

**THE ADMINISTRATIVE PROBLEMS OF
ISLAMIC FAMILY LAW AND INHERITANCE IN
THAILAND**

BY

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ABSTRACT

This thesis is a study of the administrative problems of Islamic Family Law and Inheritance in Thailand. The problems are classified into five areas: the problem of the codification; the problem of the absence of the Shari'ah Court; the problem of the absence of Muslim procedural law; the problem concerning the institution of the Dato'Yutitham and the problem of the limited application of Islamic Family Law and Inheritance.

In conducting the research, various methods of analysis have been utilised namely descriptive methods, historical methods and comparative methods. In addition, the study is based on library research, therefore, the data are obtained through the collection and compilation of the written sources.

The study concludes that some provisions of the Muslim Code on family and inheritance are outdated so they need to be amended immediately. The study also indicates that the Muslim Code is not regarded as effective law as it has never been debated and approved by the Parliament Assembly. Therefore, it should be included as part of the *Act of 1946* which governs the administration of Islamic Family Law and Inheritance in Thailand.

The study further demonstrates that the Thai judiciary has established several courts of specific jurisdiction to deal with specific cases. Therefore, it is recommended that the Thai judiciary should also establish the Shari'ah Court to provide the Dato'Yutitham with exclusive power in dealing with Muslim cases of family and inheritance.

The study also reveals that the absence of procedural law has led Muslim cases of family and inheritance to be adjudicated according to the Civil Procedure Code. The study emphasises that to be governed by the Civil Procedure Code, Muslim cases of family and inheritance face other problems: the problems regarding the scope of Islamic Family Law and Inheritance; the problem concerning the scope of the party and the problems pertaining territorial jurisdiction of the court. Therefore, it is suggested that Muslim cases should have their own procedure to ensure that justice is served upon the Muslim community in Thailand.

The study explores that the qualifications of *Dato'Yutitham*, are insufficient. Therefore, it is suggested that the *Dato'Yutitham* must have a minimum qualification of a Shari'ah degree. The study also reveals that the procedural appointments of the *Dato'Yutitham* are inappropriate. Therefore, it is suggested that the procedural appointment of the *Dato'Yutitham* should be amended to ascertain that the highest scorer, whose character is good, will be guaranteed to secure the post. Moreover, the study reveals that the status of the *Dato'Yutitham* is merely tantamount to the junior judge of the Court of First Instance. Therefore, it is recommended that the *Dato'Yutitham* should be promoted at least equal to the judge of the Court of First Instance.

Due to some limitations on the application of Islamic Family Law and inheritance which has caused the conflict of laws, this study has suggested that Islamic Family Law and Inheritance should be applicable throughout the country as well as outside the court.

ملخص البحث

تناولت الأطروحة المشكلات في إدارة القانون الإسلامي للأحوال الشخصية والمواريث في تايلاند ، حيث تمحورت المشكلات في خمسة محاور . فالمحور الأول يتعلق بالمشكلة القانونية والمحور الثاني يتعلق بعدم وجود المحكمة الشرعية ، والمحور الثالث يتعلق بعدم وجود قانون المرافعات الإسلامية . والمحور الرابع يتعلق بالقاضي الشرعي (داتو يو تيتام) . والمحور الخامس يركز على محدودية تطبيق القانون الإسلامي للأحوال الشخصية والمواريث .

واعتمدت الأطروحة على مناهج عديدة منها المنهج الوصفي والمنهج التاريخي ، والمنهج المقارن ، فضلا عن ذلك اعتمدت الأطروحة على مختلف المصادر والمراجع كونها بحث مكتبي .

وتوصلت الدراسة بأن القانون الإسلامي للأحوال الشخصية والمواريث لا يتواءم مع العصر ويجب إعادة صياغته حالا ، فضلا عن ذلك توصلت الدراسة بأن القانون المذكور لم يكن في حيز التنفيذ رسمياً ، حيث لم يتم مناقشته وموافقته من قبل المجلس التشريعي .

