



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

THE CODE OF MUSLIM FAMILY LAW AND LAW
OF INHERITANCE, 1941: A CRITICAL STUDY ON
DIVORCE AND RELATED PROVISIONS AS
APPLIED IN THE FOUR SOUTHERN PROVINCES
OF THAILAND

BY

SULAIMAN DORLOH

INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

2008

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DIVORCE AND RELATED PROVISIONS AS
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BY

SULAIMAN DORLOH

A thesis submitted in fulfillment of the requirement for
the degree of doctor of philosophy

Ahmad Ibrahim Kulliyyah of Laws
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JUNE 2008

ABSTRACT

This thesis is a critical study of the contents of the Muslim Family Law and Law of Inheritance Code, 1941 (MFLALIC). It begins with a discussion of the historical perspective, the position and the problems of the application of Islamic law in Thailand. It covers the position of Islamic Law during the *Sukhothai* Dynasty (1238-1378), the *Krung Sri Ayutthaya* Dynasty (1350-17657) and during the *Rattana Kosin* Dynasty 1782 until the present day. Particular treatment is given to the contents of the MFLALIC on divorce and its related subjects, namely: divorce by *ṭalāq*, *ta'liq*, *faskh*, and *khul'*. The research is conducted in such a way due to the fact that there has been much criticism from the public and *Dato' Yuthithams* in the Provincial Courts of Patani, Narathiwat, Yala and Satul regarding the contents of the MFLALIC on divorce. The thesis also examines the extent to which the provisions in the MFLALIC are based on the classical Islamic law of the four Sunni schools and the extent to which they depart from it. The research reveals that many provisions in the MFLALIC are generally in line with classical Islamic law. However, views of other schools such as the *Zāhirīs* and, the Shi'is are also taken into consideration despite the fact that the Muslims in Thailand are following the *Shāfi'īs* school of law. It is observed that even though the law of *ṭalāq* which has been embodied in the MFLALIC is in line with classical Islamic law, there are some provisions that can still be amended and reviewed to improve the existing provisions in the MFLALIC. Finally, it is expected that this research may contribute to knowledge by conducting a comparison between the various legal systems of the Muslim and non-Muslim countries, for instance, the Philippines, Pakistan, Egypt, Morocco, Tunisia and Sudan. The concentration, however, is focused on the Malaysian Law especially Islamic Family Law (Federal Territories) 1984.

1941

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APPROVAL PAGE

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DECLARATION

I hereby declare that this research is the result of my investigations, except where otherwise stated. I also declare that it has not been previously or currently submitted as a whole for any other degrees at IIUM or other institutions.

Sulaiman Dorloh (Haji Omar Abdullah)

Signature.....

Date.....

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**DEDICATED TO MY PARENTS
WHO TAUGHT ME
TO LOVE KNOWLEDGE AND TRUTH**

ACKNOWLEDGMENTS

In the Name of Allah, the Compassionate, the Merciful, Praise be to Allah, Lord of the Universe, and Peace and Prayers be upon His final Prophet (Allah's blessing and peace be upon him) and Messenger.

It is my sincere duty to express my gratitude to the individuals who have contributed to the completion of this work. First of all, I would like to express my deepest gratitude to *al-Marhūm* Professor Emeritus, Tan Sri Datuk Ahmad Ibrahim, the former Dean of the Kulliyah of Laws, International Islamic University, Malaysia who made a significant contribution to Islamic Family law in Malaysia. He had also shown genuine interest in the development of the Islamic Law in Thailand and had me to continue to take part in this work. I would like to thank the former honourable Rector, Prof. Dr. Mohd. Kamal Hassan who advised me to accept the position as a lecturer at the College of Islamic Studies, Prince of Songkhla University, Patani campus.

My sincerest gratitude to my supervisors Asst. Prof. Dr. Normi Hj. Abdul Malek for her careful corrections, comments, criticisms and guidance throughout the period of my studies. Without her assistance this work could not be finished. And Assoc. Prof. Dr. Abdul Rahman Awang for his moral support and careful corrections, comments on chapter one, chapter two and chapter three.

