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Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study¹

RAMIZAH WAN MUHAMMAD

Abstract

This paper examines the role played by Shari'ah Court judges towards the development of Islamic law and its application in Malaysia and Thailand. It discusses issues concerning the appointment and jurisdiction of courts with cases drawn from the two countries. Thailand is chosen because it shares some features with Malaysia. The paper also highlights the differences in terms of the administration of Shari'ah Courts, power of the judges, conflict of laws and political interests that made both countries "special" in their own ways. In Thailand, Islamic law is applied but is limited to four southern provinces. The rest of the countries are ruled under civil law or common law. Thus, a Thai Muslim is not subjected to Islamic law if he resides in other than those four provinces though they can choose to be governed either under the Islamic law or the common law. In Malaysia, however Islamic law is a state matter. All Muslims are subjected to Islamic law as prescribed in the Federal Constitution. Another interesting thing to note is that the Shari'ah Court judge in Thailand is known as Dato' Yuthitham who is appointed by the Ministry of Justice. However, in Malaysia the Sultan makes the appointment of judges except in the Federal Territories.

Introduction

Islam came to South East Asia between the twelfth and thirteenth centuries and forms part of the ideology of state making in most of the countries of south East Asia. Muslims being one of the larger populations in south East Asian countries have influenced member countries in the Association of South East Asian Nations (ASEAN) to provide a satisfactory mechanism to protect the interests of the Muslim communities whether as majority or as minority communities in their respective countries such as in Thailand and in Malaysia.

In Malaysia, Muslims form the majority of the population. In Thailand as a whole Muslims are in the minority but in southern Thailand, and in particular in the provinces of Narathiwat, Yala, Pattani and Satun, Muslims are in the majority and they are known as Thai Malay or Thai-Malay Muslims. In Malaysia, prior to independence in 1957, the situation where non-Muslim embraced Islam is known as *Masuk Melayu* (conversion to Malay).

Muslims in Malaysia form the majority population and Islam is the official religion of the Federation. As such the government tries to include and instill Islamic principles in most of the state policy making. In Thailand, Buddhism is not declared as the official religion in the constitution but the King of Thailand must be a Buddhist. The King of Thailand is the patron of all religions that exist in the Kingdom.

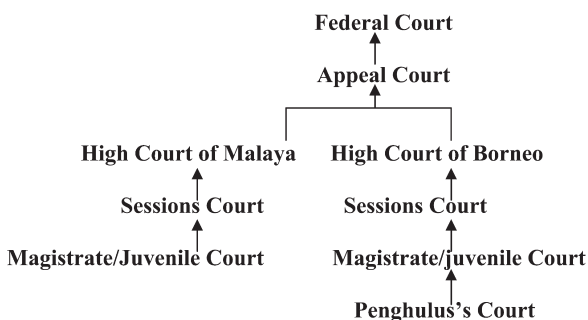
The Judiciary and Shari'ah Court in Malaysia and Thailand

Judiciary or (*al-qada*) literally means to carry out, to order or to decide. Legally it means settlement of disputes based on the divine revelations. The place for settlement of disputes in these countries is called the Shari'ah Court. In general the Shari'ah Court is meant for everybody whether they are Muslim or not. This is prescribed in the constitution of Madinah, wherein the Prophet Muhammad S.A.W. was the ultimate judge for all cases.² However, in current practice, the Shari'ah Court is meant exclusively for the Muslims.³

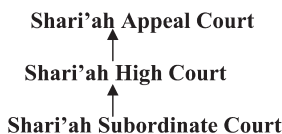
In Malaysia there are three types of courts: Civil Courts,⁴ Penghulu Courts (Native Courts)⁵ and Shari'ah Courts. The Penghulu Court is part of the federal courts in Malaysia. However, it exists in Sabah and Sarawak with limited jurisdiction over disputes, offences and some civil matters where the parties are indigenous.⁶ Penghulu Courts also have the capacity to issue a certificate that a person is a native or not.⁷ The Civil Court exists in Peninsular Malaysia and Sabah and Sarawak. It applies to everyone whether Muslims, non-Muslims or Indigenous people. It is also known as a federal court due to its nature at the federal level. Examples of the Civil Courts are Federal Court, Appeal Court, High Court and Magistrate Court. On the other hand, the Shari'ah Court is a state court and subject to the provisions of the federal constitution of Malaysia as the Supreme law of the land.

Shari'ah Courts are under state jurisdiction. In other words, Islam or more specifically personal laws of Muslims are under state jurisdiction. The appointment and the dismissal of a Shari'ah Court judge is made by the Sultans in their respective states, except in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya where it is made by the King, Yang diPertuan Agong, since these federal territories have no Sultan. This is by virtue of the 9th schedule of List II of the Federal Constitution of Malaysia.

