



A STUDY ON THE SOCIO-LEGAL NEEDS FOR THE
ESTABLISHMENT OF FAMILY COURT IN
MALAYSIA

BY

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A dissertation submitted in partial fulfilment of the
requirements for the degree of Master of Comparative Laws

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ABSTRACT

The dissertation examines the need to have a family court in Malaysia from socio-legal perspective. The proposal is based on the ground that the present system does not provide a unified court which has a comprehensive policy and an integrated jurisdiction to deal with all family related disputes. This has caused hardship to the parties because they have to run from one court to another in order to get settlement for their cases. It is worse in the case of domestic violence and dissolution of marriage due to conversion of either spouses into Islam. The court procedures are quite complicated, while the adversarial system of litigation left a traumatic effect to the family members. This present situation deserved to get special concern from the authorities. This study also provides a specific chapter to examine the administration of family courts in other countries, especially in Australia and Singapore. A study is also conducted to identify the general framework of a family court that suits with Malaysian context. Reference for this dissertation has been made to a number of contemporary textbook and a few classical textbooks, refereed journal articles, reports, conference papers, newspaper cuttings and online resources. Other than that, Malaysian and foreign statutes as well as a few decided cases are also important references. The study revealed that the non-existence of a family court with an integrated jurisdiction and comprehensive policy over all family-related cases has caused dissatisfaction among the parties who are dealing with the court. Family disputes also have a few distinctive features that differentiate them from any other civil cases. It is suggested that family cases deserved special attention and require more than just a court of law. The role of family court is not only as an adjudicator, but most importantly as a mediator that helps the parties to find a settlement harmoniously. Therefore, this study suggests a family court to be established in Malaysia.

ملخص البحث

يفحص هذا البحث بكل دقة حول ضرورة وجود محكمة قضائية خاصة الأسرة من المنظور الاجتماعي والقانوني. ذلك لأن النظام القضائي المالي لا يزود الناس بنظام قضائي موجد بسياسة شاملة وسلطة متكاملة لإدارة كل النزاعات الأسرية. فهذا يسبب صعوبات أليمة على الأطراف المتنازعة ولم تحل مشاكلهم إلا بعد تردد متكرر بين العديد من الوحدات القضائية المتفرقة. والأمر أسوأ في حالة وجود عناصر العنف العائلي أو الطلاق بسبب اعتناق أحد الزوجين في الإسلام. فالنظام القضائي التخصصي والإجراءات القانونية المتطاولة لا يخدم مصلحة الأسرة المتخاصمة بشكل سليم فهذا يستلزم اهتمام السلطات المعنية بشكل كبير. اتخذ البحث منهج المقارنة لتحليل السلوك الإداري بين القضاء الشرعي والمدني في البلاد، كما يخصص البحث جزءاً من المباحث لدراسة كيفية إدارة القضاء الأسري في عدد من البلدان خصوصاً في استراليا وسنغافورا. كما أجريت دراسة للتعرف على الإطار العمل العام للقضاء الأسري لأنسب بالأوضاع المحلي في ماليزيا. ولقد كشف البحث عن حالة عدم الرضى لدى الأطراف المتعاملين بالمحاكم القضائية بسبب غياب النظام المتكامل للمحاكم القضائية وعدم وجود السياسات القضائية الشاملة لجميع مايتعلق بالقضاء الأسرية المعددة. وكذلك أن النزاعات الأسرية لها مميزات عديدة عن النزاعات الأخرى من القضايا المدنية. فلذلك يقترح البحث بأن القضايا الأسرية تستحق عناية خاصة وتفتقر الى ما هو أكثر من مجرد محكمة قضائية قانونية بل الى مؤسسة قضائية تعنى بدورها كوسيط فعال لحل المشاكل بين الأطراف المتنازعة بتوافق وانسجام. فهذا البحث إذا يقترح بقوة تأسيس المحكمة القضائية الخاصة للأسرة في ماليزيا.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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DECLARATION

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

‘Ain Husna bt. Mohd Arshad

Signature

Date

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**A STUDY ON THE SOCIO-LEGAL NEEDS FOR THE ESTABLISHMENT
OF FAMILY COURT IN MALAYSIA**

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Dedicated to my...

Husband,

*Your faith and love
has given me the true meaning of life.*

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In the name of Allah, Most Gracious, Most Merciful. Praise be to Allah The Cherisher and Sustainer of the worlds. May the peace and blessings be upon His Messenger, Prophet Muhammad s.a.w, his family and his companions. I am grateful to Allah s.w.t. as only with His mercy and grace, I was able to complete my dissertation.

