorate students revealed that the IRCC was not only giving advices but also deciding cases on *talaq*, *ta'liq*, *faskh*, *khulu'* as well as cases involving real disputes. The IRCC, at the same time, is also issuing *fatwas*<sup>30</sup> on certain issues.<sup>31</sup> This practice, in fact, can be seen until today.

Statistics of various cases on matrimonial matters which have been decided by IRCC from 1992 to 2001 are shown in Table 1, 2 and 3 respectively.

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<sup>27</sup> This institution was formed in accordance with the Patronage of the Islamic Act of 2488 B.E. (1945). When General Chavalit Yongchaiyudh becomes the Prime Minister, this act was replaced by the Royal Act Concerning the Administration of Islamic Organization 2540 B.E. (1997). Under this act, the Committee for the provincial Court for Islamic Affairs (PCIA) was formed to give advice and to aid the provincial governor in all matters relating to Islam.

<sup>28</sup> In every province, there is one provincial Court. However, according to the hierarchy of the Court in Thailand, the provincial Court was called the Court of the First Instance. According to the Constitutional Court of Justice Act, article 14 (2) provides that the Provincial Courts have its jurisdiction according to the Act on establishing the provincial Court. Generally speaking, the Provincial Courts have the authority to hear and try the cases throughout the province.

<sup>29</sup> Article 26 (11) of the Royal Act 1997 provides, *inter alia*, the provincial Islamic Religious Committee has the power to compromise disputes concerning family and inheritance according to Islamic rules when there is a request from the Muslims.

<sup>30</sup> It is an Arabic word which means a religious ruling. Previously a fatwa in Thailand can be issued by the Islamic Religious Council of the respective province but at present it can only be issued by the *Shaykh al-Islam* (Chularajmontri).

<sup>31</sup> See The Narathiwat Islamic Religious Council, requesting *fatwas* on *lafaz cerai*, Thursday 18<sup>th</sup> February, 1992.

Table 1  
The Patani Islamic Religious Committee Council (PIRCC)

Type of talaq	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Talaq	38	45	60	68	75	85	101	120	125	135
Ta'liq	84	80	63	89	97	93	131	118	120	130
Faskh	-	-	2	-	-	-	-	3	-	-
Khulu'	-	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>122</b>	<b>125</b>	<b>125</b>	<b>157</b>	<b>172</b>	<b>178</b>	<b>232</b>	<b>241</b>	<b>245</b>	<b>265</b>

Source: The Patani Islamic Religious Committee: Matrimonial Files

Table 2  
The Narathiwat Islamic Religious Committee Council (NIRCC)

Type of talaq	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Talaq	45	60	79	84	97	103	120	128	130	150
Ta'liq	89	70	56	90	102	106	100	160	159	130
Faskh	6	7	10	9	13	10	17	12	15	19
Khulu'	1	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>141</b>	<b>137</b>	<b>145</b>	<b>183</b>	<b>212</b>	<b>219</b>	<b>237</b>	<b>300</b>	<b>304</b>	<b>299</b>

Source: The Narathiwat Islamic Religious Committee Council: Divorce Files

Table 3  
The Yala Islamic Religious Committee Council (YIRCC)

Type of talaq	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Talaq	21	34	45	55	67	71	78	80	92	120
Ta'liq	50	60	79	80	90	97	102	134	150	157
Faskh	3	2	5	9	8	10	15	19	19	20
Khulu'	-	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>74</b>	<b>96</b>	<b>129</b>	<b>144</b>	<b>165</b>	<b>178</b>	<b>195</b>	<b>233</b>	<b>261</b>	<b>297</b>

Source: The Yala Islamic Religious Committee Council, Divorce Files

In 1993, the Patani Islamic Religious Committee Council has recorded 80 people who filed the *ta'liq* cases (conditional divorce) and in 2003, it went up to 130 people. As for *faskh* case (divorce at the instance of a wife), 9 people filed *faskh* cases in 1999. Most of the matrimonial cases were filed in the NIRC. Beside the cases that were filed by the Muslims in the Narathiwat, there are also a number of matrimonial cases filed by Malaysian citizens ranging from *talaq* (divorce at the instance of a husband), *ta'liq* (conditional divorce), *faskh* (divorce at the instance of a wife) and *khulu'* (divorce by redemption), for they want to escape from unnecessary investigation and strict procedures.

