

**UUMILC 2017**  
**9<sup>TH</sup> UUM INTERNATIONAL LEGAL CONFERENCE**

**REVISITING THE ADMINISTRATION OF FAMILY JUSTICE IN  
THE FAMILY COURT IN MALAYSIA**

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***Abstract***

A ‘family court’ is generally known as a separate division of court that specifically deals with family disputes. In regulating family matters, there is no doubt that the existence of family law as a body of law is very important. However, the effectiveness of this law also depends on the institution that administers the law. In this context, it is the family court. The administration of family justice by the family court reflects the philosophy of its creation that normally takes into consideration the unique characteristics of family institution and family conflicts. Accordingly, the family court should be vested with a comprehensive jurisdiction in family matters and must be able to handle family matters effectively. The family court is not only act as a judicial institution that determine legal issues, but it also provides holistic approach and use therapeutic jurisprudence in the resolution of family disputes. In Malaysia, where dual system of family law applies, family matters of non-Muslims are heard at the civil courts, whereas for Muslims, it is the Syariah courts. For the purpose of this paper, only the civil courts are addressed. The creation of a family court at the Kuala Lumpur High Court as a specialized division of court is among the latest development in the administration of non-Muslim family law in Malaysia. This study was conducted mainly through library-based research. Field works in the form of interview and study visit were also carried out.

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**Keywords:** Family court, family justice, family dispute resolution, holistic approach, therapeutic jurisprudence.



## **1. Introduction**

In the administration of family justice, the existence of a court that can dispense family justice effectively is very important. The family court may be perceived as just another division of court. However, vast literatures, for instance, Blackmore and Thomas (2014), V.K. Rajah (2014), Leong (2013), Edwards (2013) and Swain (2012), suggest that the role of family court is beyond the traditional function of court that decides who is right and who is wrong. When a specialized court is established, it is established with specific purposes rooted from the philosophy behind the creation of this court. In England for instance, the family court is a fundamental part of the whole family justice system, a system that puts children and families at its heart. In reforming the family court process in England, the professionals need to make fundamental shift, by focusing more on the needs of children, young people, families and how to give them the best possible help (Sarah and Jacqui, 2014). In another instance, the Family Justice System in Singapore was given a broader perspective, as stated by Sundares Menon C.J. (2016), that litigants in the family justice system should not be seen only to be adjudicating over their legal rights; rather they should be the recipients of a particular kind of justice which seeks to understand their plight and to promote the welfare of litigants and their children. The two examples mentioned above show that there is some kind of shifting in the way the family justice is administered. The family justice system is not only focusing on pure legal issues, but it also takes into consideration non-legal issues that may worsen family conflicts. The element of holistic or therapeutic is started to insinuate in many family courts across the world. This paper discusses three aspects which are important in relation to a family court, these are, the effectiveness in disposing cases including backlogs; the use of therapeutic jurisprudence; and the element of comprehensive jurisdiction.

## **2. Problem Statement**

Adjudication of family disputes under the present court system is less effective to promote a holistic resolution of family disputes. This is particularly due to lack of comprehensive jurisdiction in family matters; and less given emphasis to therapeutic jurisprudence. At the same time, there were reports on backlogs and delays. Even though the family court might be able to dispose family legal matters effectively, this is not sufficient to treat family conflict as a whole.

## **3. Research Questions**

Based on the above problems, this paper identifies:

- 3.1.** Whether the Family Court has a comprehensive jurisdiction over family matters;
- 3.2.** Whether the Family Court is able to employ therapeutic jurisprudence in the resolution of family disputes; and
- 3.3.** Whether the Family Court is effective in clearing backlog cases and delay.

