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THE IMPLEMENTATION OF ISLAMIC FAMILY LAW IN A MALAY MUSLIM SOCIETY IN THE THREE BORDER PROVINCES OF SOUTHERN THAILAND.

Abstract:

The Islamic family law widely implemented within Muslim communities in the world but it manifested differently in different culture, legal and institutional context. In this incident research is a documentary research which objectives of the study are to explore the historical background of a Malay Muslim society in the three border provinces of southern Thailand to understand characteristics of legal system in this area and discuss about the implementation of Islamic family law in a Malay Muslim society which can be seen as minority group in Thailand. The study found that the current Malay Muslim society has been influenced by three historical periods: pre-Hindu, Hindu and Islamic periods. The Islamic family law is not associate with the state or territorial power, nor is it the law of general application. The rules of Islamic family law are local, non-literary and non-textual. The Islamic family law was limited only within the villages level. There is no institution responsible for enforcing this law. Therefore, there are many obstacles of the administration of Islamic family law which is effected to a Malay Muslim in that area in order to access to justice by using Islamic family law.

Keywords:

Islamic family law; legal pluralism; Malay Muslim society; law and society

1 Introduction

The Malay Muslim communities in southern border provinces of Thailand can be seen as minority group in Thailand. However, if we look into the deep south of Thailand the Malay Muslim is a majority people of that area. They have their own traditional way which is sometime contrast with Thai's tradition especially the Islamic values which is play very important roles within their communities. Moreover, the traditional social structure of Malay Muslim communities also influencing by the Islamic values especially, the way that Malay Muslim govern their community. However, Malay Muslim in southern border province of Thailand have a very interesting historical back ground. Therefore, it is very interesting to study how is the historical background of the area effect to the current Malay Muslim society and what role of Islamic family law play in relation to building peaceful and harmony among community member. Hence, this article going to start with the historical background of the areas which will illustrate the reasons that were responsible for shaping the current Malay Muslim society and discuss about the implementation of Islamic family law in a Malay Muslim society which can be seen as minority group in Thailand.

2 The Malay Muslim in southern Thailand and its historical background

In order to understand the current Malay Muslim communities, it is very important to note the historical background of the Malay itself especially from cultural aspect. Wu Min Aun (1990) considered the current Malay society has been influenced by three historical periods: The first was before entering of Hindu into this area, the local people following the custom of tribe; second was the arrival of Hinduism that influence to people's life, the Hindu law has been implement into society at this time and ; third was the entering and the spread of Islam to South-east Asia and its subsequent entrenchment in the indigenous culture, Islam playing very important role in Malay Muslim ways of life and placing the Islamic culture instead the local culture which contradict with the Islamic beliefs. However, the era that can be seen as turning point of Malays belief is when Hinduism and Islam enter to this area.

Hindu influencing in the Malay world.

Musor, M (2013; Azman bin Abu Hassan, 2010) considered the historical background of the Malay Peninsula of Malaya throughout the seventh century B.C., the country and its inhabitants had gone through various stages of cultural influences which had led to the development of a set of rules that govern the country until the beginning of the colonial era. The Malay Peninsula was favoured by the Indian and Chinese traders plying the sea routes between India and China. At the beginning of this era, the first Indian settlement had already established itself in Malaya until the fourteenth century Indian culture puts its stamp on the Malays' way of life, introducing Indian religion, laws and language in this region. Even replacing the native tribal organization with government by a Sultan. The Indianisation was the result of a two way traffic, first from the

Indian traders and secondly it was possibility of the spreading of ideas of Hinduism that the idea of Hinduism spread more from the visits by the Malays to the centre of Hindu culture in India. During the first to the thirteenth century, a number of Hinduised empires arises in South East Asia for example, Funan in the 1st century, Sri Vijaya in the 7th century and Majapahit in the 13th century. In the Malay Peninsula, the Hindu influence can be found in the early civilized states such as Kedah at that time called Langkasuka (currently is an area which is cover three southern border provinces of Thailand namely: Pattani, Yala and, Narathiwat) and in Pahang. The cultural influence spread into Malaya and affected the political and social institution. Moreover, the concept of state and kinship was changed, tribal policies were raised in status to kingdoms, the concept of god-king had been introduced in order to replace the tribal chieftan. Holding power by virtue of a manifest divinity that transcended the customary law of the tribe, the god-king was liberated from the traditional constrain that had limited the power of the tribal chieftan. The influence of Hindu law and the custom especially, in Malaysia can also be found in the Court hierarchy, prerogatives and ceremonies in the marriage customary rites and in the Malay customary law. The tribal and matriarchal elements in Malay customary law were in some areas modified so as to make the customary law monarchical and patriarchal. The Hindu Law which finds its sources in the Dharmasutra (law books in prose), Dharmasastra (law book in verses) and Hindu customary law contains an extensive legal system. It covers family law, succession, property, contract, crime and punishment, judicial procedure and evidence. Of all branches of Hindu law, constitutional law and criminal law have left most traces in Medieval Malay States. The Sultan is the sovereign and exercise the function of the executive, judicial and sometime legislature. His power is absolute and this influence to some extent still exist in the modern Malay community today whereby the monarchical institutions and some aspects of feudal values are part of the Malays way of life and is very sacred.