The statistics given above showed that the PIRCC had already settled a large number of matrimonial cases. Thus, we can infer that the Muslims who went to the IRCC

were not merely to seek advice but also to seek legal solution regarding to the matrimonial disputes. Normally, the IRCC would assist the aggravated party and call the witnesses to confirm the allegation. However, before deciding on any cases, the IRCC often for practical purpose took on the role of bringing both parties involved to try to make peace (*sulh*) instead of seeking legal solution. All these took place even though the committee did not have power to take legal action in such cases. However, by providing unofficial legal assistance, the IRCC was able to help in solving all those matrimonial disputes.

In the *ta'liq* cases, when the complaint is filed, the IRCC would inquire into why the complaint was being made and whether the parties had taken the necessary step to bring about the reconciliation. This requirement is stipulated explicitly in the Qur'an (4: 35). In the case where the committee satisfied with the answers given by the wife, the committee shall ask her to fill a complaint in a letter of petition or claimant form provided by the committee.<sup>32</sup> The committee shall serve a notice on the husband by stating the grounds of the *ta'liq* that "on a certain date his wife has made a complaint to the IRCC that the husband had deserted her for more than four months". In the event where the husband failed to appear before the IRCC, the committee shall presume that the husband has agreed with the wife's complaint. The committee will then fix the date for hearing, and the wife must produce before the committee two reliable witnesses who knew the circumstances of the case. After that the committee would ask the wife to take an oath. Once the oath had been recorded, the committee would issue the *ta'liq* divorce certificate to the wife.<sup>33</sup>

In the case of the desertion, the committee shall grant the divorce to the wife according to the terms and conditions as stated in the marriage certificate as long as the wife's claims do not appear doubtful, otherwise the committee may dismiss such claims. The normal period of desertion which is fixed by the IRCC is six months; nevertheless if the wife can prove that the husband has deserted her for at least four months, the Committee will accept the claims. In the case of *Norma Binti Abdullah v Omar Bin Haji Othman*,<sup>34</sup> after the claim was accepted, the committee found that the defendant

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<sup>32</sup> See Surat Pengaduan *Ta'liq* (a letter of *ta'liq* complaint).

<sup>33</sup> In this certificate, the committee shall state the divorce that has been affected based on the complaint received and the *'iddah* commencement date.

had deserted the plaintiff for 10 months beginning from 24<sup>th</sup> September, 1991. The defendant was, therefore, divorced with one *ṭalaq*.

Ill-treatment of plaintiff by the defendant could be a ground of divorce *ta'liq*, as in the *Ni-Nab Binti Tuan Muda v Daud Bin Samat*.<sup>35</sup> The plaintiff made a report to the NIRCC that the defendant had slapped her face in front of her children on 18<sup>th</sup> June 1992. The defendant came to NIRCC and admitted that he had done so. The Committee, however, decided that the divorce would be dissolved based on *ta'liq* agreement since the husband has breached the condition that had been given by him to his wife after a marriage contract had been concluded.

A husband is obliged to provide food, clothes and lodging. If he fails, a wife may claim for the maintenance or ask the IRCC to dissolve her marriage. In *A-edah Binti Abdul Karim v Cik Mamat Bin Saleh*,<sup>36</sup> the plaintiff asked the NIRCC to dissolve her marriage by *faskh* because the defendant had deserted her for a period of one year and six months. She told the Committee that her husband had failed to provide food and clothes for her. Furthermore, he had not paid a deferred dowry amounting 10,000 Baht. As a result, the committee ordered the marriage to be dissolved by *faskh*.<sup>37</sup>

Where constant quarrels occur, the committee shall advice the disputed parties to enter into the conciliation process. In *Ramlah Haji Hamid vs. Abdul Rahman Bin Jali*,<sup>38</sup> the plaintiff told the committee that she had been married with the defendant for four years with dowry of 25,330.00 baht. After the marriage, the defendant has involved in gambling and has stolen her money amounting 7,000.00 baht.

The plaintiff asked the committee to dissolve the marriage. However, the defendant refused to divorce the plaintiff. Finally, the case was brought to the conciliatory committee which then advised the plaintiff to live with the defendant but the plaintiff

<sup>34</sup> The Narathiwat Islamic Religious Committee Council, Ta'liq case, file no: 93/1992.