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Family Law Act 1975 (The Australia)
Family Court Act 1975 (The Australia)
Matrimonial Causes Act 1959 (repealed) (The Australia)

LIST OF ABBREVIATIONS

ADRJ	Australian Dispute Resolution Journal
ALJ	Australian Law Journal
CLJ	Current Law Journal
et al.	and others
etc	and so forth
FJLR	Flinders Journal of Law Reform
Ibid.	in the same place
IKIM	Institut Kefahaman Islam Malaysia
MLJ	Malayan Law Journal
NZLJ	New Zealand Law Journal
QLR	Quarterly Law Review
SALJ	Singapore Academy of Law Journal
S.A.W	Ṣallallāhu ‘alayhi wa sallam
SJLS	Singapore Journal of Legal Studies
S.W.T.	Subḥanahu wa Ta‘āla
v.	versus, against
vol.	volume

TRANSLITERATION

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ġ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = هـ
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = يـ

Short: a = ا̇ i = ي̇ u = و̇
Long: ā = آ ī = إ ū = و̄
Diphthong: ay = آي aw = آو

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CHAPTER 1

STATEMENT OF INTENT AND METHODOLOGY

1.0 BACKGROUND OF STUDY

The recommendation to establish a family court in Malaysia has begun since early 1980's.¹ It was in fact propounded in 1983 during the Seminar on Women and The Law, organized by LAWASIA Standing Committee on human rights in association with the Bar Council of Malaysia.² In 2000, Dato' Seri Shahrizat Abdul Jalil, who is now holding the office of Minister of Women, Family and Community Development also proposed for the establishment of family court in Malaysia to deal with matrimonial and family matters.³ Her proposal was supported by Datuk Dr. Rais Yatim, the Minister of Information, Communications and Culture, and supported also by the Malaysian Bar Council.⁴ In recent years, the suggestion to establish a family court in Malaysia was again mentioned by few bodies such as Association of Women Lawyers and Sisters in Islam.⁵ Unfortunately until today, there is no such establishment. However, the High Court of Kuala Lumpur has its own family division which is more or less possess similar function to the intended family court. This indicates that the Malaysian court has started to distinguish family disputes from other civil disputes. On the other hand, the Shariah court could already be considered as a family court for Muslims.

¹ Shamsuddin Suhor, "Mahkamah Keluarga" in *Undang-undang Keluarga (Sivil)*, Shamsuddin Suhor & Noor Aziah Mohd Awal, Dewan Bahasa dan Pustaka, 2007 at 227.

² Muhammad Nizam Awang@Ali, "Mahkamah Keluarga Di Malaysia: Suatu Pandangan" [2004] I *KANUN* 20 at 34.

³ "Speech by the Minister of Women and Family Development at the Legal Aid Conference, Bar Council of Malaysia, in Kuantan on 19 January 2002," Kementerian Pembangunan Wanita, Keluarga dan Masyarakat, <<http://www.kpwkm.gov.my/>> (accessed November 17, 2008)

⁴ R. R. Chelvarajah, "Family Court," The Malaysian Bar, <www.malaysianbar.org.my/press_statements/family_court.html> (accessed 25 January 2009)

⁵ "Memorandum on the Administration of Justice in Malaysia," Sisters in Islam, <www.sistersinislam.org.my/> (accessed 21 October 2008)

Generally, matters relating to divorce and matrimonial causes come under the jurisdiction of the High Courts.⁶ At the same time, the High Courts also have jurisdiction to hear other civil claims including bankruptcy, admiralty⁷ and criminal offences.⁸ The criminal and civil appeals from subordinate courts are also heard in the High Court.⁹ In most of the time, family cases must have to ‘compete’ with all those cases that are waiting to get settlement from the High Court, except in the High Court of Kuala Lumpur where there is some form of specialization. Under the present system, different matters relating to family law are heard at different courts. For instance, petition for divorce, nullity, custody, judicial separation, declaration of legitimacy,¹⁰ division and disputes over matrimonial property are heard at the High Court.¹¹ While applications for maintenance are normally handled by the magistrates and sessions courts although the High Court has jurisdiction as well.¹² Adoption cases are heard at either the High Court or the sessions courts.¹³ The same situation also occurred under the administration of Islamic family law in Malaysia.