Islamic influence in the Malay world

The Islamization was introduced into Malay world especially Patani as early as during the 10th century by Arab and Persian traders but it was not influenced to the Malay peoples much at that time until 14th century many religious teachers from Pasai in Sumatra crossed over the Straits of Malacca to Patani to help established an Islamic Patani kingdom. These Islamization of Pasai is also a religious guide and model for sultan of Malacca and also plays a role in the Islamization of certain kingdoms in other Indonesian texts. The Islamization of Patani came from within via a settlement of Muslim from Pasai who subsequently converted the king and his court to Islam (A.Teeuw&D.K Wyatt, 1970). However, the rapid spreading of Islamic teachings in Malay world was indirectly improved by the Hindu influence in the Malay society. The Ruler under the Hindu influence was portrayed as a god king and he demands absolute loyalty of his subjects so that when the king converted to Islam he made all his people do the same without any opposition. The early missionaries of Islam found out that officials were administering a system of Hindu customary law and the Malays were very much influenced by mysticism and they tried very hard to change that in compliance with the Islamic teachings using every method of propaganda at their

command. This was made easier because they had the blessing from the Sultan of the respective states and the concept of blind loyalty to the feudal lords in the Malay community. When they converted the Sultan to Islam, his subjects would do the same. At this time Islam indeed was welcomed because not only did it free the Malays from the oppressive stratification of Hinduism and absolute power of the Hindu ruler but also change the ideological aspect of the community. Instead of being a subject of a god king, their perspective of the world has widen. This has open a new era of development to a community that has been living in the state of backwardness and oppression of the feudal lords. (Musor, M, 20xx; Azman bin Abu Hassan, 2010). Hence, R.H.Hickling, (2001) concluded that the origin of this Malay royalty was due to the marriage of Indian immigrants with the daughters of local chiefs, their children inheriting Hindu ideas of territory and divinity grafted on to primitive Malay conceptions of tribe and of the magical power of chiefs and medicine men.

During the 14th country Malacca rose to be the centre of Malay civilization in the Peninsula. Due to its geographical strategic position it had become a famous port and a trade centre linking Middle-East and China. By the end of 15th century Malacca had become a power of great importance in South East Asia. During the time of Megat Iskandar Shah the first ruler of Malacca some Arabic Moors, Persian as well as Bengalis moved to trade in Malacca. These merchants were very rich with large business and fortune, brought with them mullahs and priests learned in Islamic teachings. Sultan Iskandar Shah derived great profit and satisfaction by the prosperity of trade in Malacca. He was very pleased and in return he did them honor, giving them places to live and places to built their mosque. The Islamic missionaries in Malacca then tried very hard to convert the Sultan to Muslim and at last Sultan Iskandar Shah with all his house turned Muslim. The rapid spreading of Islamic teachings in Malacca and the whole Peninsula was indirectly improved by the Hindu influence in the Malay society. The Ruler under the Hindu influence was portrayed as a god-king and he demands absolute loyalty of his subjects. When Sultan Iskandar converted to Islam he made all his people do the same without any opposition. Within half a century, Malacca became a centre of Islamic studies. It converted the whole Peninsula by force of arms and made their Rulers accept the new faith and dispatched missionaries along every trade route. The early missionaries of Islam found out that officials were administering a system of Hindu customary law and the Malays were very much influenced by mysticism and they tried very hard to change that in compliance with the Islamic teachings using every method of propaganda at their command. This was made easier because they had the blessing from the Sultan of the respective states and the concept of blind loyalty to the feudal lords in the Malay community. When they converted the Sultan to Islam, his subjects would do the same. At this time Islam indeed was welcomed because not only did it free the Malays from the oppressive stratification of Hinduism and absolute power of the Hindu ruler but also change the ideological aspect of the community. Instead of being a subject of a god-king, their perspective of the world has widened. This opened a new era of development to a community that has been living in the state of backwardness and oppression of the feudal lords. (Musor, M, 2013; Azman bin Abu Hassan, 2010)