Structure of Civil Courts at the Federal Level



Structure of Shari'ah Court at the State Level



Court institutions in Thailand are divided according to three levels: the Supreme Court, the Court of Appeal and the Court of first instance. The Court of first instance is provided in each province. In the southern provinces consisting of Narathiwat, Yala, Pattani and Satun there is one Shari'ah Court judge who sits with the judge of the Provincial Court (court of first instance) to hear a case on personal laws of a Muslim.

There are however five provincial courts that could hear the case on Muslim matters apart from the above four provinces that is in Betong. One has to take note that there is no Shari'ah Court in Thailand. But there is a Shari'ah Court judge known as Datuk Yuthitham to hear cases on Islamic law.

Jurisdiction of the Shari'ah Court

Jurisdiction of Shari'ah Court is known as '*Wilayah al Qada*. Literally *wilayah* means "territory". In other words it denotes the territorial limits, within which a judge is allowed to hear the case, have a proceeding and give judgment accordingly.

The jurisdiction of Shari'ah Court is not confined to specific matters. It includes civil and criminal cases such as *hudud* law, family law, transactions and other cases that involve the rights of Allah or of human beings or combination of both rights.

Umar bin al-Khattab, one of the first four Caliphs of Islam, wrote to his judge Abu Musa al-Ashaari to the effect:

Jurisdiction is to be administered on the basis of the Qur'an and Sunnah. First understand what is presented to you before passing judgment. Full equality for all litigants in the way they take places in your presence and in the way you look at them and in your jurisdiction. That way no highly placed person would look forward to your being unjust nor would a weak person despair of fairness. The burden of proof is the responsibility of the plaintiff and the oath on the denying party. Compromise is always the right of the litigants except if it allows what Islam has forbidden or forbids what Islam has allowed. Clear understanding of every case that is brought to you for which there is an applicable text of the Qur'an and Sunnah. Yours then is the role of comparison and analogy so as to distinguish similarities and dissimilarities—thereupon seeking your way to the judgment that seems nearest to justice and apt to be the best in the eyes of Allah. Never succumb to anger or anxiety and never get impatient or tired of your litigants.⁸

In current practice of modern secular states there exist two types of courts: civil courts and Shari'ah Courts to govern affairs for non-Muslims and Muslims, respectively. Generally there are limitations on the power of the Shari'ah Court to hear cases which are confined to laws of personal status that consist mainly of family laws and law of inheritance.

Shari'ah Courts in Malaysia and Thailand

In Malaysia the jurisdiction of the Shari'ah Court is specified in the 9th schedule of List II of the Federal Constitution. For the criminal cases, Shari'ah Court is given power to sentence what has been prescribed in Muslim Courts (Criminal Jurisdiction) Act 1965 amended 1984. According to this Act, Shari'ah Court can pass sentence to the maximum of RM 5,000 or three-year imprisonment or six strokes of whipping or combination thereof.

One should take note that the jurisdiction of Shari'ah Court is restricted to only persons professing the Muslim faith and in matters pertaining to Muslim family law and inheritance.

In civil matters, the jurisdiction of Shari'ah Court includes matters relating to:

1. Betrothal, marriage, annulment of marriage, divorce and judicial separation.
2. Distribution of property or claims of property that arise from item No. 1 above.⁹

3. Maintenance, legitimacy and custody of children.
4. Gifts, *harta sepencarian* (jointly acquired property between husband and wife throughout their marriage), *wakf* (public endowment) or *nazr* (vow).
5. And any other matter as allowed by the enactment.¹⁰

Shari'ah Courts in Malaysia were not given jurisdiction in respect of offences except in so far as conferred by the Federal Law. The Muslim Courts (Criminal Jurisdiction) Act, 1965 originally provided that the Muslim Courts may exercise jurisdiction over offences perpetrated by persons professing the Islamic faith and that are prescribed by any written law. However, the maximum punishment that the Shari'ah Court judge could inflict is either with a term not exceeding six months or with a fine not exceeding RM 1,000 (one thousand Malaysian Ringgit). This limited jurisdiction lowered the status of the Shari'ah Court and of Islamic law as a whole. Therefore, in 1984 the Muslim Court (Criminal Jurisdiction) (Amendment) Act 1984 (Act 612) was amended to increase the power of the Shari'ah Court. It provides that such jurisdiction shall not be exercised in respect for a term exceeding three years or with a fine exceeding RM 5,000 or lashing exceeding six strokes or any combination thereof. The Act was revised again in 1988 and renamed as the Syariah Courts (Criminal Jurisdiction) Act, 1965 (Act 355) and made applicable to the provinces of Sabah and Sarawak. The Act was made applicable to all states in Malaysia in 1989 when the Act was amended again by Act 730 and renamed as Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act, 1989.¹¹