## **4. Purpose of the Study**

This paper embarks on the following objectives:

- 4.1.** To identify whether the Family Court has a comprehensive jurisdiction over family matters;

4.2. To study whether the Family Court is able to employ therapeutic and peaceful resolution of family disputes; and

4.3. To analyse whether the Family Court is effective in clearing backlog cases and delay.

## 5. Research Methods

This paper adopts qualitative analysis method of study. Library research is conducted by examining the primary and secondary materials including statutes, textbooks, journal articles, seminar paper and reports. However, since literatures that specifically discuss on the family court in Malaysia is very limited, it is very important to conduct fieldworks to study and analyse the practice of family court. Fieldworks include interview and study visits. Interview was conducted in semi-structured form to obtain certain opinions about the current practice of family court and to get information which is not documented. Whereas, study visits are conducted to confirm certain information gathered from literatures and also to get a deeper insight on the administration of family justice. Statistics are collected when necessary, to facilitate comparison and to derive valid inferences.

## 6. Findings

In Malaysia, there is a dual system of family law that deals with Muslims and non-Muslims respectively. The scope of this paper only covers the family court for non-Muslims, which is established within the civil courts. Based on the study undertaken, it is found that in Malaysia, the family court is only available in Kuala Lumpur. Whereas in other states, there is no dedicated family court, but a specific judge is assigned to handle family matters. However, this judge also deals with other miscellaneous civil matters. Therefore, the following discussions are mainly focus on the Kuala Lumpur Family Court, since it is the only family court in Malaysia. Further, the Kuala Lumpur Family Court is always the benchmark for the other courts throughout the country.

### 6.1. Historical background of the creation of Kuala Lumpur Family Court

Historically, the Kuala Lumpur Family Court was established on 1st November 1999 as a division of the High Court, with administrative jurisdiction in the Federal Territory of Kuala Lumpur. When it was first established, all family cases in Kuala Lumpur were heard in the Civil Court No. 4. However, this court was also hearing other civil cases.

Due to the increasing number in family cases in Kuala Lumpur, the Bar made a representation to the Chief Judge to have a specialized court. Therefore, on 1st June 2002, the Family Division was set up as Civil Court No. 8, to hear family cases only. The court commenced operation on 1st July 2002. This court continued until now, but it is no longer called Civil Court No. 8. Since 1st January 2010, the court has been called Family Court, or Civil Court Family Division of the High Court Kuala Lumpur. The main objective of the creation of this division is to deal with backlogs and to curb with the rising number of family cases filed at the Kuala Lumpur High Court.

## **6.2. Jurisdiction of the Family Court**

Generally, as the name suggest, it is common to assume that a family court must have a comprehensive jurisdiction over all types of family disputes. This understanding is also based on several definitions of family court that have been presented over the years by legal experts in many countries (Quah, 1993). However, the essential meaning of family court as a judicial institution is still the classical definition that was first used in 1925 when the Family Court of Toledo was set up. Accordingly, a family court is indicated by a court that has an integrated and unified jurisdiction in a single court with competence over all aspects of family matters. It includes juvenile delinquency, divorce, nullity and separation, guardianship and custody disputes, maintenance, matrimonial property disputes, domestic violence, child neglect and cruelty; and adoption. Instead of jurisdiction over such matters being fragmented between several courts, it is consolidated in a single court, although there may need to be specialized divisions or sections within that one court (Brown, 1966). This definition mainly refers to a comprehensive jurisdiction in family matters that should be vested in the family court.

The jurisdiction of the Kuala Lumpur Family Court is similar to civil jurisdiction given to other High Courts in Malaysia, which is spelt out under s.24 of the Courts of Judicature Act 1964. According to this section, civil jurisdiction of the High Courts in family matters include jurisdiction in matters relating to divorce and matrimonial causes; jurisdiction to appoint and control guardians of infants and generally over the person and property of infants; and jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind.

Based on this provision, it is found that the jurisdiction does not cover all family matters. Some other matters can be heard either at the High Court or the lower court, such as an application for maintenance, as provided under s.2 of the Married Women and Children (Maintenance) Act 1950. Whereas, in domestic violence cases, summonses are heard by the magistrate, as provided under ss. 2 and 4 of the Domestic Violence Act 1984, while protection orders, punishments and redress are heard by both criminal and civil courts, as provided under ss. 10, 11, 12 and 13 of the Domestic Violence Act 1984. Whereas for adoption, s.2 of the Adoption Act 1952 stated that adoption cases are heard at either the High Court or the Sessions Court.