وتوصلت الدراسة بأن نظام المحاكم التايلاندية ، قد أنشأ محكمة خاصة لمعالجة القضايا الخاصة . لذلك يجب إنشاء المحكمة الشرعية لمعالجة قضايا المسلمين المتعلقة بالأحوال الشخصية والمواريث .

وتوصلت الدراسة في معالجة قضايا المسلمين بقانون المرافعات المدني لسبب عدم وجود قانون المرافعات الإسلامي الأمر الذي أدى إلى بعض المشكلات منها محدودية القانون الإسلامي للأحوال الشخصية والمواريث ، ومحدودية الأطراف المتعلقة بالقضايا ومحدودية المحكمة نفسها .

وتوصلت الدراسة بأن الشروط المطلوبة لتنصيب القاضي الشرعي غير كافية . وتوصلت الدراسة أيضاً بأن الإجراءات لاختيار القاضي الشرعي غير مناسب ، حيث لم يضمن للحاصلين على الدرجات العليا في حصول على منصب القاضي الشرعي . وتوصلت الدراسة أيضاً بأن مكانة القاضي الشرعي في منزلة صغار الحاكمين في المحكمة فقط ، بالإضافة إلى ذلك فإن دور القاضي الشرعي يقتصر على الحكم في القضية دون التدخل في خطوات المعتادة قبل الحكم ، وإنما ذلك يكون في يد الحاكم المدني .

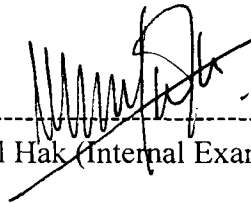
وتوصلت الدراسة في محدودية تطبيق القانون الإسلامي للأحوال الشخصية والمواريث لأربع مناطق الجنوبية الحدودية وفي المحكمة فقط الأمر الذي يتعارض مع قضايا الأحوال الشخصية والمواريث في الواقع.

APPROVAL PAGE

The thesis of Muhammadzakee Cheha has been examined and is approved by the following:



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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name..... MUHAMMADZAKGE CHEHA

Signature.....  Date..... 5th July 2005

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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- Patronage of Islam Act, 1945

Penal Code, 1957.

Penal Procedure Code, 1935.

Protection of Labour Act, 1998.

Revenue Court and Its Procedure Act, 1985.

Rule of Administration in the Seven Principalities, 1901

LIST OF ABBREVIATIONS

AAC	Agama Arbitration Council
Art.	Article
B.E.	Buddhist Era
Ed.	Edited
Edit	editor
etc	(et cetera): and so forth
Ibid	(Ibidem): in the same place
JMBRAS	Journal of the Malayan Branch of the Royal Asiatic Society
LL.M	Master of Law
MCL	Master in Comparative Laws
n.d.	no date
n.np	no name of publisher
n.pp	no place of publication
p.	page
PBUH	Peace Be Upon Him
Ph.D.	Doctor of Philosophy
s.w.t	subḥānahū wa ta'āla
sec	section
Trans.	Translated by
Vol.	Volume

TRANSLITERATION TABLE

ا a	ز z	ق q
ب b	س s	ك k
ت t	ش sh	ل l
ث th	ص ṣ	م m
ج j	ض ḍ	ن n
ح ḥ	ط ṭ	ه h
خ kh	ظ ḏ	و w
د d	ع ʿ	ء ʾ
ذ dh	غ gh	ي y
ر r	ف f	

short vowels

اَ - a

اِ - i

اُ - u

long vowels

اَ - ā

اِ - ī

اُ - ū

diphthongs

اَو - aw

اِی - ay

doubled

اَوَو - uww

اِیِ - iyy

CHAPTER ONE

INTRODUCTION

1.0 General Introduction

Thailand has been, until very recently, an officially Buddhist country. The promulgation of the latest constitution in December 1997 changed this official position of Buddhism even though the same Charter declares that “the King is a Buddhist” as well as the “Upholder of religions”.¹ Constitutionally, every religion practised by the citizens of the country is of equal status.² Based on this provision, Islamic Family Law and Inheritance has been granted application in Thailand.