As far as criminal jurisdiction is concerned Shari'ah Court has jurisdiction over persons professing the Islamic faith in respect of criminal offences conferred, which is conferred upon the Shari'ah Court by Federal law i.e. Muslim Court (Criminal Jurisdiction) Act 1965. In the case of *Haji Laungan Tarki bin Mohd Noor vs. Mahkamah Anak Negeri Penampang, Hashim Yeop Sani, SCJ*, in delivering his judgment said:

In Peninsula Malaysia the jurisdiction of Shari'ah court is only over persons professing the religion of Islam and the Shari'ah Courts have only such jurisdiction in respect of offences as are conferred by Federal law. The federal law concerned is the Muslim Courts Criminal Jurisdiction Act 1965.

The criminal jurisdiction of the Shari'ah Court can be grouped into six categories as follows:

1. Matrimonial Offences such as wife abuse and wife's infidelity.
2. Sexual Offences such as illicit intercourse, close proximity (*khalwat*), incest and prostitution.
3. Offences relating to intoxicating drinks, drinking, selling and buying alcohol.
4. Offences concerning the spiritual aspect of individual life which also affect Muslim communal life such as failure to attend Friday congregational prayers, non-payment of *zakat fitrah* and failure to fast in the month of Ramadhan.
5. Offences relating to conversion of religion i.e. to renounce Islam (apostasy) such as failure to report and register the conversion.
6. Miscellaneous offences not provided under the above categories.¹²

In the case of Thailand, the jurisdiction of the Shari'ah Court is limited only to matters relating to marriage, divorce and inheritance.¹³ According to the Act, on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Provinces (B.E. 2489), the Islamic law on family and succession shall apply to all Muslims

who are residing in those provinces.¹⁴ Muslims who are residing outside those four provinces are not eligible to be tried according to the Islamic law.

The Qadhi in Malaysia

The qualifications of judges (*qadhis*) appointed to the Shari'ah Courts in Malaysia are set out in respective State enactments.¹⁵ Basically, the academic qualification of a judge (*qadhi*) is that he is learned in Islamic law.¹⁶ However, there is no further explanation as to what amounts to "learned in Islamic law". In the classical works one could say that a person is learned when he is able to issue a decree that is not against the Divine revelation and the precedent. In other words a judge must be a *mujtahid*. Ibn Humman defines *mujtahid* as a person who is educated in the principles of Islamic law and therefore a person who is highly conversant with the *hadith* and also has knowledge for the application of law to specific cases.

Prior to the independence of Malaysia in 1957, the qualifications of a Shari'ah Court judge in Kelantan were as follows:

- a. Experience in clerical work or in any other work at any government office or in any religious post.
- b. Sufficient knowledge of Islam whether for appointment to a post in the state or abroad.
- c. A credible position in the community.
- d. A man chosen by the *mufiti* and agreed upon by the Sultan.¹⁷

In Selangor the qualifications of chief *shari'ah* judge, are provided in the state enactment in section 38(3). The candidate must be a Malaysian citizen and has at least 10 years experience preceding his appointment as a Peguam Syarie (Syarie Counsel/Lawyer) or as a member of Shari'ah Courts, or he is learned in Islamic legislation in Malaysia. Nevertheless, anybody, before the enforcement of the State enactment who had served as a *qadhi* or prosecutor shall be deemed to be a member of the Shari'ah Courts. Whereas a person who has been practicing as an advocate and solicitor before the enforcement of the Selangor Administration of Islamic Law Enactment shall be deemed to be a Peguam Shari'ah.¹⁸

The qualification of Syariah High Court judge in the Federal Territory is as follows:

- a. He is a citizen of Malaysia.
- b. He has one of the following two qualifications:
 - (i) Has, for a period of not less than 10 years preceding his appointment, been a judge of Syariah Subordinate Court or a *Kathi* or a Registrar or a Syariah Prosecutor of a State.
 - (ii) He is a person learned in Islamic law.¹⁹

According to Peguam Syarie (Syarie Counsel/Lawyer) Rules 1991 of Selangor, any person who fulfills the following requirements is eligible to be appointed as Peguam Syarie.²⁰

- a) i) A person who holds a bachelor degree in Syariah which is recognized by the Majlis and conferred by an institute of higher learning recognized by the federal government; or
- ii) an advocate and solicitor registered under the Legal Profession Act 1976;

- b) i) has completed a professional training recognized by the Majlis in the field of Islamic Judiciary; or
 - ii) is knowledgeable in Islamic law.
- c) Is of good character and
 - i) has not been convicted in Malaysia or elsewhere of a criminal offence (under any written law) as would render him unfit to be a Peguam Syarie, and in particular, but not limited to an offence involving fraud and dishonesty;
 - ii) has not been adjudicated bankrupt; or
 - iii) has not been found guilty of any of the acts or omission mentioned in a paragraph (a), (h), (c), (e), (f), (h), (k) or (1) of subsection 6 of section 33 of the Bankruptcy Act 1967; and
- d) is a Federal citizen or a permanent resident of Malaysia.