<sup>35</sup> The Narathiwat Islamic Religious Committee Council, Ta'liq case, file no: 48/1992.

<sup>36</sup> The Narathiwat Islamic Religious Committee Council, Faskh case, file no: 80/1992.

<sup>37</sup> The decision, as mentioned in the document, was made based on the *fiqh* book entitled *Ghayat al-Afrah*, page 28, chapter 5 on Faskh. However, the name of author of the book was not mentioned. See the Narathiwat Islamic Religious Council, Divorce by *faskh*.

<sup>38</sup> The Narathiwat Islamic religious Committee Council, Divorce by redemption, file no: 36/1989

still disagreed with the advice of the Conciliatory Committee (CC). The plaintiff later on sued the defendant for divorce by redemption (*Khulū‘*) amounting 12,665 baht as proposed by the CC. The plaintiff agreed to pay that amount on Thursday, 17<sup>th</sup> August, 1989 on the condition that the defendant must return her money of 7,000 Baht. The defendant agreed and the Committee ordered the marriage to be dissolved by redemption as required by the plaintiff.

In *Kiah Ahmad vs. Mat Jusoh Abdul latif*,<sup>39</sup> the plaintiff in this case has made a report to the NIRCC that the defendant has beaten her, disallowed her to visit her relatives' house and failed to provide sufficient money to her. Therefore, the plaintiff asked the committee to dissolve her marriage by redemption with the amount of money 5,000 baht. Once the defendant has accepted it, then, the committee can order the marriage to be dissolved as requested by the plaintiff.

However, there are several instants where the Muslims had filed their cases directly to the Provincial court. As for the *Dato' Yuthitham*, they felt strongly that the authority to decide matrimonial cases should still be with the Provincial courts since the government has appointed the *Dato' Yuthitham* to hear and try the matrimonial cases in the four southern border provinces of Thailand.<sup>40</sup> Thus, the *Dato' Yuthithams* were of the opinion that the IRCC had no authority to deliberate on the matrimonial disputes of the Muslims in those four provinces.<sup>41</sup>

With regard to the *Dato' Yuthitham*, there are no set of rules on how the *Dato' Yuthitham* should decide on and advise in the matrimonial cases. In practice whenever a matrimonial case involving Muslims is filed in the Provincial Courts, the Court registrar will propose the case to the *Dato' Yuhitham* who will then examine the facts of the case and send it to the Thai civil judge to be brought to the court for deliberation. The advice given by the *Dato' Yuthitham* on Islamic law would cover and deal with all types of inheritance and divorce, i.e. *ṭalāq*, *ta'liq*, *faskh* problems

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<sup>39</sup> Narathiwat Islamic religious Council, no citation.

<sup>40</sup> Article 3 of Act on the application of Islamic Law in Patani, Narathiwat, Yala and Satul, Act of 2486 B.E. (1946) which provides, *inter alia*, that the *Dato' Yuthitham* shall have the right to apply Islamic law only

<sup>41</sup> Interview with Dato' Ismail Che, *Dato' Yuthitham*, at the Patani Provincial Court, on 25<sup>th</sup> July, 1999.

that have been put forward by the parties concerned. In giving advice, the *Dato' Yuthithams* have always relied on *fiqh* books in their own collection as well as on the code of Family law and law of inheritance code of 1941. The *Dato' Yuthitham* must rely on it as it is stated in the preamble of the codified code which reads:

This law (the code) was compiled in accordance with the Holy Qur'an and the Islamic religious books, therefore, when there were family and inheritance disputes the *Dato' Yuthitham* must refer to it. If the code was silent, the *Dato' Yuthitham* must refer to the Thai Civil and Commercial Law Code as well as the Thai Civil Procedure Code as long as it does not repudiate to the code. This is because both laws were supreme laws of the Country.