The adversarial system of litigation seems to add more problem since it leaves traumatic effect to the family members particularly children. Adversary procedure is like a private fight which gives very little chance for the disputing parties to resolve their conflict harmoniously. This is not the case if inquisitorial system is applied in the proposed family court where more humanitarian aspects are emphasized. The parties are also encouraged to settle their dispute amicably. It provides a legal mechanism of

⁶ Section 24(a), Courts of Judicature Act 1964.

⁷ Section 24(b) & (c), Courts of Judicature Act 1964.

⁸ Section 22, Courts of Judicature Act 1964.

⁹ Section 26 & 27, Courts of Judicature Act 1964.

¹⁰ Legitimacy Act 1961, section 5.

¹¹ Law Reform (Marriage and Divorce) Act 1976, section 2(1).

¹² Married Women and Children (Maintenance) Act 1950, section 2; Law Reform (Marriage and Divorce) Act 1976, section 2(1) & (2).

¹³ Adoption Act 1952, section 10.

family dispute resolution while at the same time preserving the family relationship from getting worse.¹⁴

This study is significant because it evaluates the needs to have a family court in Malaysia from legal as well as social views. It helps the policy-maker to obtain the basic concept of family as a social institution and the exigencies of having a specialized court for family cases. Besides, this study also fills in the lacuna in legal literature relating to family court in Malaysia which is very limited in number.

1.1 AIMS AND OBJECTIVES OF THE STUDY

- i) To examine social and legal needs for the establishment of family court in Malaysia.
- ii) To identify weaknesses and loopholes of the present court's system in family disputes litigation.
- iii) To study the implementation of family court system in other countries which have already established their own family courts such as Singapore and Australia.
- iv) To come up with a recommendation for the establishment of a competent and suitable family court system in Malaysia.

¹⁴ Muhammad Nizam Awang@Ali, "Mahkamah Keluarga Di Malaysia: Suatu Pandangan" [2004] I *KANUN* 20 at 21.

1.2 PROBLEM STATEMENTS

The study is undertaken to examine the needs to have a family court in Malaysia from legal as well as social perspective. It works on the premise that, unlike other civil cases, there is a need for a family dispute to be entertained in a single court which is specialized in dealing with all family related disputes. Family disputes should be resolved by a therapeutic approach rather than punitive or competitive. The present court system which adjudicates the family disputes differently seems ineffective in providing a comprehensive approach in deciding the case. The fact that different procedures are applicable in different court has led to a dissatisfaction to the parties involved.

1.3 HYPHOTHESES

The study is based on the original framework that the present court system which adjudicates family cases in different courts has led to more hardship and painful experience to the families since it would certainly involved prolonged proceedings, time consuming and high legal fees. It also causes emotional and mental pressure to the family members. Thus, a single court system, i.e. a family court need to be established, not only to expedite the litigation process and reduce the cost, but also to carry out the procedures in less formal manner and takes into consideration more humanitarian aspects. The most important feature is that family court has a comprehensive and integrated jurisdiction over all family related disputes.

1.4 RESEARCH METHODOLOGY

The study is fundamentally based on library research where the primary sources are journal articles, textbooks, seminar papers, reports as well as Malaysian and foreign statutes. Only few decided cases are cited because the topic of the study does not require a plenty of cases to be discussed. Other sources include newspaper cuttings and website materials.

The discussion focuses on the court system governing family law in Malaysia that mainly obtained from refereed journal articles. The study of the current system has revealed the weaknesses in the present court system administering family matters. This includes, among others, time consuming, high legal fees, lack of humanitarian aspects as well as complicated procedures and technicalities. The establishment of family court is regarded as a major improvement to the court system. Since the family law in Malaysia is governed under the dual system of court, i.e. the Shariah court and civil court, it is important to discuss the administration of family law in both courts. Thus, reference to Malaysian statutes and few relevant cases has been made. A comparative approach has been taken to examine the effectiveness of both courts that administer family law in Malaysia. In addition, reference has also been made to a few number of newspaper cuttings dated as early as 13 July 1989 which are related to this study.

This study also examines the administration of family courts in two countries namely Australia and Singapore. Reference has been made to the relevant statutes and legislations obtained from the official website of the Family Court of Australia and Singapore respectively. The websites also provide an access to the family court's publication such as the family court's bulletin, scholarly article and general information about the operational aspects of the courts. They are also updated

regularly. The sources relating to the family courts in countries other than Australia and Singapore are also taken into consideration in order to get further clarification and developing ideas. The materials include letters to journal, scholarly texts as well as journal article. Online reference from reliable sources is considered vital at present day as it is the fastest and easiest way to keep abreast with the changing laws in other countries. This includes reference to a global provider, the Lexis Nexis website.