From the above discussion one could say that qualifications for a Shari'ah Court judge in Malaysia are the same as those required for qualified candidates to hold a post of a judge in the Civil Court. Certain criteria have been included to accommodate some technical formalities of a substantive law in Malaysia. The criteria that needs to be looked into is about his knowledge in Islamic law in which he is able to have his own judicial creativity after equipping himself with the existing sources of Islamic law i.e. Quran, Sunnah and secondary sources of Islamic law. Some of the substantive and procedural laws that need to be familiarized by the lawyers are Islamic family law, Shari'ah criminal offences, Civil and Criminal Procedure.

Judicial Creativity

In addition to the use of the primary sources of Islamic Law, it is very essential for the judges to use their own knowledge when giving judgment. This is evident from Muadz bin Jabal's response to the Prophet's query when he was asked on the method of arriving at a decision. He explained that first he would look into the Holy Qur'an, next to the Sunnah of the Prophet and finally he would resort to *ijtihad*.²¹ One could say from the legal point of view that it is permissible for a judge to use his judicial creativity in any case where there is no provision in the Divine revelations.

Creativity is defined as the ability to create new ideas or things using one's imagination. As far as the Shari'ah Court judge is concerned, imagination does not mean whim and fantasy but to arrive at a decision through due diligence, past experience and knowledge based on Divine revelation and the traditions of the Prophet and his Companions.

Judicial creativity is defined as an apparent power of the judges to modify the scope and pattern of existing provisions relating to offences and to create new provisions resulting in man-made laws. Since Islamic law is a jurist's law, it is a duty of every Muslim to look for a new *hukum* a new event based on the Divine revelations; precedents of the Prophet and the Companions; as well as the scholarly views by the classical and contemporary Muslim jurists. According to Datuk Abdul Hamid Said, former High Court judge, judicial creativity for common law judges is limited to the doctrine of precedents to create a new law. Further he said that Order 92 of the Rules of the High Court 1980 provides that it is inherent power of the court, as may be necessary, to prevent injustice or to prevent an abuse of power of the process of the court.

Ibn Taimiyyah opined that the judge must also use his insight while giving judgment because it has great benefits. Anybody who disregards it will actually forfeit rights of other people.

The Qadhi in Thailand

The person who caters for *shari'ah* matters in Thailand is known as Dato Yuthitham or Datok Kadi.²² The designation was created under the Act of Exercising Islamic Law in Territorial Jurisdiction of Pattani, Yala, Satun and Narathiwat in B.E. 2489. This act also mentioned that in cases of personal laws a civil court judge has to sit with Dato' Yuthitham in the course of the trial. Otherwise, the judgment of Dato' Yuthitham has no legal effect.²³

Thus, Dato' Yuthitham refers to a Muslim judge. The establishment of Dato' Yuthitham institution is sanctioned by the Royal Act of 1946 which provides special concessions allowing the application of Islamic law in matters concerning family and inheritance.²⁴ He is placed in the Thai Provincial Court in four southern provinces and his duty is mainly to assist the civil court judges. He was also known as a judge without a court.²⁵ This means that Dato Yuthitham is a judge without a proper organization, staff and place to hear a case. There are two Dato' Yuthitham in each province.

Being an assistant to the civil court judge he could not make his decision independently. In other words, the application of Islamic law for Muslims in Thailand is subject to the approval of the Civil Court judge. According to Mr Apirat Mad Sae, a *shari'ah* judge in Pattani, though the decision is made in the presence of civil court judge, the latter would respect the *qadhi's* decision and follow the decision accordingly.²⁶ In other words the decision of Dato' Yuthitham is final.²⁷

The power to appoint Dato' Yuthitham and to dismiss him is under the authority of the Ministry of Justice. This is provided in the Judicial Official Act 2000.²⁸ Special procedures must be observed before the appointments of Dato' Yuthitham are made. The vacancy of the posts has to be announced by the Regional Director General of judges. Then the interested candidates are invited to submit their applications within a specified period. The Regional Director then consults the provincial chief judge and the provincial governor of their respective provinces to review the qualifications and suitability of each applicant before they could sit for religious proficiency examination. The salary and promotion of *shari'ah* judges is also placed under the Ministry of Justice.²⁹ Usually there will be two Dato' Yuthitham in each provincial Court. He is like any other civil servant eligible for pension after the retirement age of 60.