However, in practice, there were some cases where the *Dato' Yuthitham* did not actually rely on the code in deciding the case as it has been justified in the case of *Mari-Yea Tayi' @ Manea vs. Hama' Tayi*.<sup>42</sup> The applicant in this case, Mrs. Mari-Yea had filed a suit against her husband by alleging that her husband has deserted her and her children for more than two years. The learned *Dato' Yuthitham* of the Yala Provincial Court held that the applicant had a right to get her marriage dissolved in accordance with article 1516 (4) of the Thai Civil and Commercial Law Code 1935.<sup>43</sup> In fact, the matrimonial cases filed in the Provincial court are not so many. A statistic from the survey revealed that from 1943 to 1947, there was no single matrimonial case filed at the provincial courts. However, in 1950, there were not more than five cases per year that had been decided by the *Dato' Yuthitham*.<sup>44</sup>

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<sup>42</sup> Yala Provincial Court case, Civil Suit No: 215/2544 B.E. (2001). See also a decided case of *Miyea Yamthong @ Masamea v Asi Masamea*, Patani provincial Court case, Civil Suit No: 185/2537 B.E. (1994).

<sup>43</sup> It provides "if one spouse has deserted the other for more than one year or has failed to give proper maintenance and support, the later may enter a claim for divorce".

<sup>44</sup> See Arong Suthasasna (1987), "Shari'ah and Codification – Thailand Experience", *Shariah Law Journal*, pp. 142-143. See also Ahmad Omar Chapakia (2001), "Peranan Ulama' Fatani Dalam Politik: Kajian Kes Haji Sulong Bin Abd. Kadir", paper presented in the *Seminar Nadwah Ulama' Nusantara I*, Kuala Lumpur, 19-20 May 2001, p. 2.

There were few reasons why Muslims were reluctant to file suit at the provincial courts. Firstly, no appeal is allowed since the decision of the *Dato' Yuthitham* shall be final.<sup>45</sup> In respect to that, criticism was made by the secretary of the Central Islamic Committee of Thailand as follows:

In fact a person who has been appointed as the *Dato' Yuthitham* is only an ordinary person. Thus, in carrying out his duty as a judge, there shall be a mistake. If he decides the case wrongly, the plaintiff will be responsible and he will never be given the right to defend his right. Suppose, if this case is being tried in the ordinary court, the judge will surely allow the plaintiff to make an appeal, as such I think the right to make an appeal shall be given to the plaintiff if it is discovered that the decision of the *Dato' Yuthitham* is wrongly given. Thus, the justice is served to the plaintiff.<sup>46</sup>

Secondly, the *Dato' Yuthitham* is not given the authority to decide the case but he is given the privilege to sit on the bench and give an advice on the Islamic law only.<sup>47</sup> And lastly, the plaintiff has to incur excessive expenses in hiring lawyers. As for the IRCC, no such expenses are required.

Below is the statistics on the matrimonial cases filed in the Provincial Courts in the three border provinces of Thailand from 1992 to 2001. The result of decided cases in the three dominated Muslim provinces is shown in Table 4, 5 and 6 respectively.

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<sup>45</sup> See article 4 clause 3 of the act on the application of Islamic law in Patani, Narathiwat, Yala, and Satul, Act of 2489 B.E. (1946)

<sup>46</sup> Khacat Phai Burut Phat (2519B.E.), *Thai Muslim*. Bangkok: Prea Pittaya, pp. 329-330.

<sup>47</sup> See Section 4 of the act on the application of Islamic law in Patani, Narathiwat, Yala, and Satul, 2489 B.E. (1984).



Table 4  
The Yala Provincial Court (YPC)

Type of cases	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Divorce case	5	7	12	15	14	18	19	14	20	25
Inheritance cases	3	5	7	9	9	10	12	16	18	19
Custody of Child	5	8	9	9	12	17	19	20	25	28
<b>Total</b>	<b>13</b>	<b>20</b>	<b>28</b>	<b>33</b>	<b>35</b>	<b>45</b>	<b>50</b>	<b>50</b>	<b>63</b>	<b>72</b>

Source: The office Director, The Yala Provincial Court

Table 5  
The Narathiwat Provincial Court (NPC)

Type of cases	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Divorce case	6	8	10	15	16	19	25	27	30	35
Inheritance cases	4	5	7	6	8	10	12	14	15	16
Custody of Child	4	5	7	9	10	12	11	12	10	14
<b>Total</b>	<b>14</b>	<b>18</b>	<b>24</b>	<b>30</b>	<b>34</b>	<b>41</b>	<b>48</b>	<b>53</b>	<b>55</b>	<b>65</b>

Source: The office of the Court Director, The Narathiwat Provincial Court

Table 6  
The Pattani Provincial Court (PPC)