Reference to a few translation of the Prophetic traditions and classical textbooks in Arabic as well as translated version is also made to understand the Islamic law relating to conversion of either spouses into Islam and to show how Islam encourages its people to preserve family institution and to enjoin reconciliation.

1.5 SCOPE OF THE STUDY AND CHAPTERIZATION

This dissertation concentrates on the needs to have a family court in Malaysia from social-legal perspectives. This includes the study on the present court system that administers family law in Malaysia. There are many statutes governing this area of law. However, only the relevant statutes that are closely related to this study shall be quoted. This is because the aim is to examine the family court system in Malaysia, and not to examine the lacuna in the substantive family law.

It is also important to mention the countries that already have a family court. This includes Singapore, Australia, America, Canada, Hong Kong, Japan, New Zealand and Poland. However, for the purpose of this dissertation, only two countries are studied in depth under a specific chapter namely Singapore and Australia. The other countries would only be cited where appropriate.

This writing is divided into six chapters. The first chapter introduces the background and significance of this study. It also clarifies the objectives, statements of

the problem, methodology and literature reviews. The second chapter analyzes the importance of family court from social perspective. It explains the meaning of family and conduct a study on the nature and characteristics of family as a social institution from Islamic as well as western perspective. It is important to understand the relationship between family and family court. It is followed by explaining the theoretical aspect behind the establishment of family court such as the philosophy, the purpose and functions of its establishment. This chapter also discusses about the meaning and philosophy of conciliation and mediation.

The third chapter concentrates on the practical aspect of family law in Malaysia. In other words, it analyzes the importance of family court from legal perspective. It also discusses the legislations on family law and its application in Malaysia. This includes the legislations and legal system for Muslims and non-Muslims. It also discusses about the jurisdictional conflicts between the two courts governing Muslims and non-Muslims respectively.

The subsequent chapter explores the administration of family court in other jurisdictions, i.e. in Singapore and Australia. It is essential to examine the administration and management of family disputes in those family courts such as the process, procedures and formalities, facilities available as well as the cooperation and contribution of the courts' personnel towards the development and smooth running of the courts.

Then an attempt is made to provide a general framework for the setting up of the family court in Malaysia which is discussed under chapter five. It shall provide the essential elements and characteristics of family court in Malaysian context. Finally, the concluding chapter would sum up all the important outcomes of this study. The important suggestions and observations are also highlighted under this final chapter.

1.6 LITERATURE REVIEW

There are very limited literatures available relating to the establishment of family court in Malaysia. The recommendation to establish a family court in Malaysia has been forwarded by few individuals such as Shahrizat Abdul Jalil (2000),¹⁵ Rais Yatim (2000),¹⁶ and supported by Vicky Alokane, Irene Cheah and Honey Tan Lay Ean (2002).¹⁷ However, the recommendation was quite general in nature and not adequate to convince the highest authorities to take an immediate action. The proposal to establish a family court was initially heard in Malaysia during the Seminar on Women and The Law, organized by LAWASIA Standing Committee on human rights in association with the Bar Council of Malaysia in 1983. However, the proposal was not taken seriously by the authorities.¹⁸ In 1989, Molly Cheang and Anamah Tan presented a paper relating to the proposal to establish a family court in Malaysia at a seminar on domestic violence and family law for a changing society held in Kuala Lumpur.¹⁹ This was the time the proposal was given serious attention by media, authorities and academicians.

Subsequently few authors started to write about the proposal and provided a lengthy discussion about the concept and philosophy of the proposed family court. Abu Bakar Munir and Nor Aini Abdullah (1995)²⁰ authored an article relating to domestic violence and the need for a family court. They suggested that the role of

¹⁵ "Speech by the Minister of Women and Family Development at the Legal Aid Conference, Bar Council of Malaysia, in Kuantan on 19 January 2002," Kementerian Pembangunan Wanita, Keluarga dan Masyarakat, <<http://www.kpwkm.gov.my/>> (accessed November 17, 2008)

¹⁶ R. R. Chelvarajah, "Family Court," The Malaysian Bar, <www.malaysianbar.org.my/press_statements/family_court.html> (accessed 25 January 2009)

¹⁷ Sofianni Subki, "Family Court So Sorely Needed," e-Homemakers: Civil Law, <www.ehomemakers.net/en/article> (accessed 25 January 2009).