There are currently eight Dato'Yuthitham serving in the four southern provinces in Thailand. In theory, Dato Yuthitham plays an important role in settling disputes on family and inheritance cases among Muslims in Thailand. In practice, however they play a negligible role since they receive very few cases to handle in a year.³⁰

Qualifications of Dato' Yuthitham

In 1902 the basic qualification of the Dato Yuthitham was highlighted in the Rule of Administration in the seven principalities of Thailand. The provision is as follows:

The Criminal Code and Civil Code shall be applied except in civil cases concerning husband 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 the knowledge of the Qur'ān and enjoys the respect of the people.³¹

Those aspiring to be appointed as Dato' Yuthitham must be:³²

- A Muslim of Thai nationality and loyal to the government.
- Not less than 30 years of age.
- Capable of formulating judgment in cases relating to marriage and inheritance.
- Educated equivalent to lower secondary school.
- Fluent in Thai language.³³

A person who fulfills the above criteria of the candidature has to sit for religious proficiency examination. Later he must stand for elections in the respective province. However, the final authority is left with the Ministry of Justice to choose after the regional director general of judges submits the names of elected candidates to the Ministry.

There are two essential elements that need to be queried are items Nos. 3 and 4 above. It is quite right to say that a judge must be able to formulate the laws only in marriage and inheritance. The diversity of *shari'ah* is actually inter-related between one discipline to another though the jurisdiction of court is confined to the personal laws. A Muslim judge must familiarize himself with all kinds of laws from family law, *hudud* laws, transaction, jurisprudence and most important is the procedural law before he could give judgment. Similarly in jurisprudence where it is considered as a road map of what law is, how it is to be applied and where necessary, how law can be discovered and formulated.³⁴

Another point that has to be noted is the academic qualification of candidate that is limited to lower secondary school. This is far too low from normal requirement for all judicial officials in the ASEAN countries. At least he must possess LL.B (*shari'ah*) or BA (*shari'ah*). As such if the candidate did not have the above qualification he will not be able to formulate any law if he only passed the lower secondary school exam. It is essential indeed to highlight this point to ensure that judicial institutions that hold the task of dispensing justice are not taken for granted from the authority, whether it is Islamic law or civil law.

Analysis of Cases in Malaysia

The first case that the writer likes to share is in the application of 'Aisyah Linda Xavier Bt Abdullah (2003). In this case 'Aisyah was a non-Muslim but later she embraced Islam and married in Iran according to the Shi'ah school of law. Later when she came back to Malaysia she had applied to the Shari'ah Court to determine the validity of her marriage according to the Sunni school in Malaysia. The court was shown a video recording of the marriage solemnization that was held in Iran. The judge opined that, based on the above documentary evidence, he is satisfied that the marriage has been solemnized according to Islamic law without looking at any preference of school of law. This judgement seems to contravene Order No. 7 of the Practice Direction of Shariah Court. Despite the Order the Shari'ah Court judge preferred to recognize the marriage and allowed it to be registered in Malaysia. The presiding judge commented that the relevant Practice Direction as a noble effort to standardize the judgments of all Shari'ah Court judges but it is not intended to cause injustice to the parties. Further, strict reliance

on the Order would mean that the presiding judge does not have jurisdiction over the parties since they are followers of the Shi'ite *fiqh*. Furthermore, the fact that different schools of law are involved, is simply a technical matter. The most important consideration was that the pillars of a valid marriage have been established.

Another case is *Raja Chulan Bin Raja Mohar vs. Fara Liza Bt Bashah*. This case is about the validity of a written divorce that was sent to the defendant and the number of divorces that should be registered. The letter was written by the Plaintiff and witnessed by two witnesses. The court accepted the letter as documentary evidence. However, there was another issue whether the plaintiff has divorced his wife with three *talaq*. There was no statutory provision, which says that the divorce written as three *talaq* would amount to three *talaq*.³⁵ The judge took into account the fact that the husband pronounced triple *talaq* with the intention of denying his wife her right to maintenance which is not incumbent after a third and final divorce. As such the Shari'ah Court judge looked into the authority of the Qur'an and the *hadith* of the Prophet and views from various schools of *fiqh* so that no injustice would occur to both litigant parties. Thus, the court gave judgment that only one divorce has taken place.