3 The implementation of Islamic family law Thailand

When looking into Malay Muslim society in southern Thailand, the Islamic family law is not associate with the state or territorial power; nor is it the law of general application. The rules of Islamic family law are local, non-literary and non-textual. The substantive content of the rules was provable by evidence of local practice given by *Imam* (religious leader) or *Tuan Guru* (Islamic scholar). The Islamic family law was limited only within the villages. There is no institution responsible for enforcing this law. Although Thai government has enacted the Administration of Islamic Law in Pattani, Narathiwat, Yala and Satun Provinces Act BC 2489, this Act requires that the Civil and Commercial Code for Muslim in those Provinces must be enforced by Islamic law concerning family and inheritance only. This Act was not specify the details of enforcement of this law, as well as organization or institutions that are necessary for administration of Islamic family law. Moreover, this Act prescribed that the court of first instance in Pattani, Narathiwat, Yala and Satun are proceeding in accordance with Islamic law by issues 'Datoh Yuttitam' (Islamic scholar) to assist him concerning this matter. However, there was no Islamic family law code in order to used for reference on this matter (P. Somboon, 1983:131). Therefore, there are many obstacles of administration of Islamic family law in southern part of Thailand so that it effect to Malay Muslim in that area in order to access to justice by using Islamic family law. Cheha, M. (2003), stated the obstacles of Administration of Islamic law in southern part of Thailand, for instant, the problem of essence of the law, the problem of limited law enforcement authority, the problem of scope of family law and inheritance, the right of appeal, etc. This Act do not prescribed details of Islamic family law. Therefor, in some cases there may have a problem to finding the meaning or sources of the law. Unlike in Malaysia, the neighboring country of Thailand, the Islamic family law be part of the state law. The implementation of this law can be seen as a formal system. At the village level the law that was applied consisted of Islamic family law and customary law of *adat*. However, the Islamic family law administered was not pure Islamic law but modified by Malay customary practices (Wu Min Aun, 1990). The Islamic law which applies in Malaysia is of the *Shafii* school of jurisprudence¹, as modified by Malay *adat* (customary) law. Wan Arfah Hamzah (2003) stated that there are two main categories of the sources of Islamic law as applies in Malaysia:

¹The four classical schools of Islamic jurisprudence (of *Mahdab*) are each named by students of the classical jurist who taught them. The schools and where they are commonly found are

- Hanafi (Turkey, Pakistan, the Balkans, Central Asia, Indian subcontinent, Afghanistan, China and Egypt)
- Maliki (North Africa, the Muslim areas of West Africa, and several of the Arab states of the Persian Gulf)
- Shafii (Arabia, Indonesia, Malaysia, Maldives, Egypt, Somalia, Eritrea, Ethiopia, Yemen and southern parts of India)
- Hanbali (Arabia).

These four schools share most of their rulings, but differ on the particular hadiths they accept as authentic and the weight they give to analogy or reason (*qiyas*) in deciding difficulties.

1) Primary sources: *Qur'an* (the Word of Allah); and *Sunnah* (rules deduced from the traditions, for instant, the sayings or conduct of the Prophet Muhammad (peace be upon him)).

2) Secondary sources: *Ijma* (consensus of jurists of any particular era on a juridical rule); and *Qiyas* (deductions from reasoning by *ijtihad* or analogy).

Moreover, Islamic family law in Malaysia was restricted to being merely the personal law concerning marriage, divorce, and related matters applicable to the Muslims. However, as Islamic family law as a part of state law, Malaysian government administrate the Islamic family law under different organizations. Wan Arfah Hamzah (2003) stated that regarding the Administration of Islamic law in Malaysia provide three independent authorities:

1) *Majlis Agama Islam* (the Islamic Council); is a corporation whose primary function is to advise the Ruler in all Matters concerning Islam. Moreover, the *Majlis* is empowered to acquire, hold, and dispose of movable and immovable property; and to administer all funds of the treasury, and to collect *zakat* (compulsory alms tax) and *fitrah* (tithe payable during the month of *Ramadan*). The *Majlis* also has the power to act as the executor of a will and administer the estate of a deceased Muslim.

2) The *Mufti* (the highest religious official), The *Mufti* has the duty to make and publish in the Gazette a *fatwa* (legal ruling) on any unsettled or controversial question of or concerning Islamic law. In the making of legal ruling, the *mufti* is assisted by a committee. That committee is presided over by the *mufti* and comprises members who are either appointed or nominated by the *Majlis*.

3) *Shari'ah* Court, there are three- tiered system of *Shari'ah* Court proposed for all the States; with a *Shari'ah* Subordinate Court which has only original jurisdiction both in civil and criminal matter; a *Shari'ah* High Court has original jurisdiction both in criminal and civil matter. It also has appellate jurisdiction which an appeal can made against any decision of a *Shari'ah* Subordinate Court. In addition, the *Shari'ah* High Court has supervisory and revisionary jurisdiction at any stage of any proceeding and to call for and examine any records of any *Shari'ah* Subordinate Court and give such directions as justice may require; and a *Shari'ah* Court of Appeal, this court may hear appeals against the decision of a *Shari'ah* High Court in the exercise of its original jurisdiction or an appeal from a *Shari'ah* Subordinate Court. In addition, the *Shari'ah* Court of Appeal also has supervisory and revisionary jurisdiction.