¹⁸ Muhammad Nizam Awang@Ali, "Mahkamah Keluarga Di Malaysia: Suatu Pandangan" [2004] I *KANUN* 20 at 34.

¹⁹ Muharyani Othman, "Pushing for A Family Court," *New Straits Times, Times Two*, 13 July, 1989, 3. <www.google.com/newspapers> (accessed 25 January 2009)

²⁰ Abu Bakar Munir and Nor Aini Abdullah, "Domestic Violence and The Need For A Family Court" [1995] 4 *CLJ* lxxv (Nov) at lxxxii

family court is not only to deal with simple family disputes but also covers domestic violence cases. Family court system expedites domestic violence cases because there is no need for the victim to apply for orders or redress from two different court jurisdiction, with two different procedures. The court should act as a mediator to help the situation and try to avoid strict adherence to technical aspects in court procedures.

Nor Aini (1996)²¹ also clarified the philosophy behind the establishment of family court. Generally, family disputes involve complex questions of the analysis and prediction of human behavior that cannot be resolved by the simple application of a legal formula. Thus, it is suggested that there is a real need for a therapeutic approach to family conflicts resolution in order to maintain the peace and happiness of the family involved. Her writing shows that she is totally agreed with the philosophy of family court suggested by Molly Cheang (1985).²²

Muhammad Nizam (2004)²³ mentioned his opinion regarding the philosophy of family court and also distinguished family disputes from other civil cases. He criticized the application of adversarial system in family cases and viewed that family court would reduce the cost and time because of the simple process of adjudication and less formalities. It means that the concept and instrument applied in the process of dispute settlement in the family court are different from the process in conventional court. Muhammad Nizam (2004),²⁴ Zaleha Kamaruddin (1997),²⁵ Nor Aini (1996)²⁶ and Molly Cheang (1985)²⁷ agreed that among the most important features of family court is the element of specialization and concentration. This means the court is

²¹ Nor Aini Abdullah, "Wanted: A Family Court" in *A Collection of Socio-Legal Essays*, edited by Mimi Kamariah Majid, University of Malaya Press, 1996 at 180.

²² Molly Cheang, "Family Court: Let's Have It" [1985] *MLJ* Jan-Jun cxlviii at clii.

²³ Muhammad Nizam Awang@Ali, 21-23

²⁴ Muhammad Nizam, 26.

²⁵ Zaleha Kamaruddin, *Isu-isu Kekeluargaan dan Undang-undang*, Angkatan Belia Islam Malaysia (ABIM), 1997 at 183.

²⁶ Nor Aini Abdullah, 178.

²⁷ Molly Cheang, cli.

presided over by a specialist judge with adequate legal jurisdiction and authorization to handle all forms of family related disputes. However, only Muhammad Nizam (2004) and Zaleha Kamaruddin (1997) mentioned about the function of Shariah court which is more or less similar to a family court.

Another important aspect of family court as viewed by Zaleha Kamaruddin (2005)²⁸ is that the establishment of family court with the focusing role on mediation or conciliation is hoped to rectify the problems relating to the process of family mediation in Malaysia which is regulated under section 106 of Law Reform (Marriage and Divorce) Act 1976.

Conciliation is not a new alternative. In fact, it has been long practiced under Islamic law. Syed Khalid (2006)²⁹ in his book discussed many verses of the Holy Quran as well as *hadith* related to mediation or conciliation. Zurina (1998)³⁰ viewed that family disputes are primarily concerned with future relationships and ongoing social and parental responsibilities. Mediation is a way to find a civilized, amicable and cooperative way of family dispute resolution. It aims to solve all their struggles, moving into a cooperative frame of mind, finding peace of mind and essentially of being able to focus on the children and putting them first in priority. Therefore, it is not appropriate to apply adversarial system to the resolution of family disputes. This opinion is also similar to the earlier opinion given by Molly Cheang (1985).³¹ It is because adversary system increases trauma and escalates conflict.

²⁸ Zaleha Kamaruddin, *Divorce Laws in Malaysia (Civil and Shariah)*, Malayan Law Journal, 2005 at 113.

²⁹ Syed Khalid Rashid, *Alternative Dispute Resolution In Malaysia*, Kulliyah of Laws, IIUM, 2006 at 28.

³⁰ Zurina Md Noor, "Mediation under Islamic Law" in *Current Legal Problems in Malaysia* edited by Mimi Kamariah Majid, University of Malaya Press, 1998 at 59.

³¹ Molly Cheang, cl.