In the application of *Rukman Bin Mustapha (1996)* where the plaintiff applied to the Shari'ah Court of Terengganu to validate his marriage to Wan Sabariah in Thailand as valid according to the Islamic law thus could be registered in Terengganu. Wan Hassan solemnized their marriage. The question here was whether Wan Hassan was a valid authority to solemnize the marriage. The court took the initiative of looking into the list of names of those who have been authorized to solemnize the marriage and found that Wan Hassan's name was not there. As such the court opined that the marriage was void *ab initio*. In this case the court made this decision by relying on the documentary evidence presented.

Analysis of Cases in Thailand

As discussed above there is no Shari'ah Court in Thailand. The only person available to safeguard and apply Islamic law is Dato Yuthitham. However, his duty is limited to four southern provinces. Application and enforcement of Islamic law does not cover Muslims living outside these four provinces. A Muslim who lives in Bangkok and commits an offence that contravenes Islamic law is not liable to be prosecuted under the provision of Islamic law. This is because the jurisdiction of Dato Yuthitham is limited only to the four provinces. It was mentioned in the case of *Santi-Phap Sing Haad vs. Jamilah Sing Haad*, Civil Suit No. 522539 (1996) (Narathiwat Provincial Court) relating to the custody of children (*hadanah*), that the parties were Muslim but they were living in the province of Songkhla. The case was brought to Narathiwat Provincial Court because the marriage was registered in Narathiwat but Dato Yuthitham in Narathiwat delivered the judgment that he has no authority to hear the case because the court could hear the cases of Muslim matters only if the applicants were the residents of the four provinces including Narathiwat. Since the applicant was staying in Songkhla, he is not covered under the jurisdiction of Islamic law.

The *Santi-Phap Sing Haad vs. Jamilah Sing Haad* case makes several things clear. First, the Islamic law is not applicable to the country as a whole. Islamic law does not cover Muslims living outside the four provinces. Second, Muslims living outside the four provinces are subject to the civil law of Thailand. Third, since the Islamic law is not applied outside the four provinces, it is possible for a Muslim who has committed

a crime to escape Islamic punishments by abandoning the province and going to another province where he is no longer under Islamic jurisdiction and liability. Finally, in linking the applicability of the Islamic law to residential status, a divisive effect is created which tends to divide the Muslims, rather than unite them as one *ummah*. The impression gained from interviews with some Thai Muslims is the belief that the government has allowed the application of *shari'ah* half-heartedly just to satisfy the demands of Muslims.

Having discussed the above case in Thailand and comparing it with the Malaysian scenario one could say that the situation in Malaysia is far better off. Though Islamic law is under state jurisdiction but there is uniformity in law as most of the *shari'ah* provisions are almost the same and that the court has the power to hear the case as long as the parties are Muslim regardless of their place of their residence.

Another aspect of Islamic law in Thailand relates to the enforcement of the law. It is argued that the country's civil and commercial code takes effect throughout the country including the provinces of Pattani, Narathiwat, Yala and Satun. This means that a case settled by the decision made by Civil Court judge would have priority over the judgment of Dato' Yuthitham. As explained by Den Tohmena, a member of parliament of Pattani and a leading Muslim figure, a couple who have had their marriage registered according to civil code may seek divorce according to Islamic law in the court of Dato' Yuthitham. The judgment of Dato' Yuthitham based on Islamic law, however, will have no legal effect if one of the parties to the divorce seeks to disagree with the decision. In such a case, the divorce will become effective only when the divorce is registered according to the civil code.³⁶ This kind of arrangement would surely make people live with no respect to any laws. Ultimately the purpose of having such laws is rendered meaningless. This reinforces the impression gained in the interview that the institution of Dato' Yuthitham was created to "comfort Thai Muslims".

It can also be justifiably argued that the institution of Dato' Yuthitham in the courts of justice in Thailand is not of great consequence. The fact that Dato' Yuthitham was placed together with a Civil Court judge is an indication that he is not an independent judge in the course of delivering judgment. Quite often, the Civil Court judge writes the judgment and Dato' Yuthitham simply countersigns. It was reported that sometimes the Civil Court judge hears the case in the absence of Dato' Yuthitham who is later on required to countersign. The manner of his appointment is also not analogous to the appointment of other judges in the courts of justice. The Dato' Yuthitham is appointed by the Ministry of Justice, whereas other judges are appointed by the Judicial committee as sanctioned by the Thai Constitution.³⁷ In other words, the post of Dato' Yuthitham as a judge is not constitutionally sanctioned. The two types of judges therefore enjoy different type of status in the hierarchy of the courts.