The independent authorities described above still has a links with the local people at the village level which the mosque administrative board be a part of the Islamic Council body because the administration of Islamic family law at this level done through this committee, especially collect compulsory alms tax and tithe payable during the month of *Ramadan*. Moreover, a *Shari'ah* court has been playing the role at this level through the family cases which can be see when community member would like to get marry or divorce, they must go to religious leader in the village first and if the cases could not handle by this stage, the religious leader then

would forward case to Shari'ah court proceeding. This can be seen as one way of solving a problem of cases burden in a court system.

When looking at the actor who play the role in the Shari'ah court proceeding, there has been divided into three different organizations, the *Shari'ah* Prosecutor has the control and direction of all criminal prosecutions and proceeding. They may institute, conduct or discontinue any proceeding for an offence before a *Shari'ah* Court; *Shari'ah* attorney, who are issue by the Islamic council to represent parties in any proceedings before a *Shari'ah* Court; and the enforcement organization which appoint by the Islamic council, from among the members of the civil service of the Federation. Their function is to carry out the investigation of offences under the Administration of Islamic Law or under any other written law prescribing offences against the precepts of Islam.

While, in Thailand, the Islamic family law has been implementing under administrative of community advisory board or in some villages through mosque administrative board of the villages. In this regard, the religious leader (*Imam*) play the role as a mediator. He administrated this law via the '*Musha Warah*'¹ process as Muhammadrorfee-E Musor (2006), described the Malay Muslim communities in Thailand has been using '*Musha Warah*' process in order to solving conflict among villagers. The implementation of Islamic family law by using '*Musha Waraah*' process in Malay Muslim communities can be summarized the pattern as follow: 1) When the conflict occur in the village the cases will be sent to religious leader who is a leader of that village. A person who sent the cases can be victim or parties; 2) after religious leader acknowledged the cases he will rise the cases to consult in the Community Advisory Council; 3) the Community Advisory Council will call related parties into '*Musha Warah*' process; 4) run on '*Musha Warah*' process, people who will participate in this process including victim, offender or if offender is a child or youth a parent of them will also participate, and advisor who is from the Community Advisory Council at least one person. During '*Musha Warah*' process if all parties can make agreement, the cases will be solve in this process; 5) in some cases, if the parties cannot make agreement on '*Musha Warah*' process, the cases will be forward to the Provincial Islamic Council and this can be seen as appeal process for parties who dissatisfaction with agreement on the '*Musha Warah*' process; 6) after the Provincial Islamic Council received the conflict issues, they will call stakeholder and all parties to proceeding in order to investigate on that matter. If all parties can make agreement, the cases will be terminated in this process; and 9) if the parties are not satisfied with an agreement of the Provincial Islamic Council, then cases will be forwarded to court and the court will apply the Administration of Islamic Law in Pattani, Narathiwat, Yala and Satun Provinces Act BC 2489.

¹ This process refer to a group of people gathered to give advice on various activities of Muslims in order to find a way to perform an activity or the solution for various activities within community. It also be the process that everyone must come together to think and solve problems on the basis of the provisions of Islam.

4 Conclusion

The Islamic family law has been playing very important role in Malay Muslim daily life and can be seen as the way of life of the local people even the Thai government's disapproval the Islamic family law to be of the state law. The Islamic family law has been implementing within Malay Muslim communities under administrative of community advisory board or in some villages through mosque administrative board of the villages. However, the implementation of Islamic law in this area facing with many problems particularly, when it come to the issues of enforcement and the interpretation of the content of law. In practice, when there have a problem to finding the meaning or sources of the law, the interpretation of the law refer to religious leader which may have different knowledge background and may interpretative in the way that some parties get benefit, while, another may lose. Unlike in some Muslim country for instant, Malaysia, there has been prescribed the interpretation of Islamic law where Shari'ah court must examine the original source of Islamic law. Moreover, there also have a problem of balance of power when religious leader who make a decision on the issues. He may make a decision that against the right of conflict parties, particularly the problem of appeal system. Moreover, there do not have any organization to appeal the decision that has been made by religious leader when conflict party unsatisfied with that decision. However, the ordinary justice system can be seen as one way of the solution but Malay Muslim in Thailand avoid to use this system because Islamic law do not associate with the ordinary court proceeding in Thailand at all.

5 References

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