Type of cases	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Divorce case	5	8	11	10	12	14	18	19	20	21
Inheritance cases	2	5	6	7	8	10	11	13	14	16
Custody of Child	4	6	8	9	9	12	16	17	19	19
<b>Total</b>	<b>11</b>	<b>19</b>	<b>25</b>	<b>26</b>	<b>29</b>	<b>36</b>	<b>45</b>	<b>49</b>	<b>53</b>	<b>56</b>

Source: The office of Court Director, The Pattani Provincial Court

Based on the statistics, it is clearly demonstrated that the Provincial Courts of Narathiwat, Pattani and Yala solved lesser number of the matrimonial cases of the Muslims in the south as compared with the IRCC. It should also be pointed out that there was a strong tendency amongst the Muslims in the south to go to the IRCC to settle their marital disputes rather than to go to the Provincial Courts.

The matrimonial cases which are frequently decided by the Provincial Courts fall under the category of the divorce by desertion. It is observed that the provincial court is not consistent in applying the law, though it is the *Dato' Yuthitham's* duty to apply Islamic law. The example can be seen in the case of *Mariyeta Tayi '@ Menea*

*vs. Hama Tayi*'.<sup>48</sup> In this case, the plaintiff requested her marriage to be dissolved by *ta'liq* based on *lafz ta'liq* which is attached on the marriage certificate, issued by YIRCC. The wife then filed a suit at YPC by alleging that her husband had deserted her and her children for over two years. The learned *Dato' Yuthitham* granted a divorce by relying section 1516 (3) of the Thai Civil and Commercial Law Code 1935 which stated to the effect that:

If a spouse has deserted the other for more than one year or has failed to give proper maintenance and support the later, she may enter a claim for divorce.

However, in *Nuriyah vs. Ma'ripeng Che Leh's* case,<sup>49</sup> the learned *Dato' Yuthitham* applied Islamic law as it was embodied in the code of the Muslim Family Law and the Law of Inheritance code 1941. In this case, the plaintiff, Miss Nuriyah, had applied to the Patani Provincial Court to confirm a *talaq* by *ta'liq* under article 92 (4) of the Muslim Family Law and the Law of Inheritance Code 1941, by arguing that the husband had pronounced the conditional divorce or *ta'liq* and the defendant had failed to comply with it, by willfully deserting her for a period of six months. Moreover, he had not given maintenance to the plaintiff and her children. The learned *Dato' Yuthitham* of the PPC advised the Thai judge and stated that the plaintiff was entitled a divorce in accordance to the *ta'liq* agreement which has been given before the imam. The court then ruled in favour of the plaintiff.

Whenever the husband has maintained or treated another woman as his wife, the plaintiff may file a petition for a divorce from her husband on the ground of *shiqaq*<sup>50</sup> or disagreement. In *Siti Nuriyah @ Sumaiyah Ma'ding vs. Ibrahim Ma'ding*,<sup>51</sup> the learned *Dato' Yuthitham*, *Dato' Ni Wea Ali Ni Loh*, who advised the case was of the opinion that since the defendant had maintained another woman as his wife, the plaintiff would enter a claim for divorce according to section 1516 (1) of the Thai

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<sup>48</sup> Yala Provincial Court, Civil Suit No: 215/2001.

<sup>49</sup> The Patani Provincial Court, Civil Suit No: 787/1999.

<sup>50</sup> The word *shiqāq* is the Arabic word which means to break into two. The juristic meaning of *shiqaq* is discord and conflict between the spouses. Its principle is derived from the Holy Qur'an (4: 35).

<sup>51</sup> The Narathiwat Provincial Court, Civil Suit No: 8/1997.

Civil and the Commercial Law Code 1935, as grounds for a dissolution of the marriage. The court then ruled in the favour of the plaintiff.