Dato' Yuthithams are required to sit for religious proficiency examinations but they are not really *shari'ah* experts. The law simply requires that they possess qualifications equivalent to a secondary school certificate level. It is therefore suggested that the government should look for *shari'ah* graduates when appointing Dato' Yuthitham. Even then, the position of *shari'ah* will not have the desired consequence. Hence, there is a strong move among the Thai Muslims demanding the establishment of the Shari'ah Court as an independent body with power to enforce the law.³⁸

In another case, *Zainab Senik Wati vs. Rushdi Senik Wati*, Civil Suit No. 17/1999, (Narathiwat Provincial Court) it was related that Zainab on behalf of her two children has applied to the Juvenile Court for the maintenance of her children from her husband. However, the Court was reluctant to hear the case because they were not sure whether they have jurisdiction on that matter. As such the Juvenile Court wrote a

letter to the President of Supreme Court in Bangkok enquiring which court has jurisdiction in this case. The Supreme Court decided that it was under the jurisdiction of Juvenile Court. However, Dato' Yuthitham would be invited to hear the case and decide the case accordingly. According to the Supreme Court the decision is by virtue of Sections 3 and 4 of the Act Relating to Exercising Islamic Law in the Four Provinces B.E. 2489 that the power of Dato' Yuthitham to hear the case in court of First Instance and the Court of First Instance includes the Juvenile Court.

The analysis that could be made on the above case is that the Supreme Court could interfere in any cases that relate to the Islamic law. It is the initiative of the Court of First Instance to forward the case to the Superior Court if they are not sure about the jurisdiction. However, in Malaysia the jurisdiction of the Shari'ah Court has been prescribed in the state enactment of respective states in Malaysia. There are certain conflict of laws that exist between the Civil Court and the Shari'ah Court but merely on the interpretation of laws. As far as custody and maintenance of children is concerned, it is within the jurisdiction of the Shari'ah Court.

In another case *Mari Yea Tayi vs. Hamad Tayi* (Yala Provincial Court 2001), the applicant in this case had filed a suit that her husband, Hamad had deserted her and their children for the past two years. The learned Dato Yuthitham of Yala Provincial Court has held that the applicant has the right to get her marriage dissolved in accordance with article 1516 of the Thai Civil and Commercial Code. There was no witness called to testify whether the allegation made by the wife was true or not. The husband was not called to defend his case. In addition to that the decision was made according to Thai Civil Code i.e. that is applicable for the non-Muslims.

Conclusion

A comparative study of the judicial systems in Malaysia and Thailand is highly revealing. Both countries operate on variants of parliamentary democracy. Yet they differ in terms of accommodating the legitimate rights of Muslims. In Malaysia, Shari'ah Court judges were given an opportunity to utilize their judgment and creativity in deciding the cases. It is indeed their duty to refer to views of the Muslim jurist before making their decisions. In addition, the qualifications of the Shari'ah Court judges in Malaysia are set higher than those in Thailand in terms of academic achievement and experience.

In contrast, Thailand is a constitutional monarchy and operates on a parliamentary system. Yet, the Muslim interests and welfare have been grossly neglected. In terms of court structure, it provides for one position, namely that of Dato Yuthitham, to cater for the religious needs of all Muslims. However, the person of the Dato Yuthitham is neither an expert in *shari'ah* law nor is his office of any significant consequence. Though it is accorded a place in the legal system, the application of *shari'ah* law is confined to only four provinces, to the exclusion of others. Its jurisdiction is also circumscribed to include only personal laws, i.e. relating to marriage, divorce and inheritance. There was no statute that governs the procedural matters that Dato Yuthitham ought to follow. Even in these restricted areas, the law is applied in such a way as to make mockery of Islamic law. Consequently, there is a determined move on the part of Muslims asking for the establishment of Shari'ah Courts all over Thailand.

The last point that needs to be highlighted here is about the laws in Thailand which are all written and available only in Thai language. Only lately there are certain laws that have been translated into English including the State Constitution. Hence, only someone who is well versed in Thai language could refer to and understand the laws

in Thailand. For this and for other structural reasons access to legislation is often difficult even for the Thai.³⁹ As a result there is less transparency and greater difficulty for any researcher to undertake serious and sustained research in judicial administration.