To the Muslims, personal law has been considered as the domain which Islam has influenced the most and which makes their society distinct. On this particular point, the late Joseph Schacht observed:

As long as the sacred law received formal recognition as a religious ideal, it did not insist on being fully applied in practice. But it could not abandon its claims to exclusive theoretical validity, and acknowledge the existence of an autonomous secular law; its representatives, the *'ulamā*, were the only qualified interpreters of the religious conscience of the Muslims; and the idea that law must be ruled by religion has remained an essential assumption even of modern Muslims.³

¹ See Section 10, the *Constitution of the Kingdom of Thailand of 1997*.

² *Ibid*, Section 38.

³ J. Schacht, “Law and Justice,” *The Cambridge History of Islam*, Cambridge University Press, Cambridge, 1974, Vol.II, pp.566-567.

Seyyed Houssein Nasr also made a very perceptive observation on the special status of personal law in Muslim society:

What has remained intact through the ages has been that aspect of the *Shafi'ah* which concerns directly the human person, such as marriage, divorce and inheritance. These are thus labelled as personal law. This domain has been the refuge and stronghold that has enabled Islamic society to remain Islamic in spite of the various forms of political institutions that have ruled over it in past centuries. Therefore what is under discussion is the last refuge of the legal aspect of the *Shafi'ah* in Islamic society as a whole.⁴

Thailand is among the non-Muslim majority countries which recognises the application of Islamic Family Law and Inheritance, which is considered as an integral part in the system of religion.⁵ Muslims in Thailand, who are the minority in population, have been, for decades, struggling to have the Islamic law i.e., personal law applied to them. Their struggle has received the government's attention by allowing the application of the Islamic Family Law and Inheritance. However, it is limited only to the southernmost provinces, namely Pattani, Narathiwat, Yala and Satun. This is due to the historical background of this region.

Historically, these four provinces were known as the Malay-Muslim Kingdom. When it was formally incorporated into the Buddhist Thai state in 1901, many measures were taken to ensure that the Muslims would gradually come to accept their status under Thai

⁴ Houssein Nasr, *Islamic Life and Thought*, State University of New York Press, New York, 1981, p. 27.

⁵ Chibli Mallat & Jane Connors. Edit. *Islamic Family Law*, Graham & Trotman, London, 1989, p. 4.

rule.⁶ One of them was to promote freedom and equality before religion. In the Royal Decree of 1901, concerning the governance of the region, it was stipulated that no law should be established without specific royal consent.⁷ The aim of this clause was to establish a single legal system applicable to the entire country. However, the Royal Decree of 1901 was not applicable to the Muslims in Southern Thailand in respect of their constitutional rights of equality and freedom of religion.⁸

The reason may be due to the fact that the government realised that the majority of the population in Southern Thailand are Muslims. They have their own cultures, customs and laws which are different from those of the Thai Buddhists. To the government, Muslims cannot be treated in the same manner as the rest of the population.⁹ Accordingly, the government promulgated the Islamic Family Law and Inheritance Law to be enforced in these four provinces. They were introduced during the time of King Chulalongkorn (King Rama V) of the Chakri Dynasty through the *Rule of Administration in the Seven Principalities of 1901*.¹⁰ Section 32 of the rule commanded to the effect that:

Criminal Code and Civil Code shall be applied to Thai citizens except in civil cases concerning husbands and wives, and inheritance where both parties are Muslims or a Muslim is a defendant, in which case the Islamic law shall be applied.¹¹

⁶ Surin Pitsuwan, *Islam and Malay Nationalism: A Case Study of the Malay-Muslims of Southern Thailand*, Harvard University, Cambridge, 1982, p. 119.

⁷ Uthai Hiranyanto, *Paendin Thai: Changwat Chai Daen Paktai (Thailand: Southern Border Provinces)*, Local Administration Department of Interior, n.d, p. 28.

⁸ Surin Pitsuwan, *Islam and Malay Nationalism: A Case Study of the Malay-Muslims of Southern Thailand*, p. 119.

⁹ Ibid.

¹⁰ In the forthcoming discussion, it shall be briefly called the "Rule of 1901".

¹¹ See Section 32, the *Rule of Administration in the Seven Principalities of 1901*.