## **THE CONCILIATORY BODY**

Both institutions, the Provincial Courts and the Provincial Islamic Religious Committee Council seemed to agree to establish the conciliatory body in order to prevent the marriage from breaking down and to maintain the relationship between the plaintiff and the defendant after the divorce had been granted. From its inception, the main task of the Provincial Islamic Religious Committee Council has been to compromise disputes concerning family and inheritance. This noble job was later on recognized by the Patronage of Islamic Act of 2488 B.E. (1945). This act which was renamed as the Royal Act Concerning the Administration of Islamic Organization 2540 B.E. (1945) provides that:

The Provincial Islamic Religious Committee has the power to compromise disputes concerning family and inheritance according to the Islamic rule<sup>52</sup>

It is observed that this act is silent about the appointment of the arbitrators, its qualifications and the procedures of handling the conciliation session. As a result, the IRCC has to adopt a conventional approach wherever the act is silent. In Narathiwat, for example, the normal practice is that when complaint was lodged, the IRCC shall direct the parties to enter for reconciliation before the conciliatory committee. If the Conciliatory Committee is unable to persuade the parties to resume marriage life together, the committee will ask the husband to pronounce the divorce.<sup>53</sup> From this practice, it is observed that the appointment of *Hakam* or arbitrator is overlooked by the committee whereas the importance of *Hakam* is clearly mentioned in the Holy Qur'an.<sup>54</sup>

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<sup>52</sup> See Article 26 (11) of the Royal Act.

<sup>53</sup> Ma-Useng Pador Kampong (1993), *Peranan Majelis Ugama Islam Narathiwat Dalam Mengembangkan Islamiyah Di Propinsi Narathiwat Thailand Selatan*. Unpublished M.A Thesis, Institute Agama Islam Negeri Sunan Kalijaga, Yogyakarta, Indonesia, p. 47. See also a decided case of Rahimah Haji Hamid, Narathiwat Islamic Religious Committee Council, No. case: 36/2532 B.E. (1989).

<sup>54</sup> See the Holy Qur'an (4: 35).

Looking at the importance of this institution, the Ministry of Justice has issued the rule for the Administration of the Court of Justice in the matter of conciliation of the disputes B.E. 2544 (2001). According to this rule, the qualifications of the arbitrator are as follows:

1. He must have a basic knowledge in Sciences, Economics and Law.
2. He must be 25 years old.
3. He must be morally excellent.
4. He must not become an incompetent person by the judgment of the court.
5. He has never been sentenced to be imprisonment unless in negligence cases.<sup>55</sup>

The responsibility of the arbitrator is to reconcile and to compromise the disputed parties.<sup>56</sup> In exercising his duty, no coercion is allowed.<sup>57</sup> This conciliation process is conducted before the case being brought to the court. If the arbitrator failed to reconcile or compromise, the arbitrator in charge will send a report to the court.

From the discussion above, it is noticed that both institutions are working hard to settle the matrimonial disputes through the conciliatory process in order to prevent from marriage breakdown. Whether or not this body can work effectively, it depends on the role played by the arbitrators during the conciliation session. As for the qualifications of the arbitrators that have been laid down in the rules, it seems that there is a possibility in reducing the numbers of the marriage breakdown in the four southern border provinces of Thailand.

## **CONCLUSION**

From the above discussion, we can conclude that the Islamic law is considered as the law for the Muslims in Thailand. However, after 1902, the Islamic law was considered as the law for the Muslims in only certain provinces by virtue of many acts i. e. the Rule of Administration in the Seven Principalities of 1902, the Patronage

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<sup>55</sup> See No. 28 of the rules and regulation for the administration of the court of justice in the matter of the reconciliation of the disputes.

<sup>56</sup> *Ibid.* Rule no. 32 (1) (2).

<sup>57</sup> *Ibid.* Rule no. 32 (3).

of Islamic Act of 1945, and the Application of the Islamic Law in Patani, Narathiwat, Yala and Satul Act of 1946. In other words, the Muslims in Thailand are governed by two different sets of laws - one is the Islamic law and the other is the secular law.

With regard to the Islamic law, it was administered by two different institutions, the provincial courts and the Islamic Religious Councils. In fact, the Muslims are in a complex position, that is when they want to apply the Islamic law especially in settling their matrimonial disputes, they always confused as to whether to rely on the state law or the Islamic law. As for the latter, the decision depends on the *Dato' Yuthithams* whereby their decision is absolute and no appeal is allowed. Meanwhile the decision of the former depends on the Thai civil judges. As a result, the decision given is totally different from that of the Thai civil judges since they applies the Thai civil law code though they are assisted by the *Dato' Yuthithams*. This problem, from our points of view, can be solved through the establishment of the *Shari'ah* Court and the upgrading of the position of the Islamic law in the Thai legal system.