NOTES

1. Paper presented at the Inaugural Conference of Asia Law Institute (ASLI) at the National University of Singapore, 27–28th May 2004.
2. Article 23 of the Constitution of Madinah.
3. For example in Thailand, Malaysia and Singapore.
4. Consists of Federal Court, Court of Appeal, High Court, Session Court and Magistrate Court.
5. List 2A, 9th Schedule of the Federal Constitution of Malaysia.
6. Wu Min Aun, *The Malaysian Legal System*, 2nd edn, Kuala Lumpur: Longman, 2004, p. 175.
7. See *Cases On native Customary Law in Sabah (1953–1972)*, Kota Kinabalu: Government Printer, 1973, p. 4.
8. Ibn Qayyim, *Flam al-Muwaqqi'in*, Vol. 1, Beirut: Dar al Kutub, 1991, p. 62.
9. Matters pertaining to probate and administration of Muslim estate do not fall within the jurisdiction of Shari'ah Court. Such matters confirmed in the case of Jumaaton and Raja Delaila v Raja Hizaruddin [1998] 6 MLJ 556.
10. Section 11(b) Johor Syari'ah Court Enactment 1993.
11. Ahmad Ibrahim, "The Annotated Statutes of Malaysia", Kuala Lumpur: *Malayan Law Journal*, Sdn.Bhd., 1995, p. 1.
12. Ahmad Ibrahim and Ahilemah Jonid, *The Malaysian Legal System*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987, p. 62.
13. Section 3 of the Act of Exercising of Islamic Law in Pattani, Narthiwat, Yala and Satun, B.E. 2489.
14. See online: <http://www.judiciary.go.th/The%20Judiciary.htm>
15. Section 42, Administration of Islamic Law Federal Territory Act 1993.
16. Section 38(3) Administration of Islamic Law Enactment No.8 Selangor 1989, Section 43(2) (ii) of Administration of Islamic Law Federal Territory Act 1993.
17. Abdullah Alwi Haji Hassan, *The Administration of Islamic Law in Kelantan*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1996, p. 172.
18. Section 38(4) of Selangor Administration of Islamic Law 1989.
19. Section 43 of Administration of Islamic Law Federal Territory Act 1993.
20. Only a Peguam Syarie can defend his/her client in Syariah Court. Being an advocate and solicitor is not a pre requisite that he/she is eligible to act on behalf of his/her client in Syariah Court.
21. *Ijtihad* is from the word *juhd* which means hard work or exertion. It is defined as exertion of personal efforts to arrive at a correct decision on an issue. In this context, the author would translate it as judicial creativity.
22. Borwornsak Uwanno, Surakiart Sathirathai, "Introduction to the Thai Legal System", in *Legal Systems in ASEAN Region*, ed., ASEAN Law Association, Bangkok: ASEAN Law Association, 1987, p. 88.
23. Section 4 of the Act of Exercising Islamic law in Territorial Jurisdiction Pattani, Satun, Yala nd Narathiwat, B.E.2489.
24. W.K. Che Man, *The Administration of Islamic Institutions in Non-Muslim States: The case of Singapore and Thailand*, Singapore: Institute of Southeast Asia, p. 10.
25. Nima Jehtae, "Administrative Offices in Managing the Religious Affairs in Thailand", unpublished Master Thesis, Kulliyah of Revealed Knowledge and Human Sciences, Petaling Jaya: International Islamic University Malaysia, 1998, p. 100.
26. Interview conducted with him on 12th September 2001 at his office in Pattani.
27. Prasit Kovilaikool, "The Legal System of Thailand", in *ASEAN Legal System*, ed. by ASEAN Law Association, Singapore: Butterworths Asia, 1995, p. 391. However, in interviews with others who requested anonymity, it was revealed that occasionally a civil court judge would hear the case and write the judgment. He would then simply require Dato Yuthitham to countersign the judgment in which he had no input whatsoever.
28. Article 3 of the Justice Ministerial Decree No. 5 (1979) regulated under Judicial Official Act 2000.
29. *Ibid.* Article 45.
30. Interview conducted with Dato' Yuthitham Abdullah in Narathiwat on 10th of September 2001.

31. Section 32 of the Rule of Administration in the Seven Principalities of Thailand.
32. Section 44 of the Judicial Official Act 2000.
33. This condition is an integration policy of Thai government so that Thai Muslim could communicate with his fellow Thai Buddhist.
34. M. Cherrif Bassiouni and Gamal M Badr, "The Shariah: Sources, Interpretation and Rule-Making", *UCLA Journal of Islamic and Near Eastern Law*, Vol. 1, No. 2, Spring/Summer 2002, p. 136.
35. Under *hukum syara'* a woman who is divorced with three *talaq* is known as *talaq bain kubra* is not entitled to maintenance as there is no right to remarry given to the husband.
36. Den Tohmeena, *Shariah Court*, Pattani: Saudara Baru Press, 1997, pp. 41–42.
37. Articles 192 and 193 of the Thai Constitution, 1997.
38. *Ibid.*, pp. 46–48.
39. R.H. Hickling, "The Legal System of Thailand", *Hong Kong Law Journal*, Vol. 2, 1972, p. 8.