I would also like to express my sincere appreciation and gratitude to Asst. Prof. Dr. Hassan Madmarn, the former Director of the College of Islamic Studies, Prince of Songkhla University, Patani Campus, Thailand who failed to urge me to pursue my studies at the PhD level and allowed me to take study leave at the International Islamic University, Malaysia even though the College of Islamic Studies is facing a shortage of lecturers.

To all the administrative officers and staff at the College of Islamic Studies, Patani as well as the staff of the Ahmad Ibrahim Kulliyah of Laws office, especially Mdm. Habidan Snikwee, an Administrative Staff member at the Islamic Studies Department and Mdm. Husna Che Lah, an Administrative Staff at the Administrative Office, my colleagues at AIKOL especially Mr. Tajul Aris Ahmad Bustami, Dr. Hisham Mohd. Kamal and Dr. Azizah Binti Mohd and students at the College of Islamic Studies, PSU, I wish to record my special gratitude for providing me with administrative assistance and moral support during my study leave.

I also take this opportunity to thank *Dato' Yuthithams* in the southern four border provinces of Thailand especially, Dato' Abdullah Tuan Meden, Dato' Ni Wae Ali Ni Loh, Dato' Apirat Mad Saed, Dato' Ismail Che, Dato' Abdullah Samaee and Dato' Abdullah bin Daud from whom I constantly got advice and suggestions on the aspects of Islamic Family Law and the former Chief Judge of Patani Provincial Court, Mr. Anusorn Srimendth, Mr. Ibrahim Omar Banthon, the Director of Narathiwat Juvenile Court and the Presidents of Muslim Religious Committee Councils of Narathiwat, Patani, Yala and Satul for allowing me to study and access unreported cases on Islamic Family Law that have been filed by the provincial courts and the Islamic Religious Committee Council Office. The same gratitude is also extended to my parents-in-law, Kru Ismail Bin Noh and Kru Che Yoh Binti Ali Ishak for their help and support in looking after my son and daughters during my stay at the IIUM.

I would like to take this opportunity to record my heartfelt gratitude to my beloved wife, Hafsah Binti Ismail, my son, Arif and my daughters, Nurul Huda and Yusriyyah for their understanding, patience and sympathy which have helped me to accomplish this work. And finally, I dedicate this work to my people in Patani and to my beloved father, *al-Marḥūm* Haji Umar bin Abdullah and my beloved mother *al-Marḥūmah* Hajjah Ayshah Binti Muhammad who have always encouraged me to seek knowledge and the truth.

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LIST OF ABBREVIATIONS

AIR	All Indian Report
Art	Article
B.E	Buddhist Era
Bom	Bombay
C.E	Christian era
Cap	Chapter
CC	Conciliatory Committee
Edn	Edition
Ibid	ibidem: in the same place
Inter alia	among other things (Lat)
ILR	Indian Law Report
JH	Journal Hukum
JMBRAS	Journal of the Malayan / Malaysian Branch of the Royal Asiatic Society
MLJ	Malayan Law Journal
MFLALIC	Muslim Family Law and Law of Inheritance Code of 1941
n. p.	No publisher
n.d.	No date
n.pp.	No place of publication
No	Number
p.	Page
para	Paragraph
p. b. u. h	Peace be upon him
PLD	Pakistan Law Division
Sec	Section
Transl	Translated by
U.S.A	United State of America
V	Versus, against (in legal terms)
Vol	Volume

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CHAPTER ONE

INTRODUCTION

1.0 General Introduction

Although Thailand is a Buddhist country,¹ the Islamic Family Law and Law of Inheritance were introduced in 1941 as an exception to book V (book five)² of the Thai Civil and Commercial Law Code.³ This is because in the four provinces, the majority of the population is Muslim. Nevertheless, the contents of the Muslim Family Law and Law of Inheritance Code of 1941⁴ for the southern four border provinces of Thailand and its administration remain inconspicuous. In this connection, M.B. Hooker has observed that:

... Islamic Family Law survives as an exceptional to the Thai civil code but its content and administration are unknown.⁵

Mahamasake Cheha in his thesis, the Administrative Problem of Islamic Family Law and Inheritance in Thailand has commented that:

The Muslim code on family and inheritance of southern Thailand serves as a single source of Islamic Family Law and Inheritance in southern Thailand. However, it contains many outdated provisions which need urgent revision. Moreover, the Code has omitted several important

¹ See Article 9 of Constitution of the Kingdom of Thailand, 1997.

² Book V(book five) of the Thai civil and commercial law code includes article 1435 to article 1598, comprising of 163 articles. Book V(book five) of the code contains three titles. Title one is about marriage, title two deals with parents and children and title three discusses maintenance. See Chatri Bunnag and Varee Naskul,"Family Law in Thailand ", *Journal of Family Law*, vol. 1, no 2 (1975) at 202.

³ It has been enforced since 1st October, 1934 and was amended on 16th October, 1976. This Code is considered as final Thai Family Law applicable to the Thai-Buddhist people. See Rongruj Reung Watwong, *Krub Khrua (Family)*, (Bangkok: Winyuchun, n.d.,) at 12-13.

⁴ Hereinafter referred to as the MFLALIC.

⁵ M. B. Hooker, *Islamic Law in South-East Asia*, (New York: Oxford University Press, 1984), 164.

provisions which should be laid down for the sake of the implementation of Islamic Family Law and Inheritance.⁶

Despite the above fact, this law has not been brought to parliament for approval. This may involve controversial issues as to whether this law is really valid to be enforced. In this respect, article 92 of the constitution of the Kingdom of Thailand of 1997 states that:

A bill or an organic law bill may be enacted as law and with the advice and consent of the National Assembly.

From the above quoted constitutional provision, it can be said that any bills which have not been approved by the National Assembly cannot be considered as the effective law. Nevertheless, this law is frequently used as a reference by *Dato' Yuthithams*⁷ as well as the Thai civil judges in the Provincial Courts⁸ of Patani,⁹

⁶ Muhamasake Cheha, "(The Administrative Problem of Islamic Family Law and Inheritance in Thailand)", (Ph.D Thesis, International Islamic University, Malaysia, 1998) p.108.

⁷ It is to be noted that all Thai names are spelled in accordance with the pronunciation, rather than based on literary Thai spelling. According to the Rule of the Administration in the Seven Principalities of 1902, the title of the Muslim judge was called "*to' kali*". This title was first employed by the Thai government as it was stated in the letter issued by the Ministry of Justice No: 30 / 4353 dated on 24th, September 1917 to refer to a Muslim judge. In the same year the Ministry of Justice changed the title of *to' kali* to *to' kasi* or *kazi*. It is a Thai version borrowed from the Arabic word of *qāḍī*. The Malays and Muslims in the South usually address the Muslim judge as *to' qoḍī* as commonly referred to in much of the Malay world in Southeast Asia. In 1917, the Ministry of Justice changed the title of *to' kasi* to *Dato' Yuthitham*. The word "*Yuthitham*" is a Thai version denoting justice whereas the word "*Dato'*" is a Malay word for a venerable person. In this research the word *Dato' Yuthitham* will be employed instead of *Dato' Qāḍī*. See Dato' Aziz Benhawan, Paper Presented at 5th SEAS Conference, *the Education and Training of Shariah Judges and Lawyers*, Singapore, 26 -28 February, 1988, at 2. See also Narong Siriphacana, *Kwam Pen Ma Khong Kot Mai Islam Lae Dato' Yuthitham* (The Development of Islamic Law and Dato' Yuthitham), (Bangkok, n.p., 1975) at 44 - 46. It is worthy to mention here that the *Dato' Yuthithams* are appointed by the government only in the four Muslim border provinces of southern Thailand. There are two *Dato' Yuthithams* in every province. See Nima Jehtae, "*Al-Tanzīm al-Idārī Li Shu'ūn al-Islāmiyyah Fī Tayland* (The Administration of the Islamic Religious Affairs in Thailand)", (Master's dissertation, International Islamic University, Malaysia, 1998) at 100-105.

⁸ According to the structure of the court in Thailand these courts were called "the court of the first instance or the provincial courts." In this research, the phrase " Provincial Court " will be employed.

⁹ The word "Patani" with one "t" is the Malay version and indicated a Malay city-state whilst Pattani with the double "tt" is transliterated from the Thai spelling. It officially referred to a southern border province of the Thai Kingdom. In this writing the word Patani is employed. See W. K. Che Man, *Muslims Separatism: The Moros of Southern Philippines and the Malay of Southern Thailand*, (New York: Oxford University Press, 1990), 45.

Narathiwat,¹⁰ Yala and Satul in Southern Thailand in deciding matrimonial disputes among Muslims.

With regard to the application of the MFLALIC, many questions may arise, for example, how does the dissolution of marriage take place according to the MFLALIC and whether the provisions of the MFLALIC on the dissolution of marriage are in line with Islamic Law? This is because no attempts have been made by the Thai government to reform and review the provisions of the MFLALIC. On this particular point Gavin W. Jones has observed that:

Marriage laws for the minority Muslim population in Southern Thailand have not undergone any of the reforms...the Islamic authorities take a very traditional view of marriage and divorce procedures, with more emphasis on the rights of men in marriage, divorce, and polygamy than on their responsibilities.¹¹

Therefore, the research aims to examine and critically assess whether the MFLALIC provides sufficient provisions concerning the law of divorce and its related subjects as stated in the classical writings of the Muslim scholars according to their respective schools of law (*madhhab*) and modern legislations from various countries especially Malaysia.

1.1 Objectives of the Research

The main objective of this study is to examine whether the provisions of the MFLALIC on divorce and its related subjects are applicable to the Muslims in the southern four border provinces of Thailand and adequate to meet the concept of divorce in Islamic law. On this point, the specific objectives are as follows: -

¹⁰ Also spelled Narathivat, previously it was popularly known by Muslims as *Bangnara* and was officially renamed on 10th June, 1942. However, in this research the word Narathiwat will be employed. See *Ibid.*, 44.

¹¹ Gavin W. Jones, *Marriage and Divorce in Islamic South-East Asia: Thai Social, Economic and Legal Context*, (New York: Oxford University Press, 1944), 55. See also Arong Suthasat, "Shari'ah and Codification-Thailand Experience" *Shari'ah Law Journal*, vol. 4 (January 1987) at 117.

- 1- To study the law of divorce as laid down in the Holy Qur'ān and the Tradition of the Prophet (p. b. u. h);
- 2- To investigate the opinions of the classical Muslim jurists on divorce and its related subjects particularly the four major schools of law in Islam;
- 3- To point out whether the provisions of the MFLALIC on divorce and its related subjects are in line with the concept of Islamic law;
- 4- To highlight some of the weaknesses which should be solved in order to improve the existing provisions in the MFLALIC.
- 5- To compare with some other legislations such as Islamic Family Law in the Philippines, Singapore and some other Muslims countries especially the Islamic Family Law (Federal Territories) 1984(Act 303) of Malaysia in order to improve the MFLALIC; and
- 6- To make some suggestions and recommendations concerning the provisions of the MFLALIC on divorce and its related subjects those are applicable in the provincial courts in the four southern provinces of Thailand.

1.2 Statement of Problem

This research is conducted based on the presumption that the present MFLALIC governing *ṭalāq*, *ta'liq*, *faskh* and *khul'* in the four southern provinces of Thailand is insufficient to deal with those issues. It leads to inefficiency and reflects some weaknesses when applying the MFLALIC in the provincial courts. This would create an impression among the Muslim community as well as the Thai Buddhist majority that the Islamic law in general is unable to solve their problems in matrimonial