Therefore, in terms of jurisdiction, civil family matters in Malaysia are heard by three courts, namely, the High Court, Sessions court and Magistrates' court.

## **6.3. Therapeutic Approach in Family Matters**

The way how a family court deals with family disputes is reflected from the philosophy and reason for its creation. The family court is always attributed to the element of holistic and therapeutic. For instance, it is reported in The Bahamas Report of Family Court System Committee (2008), that a family court is characterized by its philosophy to encourage the parties to resolve their family disputes themselves, with specialist assistance and support where ever necessary. It can be understood that the philosophical background of the family court is to provide a mechanism of dispute settlement which is not strictly bound to the traditional system of dispute settlement, but also allows the courts and parties to look at the overall factors that may invite peaceful resolution.

To further understand the philosophical background of a family court, Babb (1998) discussed two important factors that must be taken into consideration in the creation of family court. The first one is the ecology of human development and the second one is therapeutic jurisprudence. The ecological framework allows the court to look beyond the individual litigants, to holistically examine the larger social environments in which participants live and to fashion legal remedies that strengthen a family's supportive relationship. Whereas, the therapeutic jurisprudence denotes the judges' role as a 'healer' thus they should display a more therapeutic approach towards families and children by demonstrating respect and empathy and support the appropriate alternative dispute resolution techniques.

Understanding that family disputes always involve more than legal issues, therapeutic jurisprudence is seemed more appropriate to deal with family matters. In discussing therapeutic jurisprudence, Lens (2015) asserted that therapeutic courts integrate the element of psychological insight, employ healthy doses of respect, empathy and forgiveness and facilitate access to treatment resources. The courts created supportive rather than antagonistic environment, judges are more conciliatory, respectful and strive to bring all the parties together. Lens also suggested that family court judges should be selected based on judicial temperament and style, and ability to implement therapeutic technique.

At the Kuala Lumpur Family Court where there is only one judge and limited officers who are struggling with a lot of cases filed every day, the resources and time to emphasis on therapeutic approach is very limited. Nevertheless, the Court acknowledged that certain important elements must be taken into consideration. Based on the interview conducted with a former family court judge in April 2012, it was informed that any person appointed as a family court judge, particularly in Kuala Lumpur, must be very efficient and move very fast to cope with the number of cases that are coming in. The selection of family court judge was carefully made due to the nature of this court that handles very sensitive cases such as breakdown of marriage, custody, guardianship of children, maintenance and division of matrimonial assets. Therefore, it was understood that this court needs a very senior and experienced judge to manage the Court. The background and qualifications of the prospective judge were screened through to ensure that they are suitable to manage and run the family court very well, given the urgency and sensitiveness of the cases. This is because there have been a lot of cases where the certificate of urgency was filed. For instance, to ask for custody, care and control of the child, access to the child, injunction to stop the disposal or dissipation of matrimonial assets, or injunction to restrain the other party from converting the child until the child is 18 years old.

It is observed that the Family Court in Kuala Lumpur, like any other common-law based courts, practises adversarial system of litigation, where judges play a passive role during normal court proceedings and most dialogue between litigants and the judge flows through the lawyers. This is not the case in therapeutic court where, according to Lens (2015), judges will acknowledge a parent's missing voice and engage with parents directly through dialogue.

#### **6.4. Effectiveness in dealing with backlog cases and delays**

In 2011, the World Bank published a report on Malaysia Court Backlog and Delay Reduction Program. This report revealed problems faced by the judiciary, particularly with regard to the backlogs and delay of cases. This situation was quite staggering for about two decades since the late 1980s, in

which its reputation for probity and speedy delivery of decisions declined dramatically. The backlogs and delays in the court could not be tolerated, even though the caseload is substantial. Therefore, serious efforts have been made to reduce backlog of cases and delay. One of the efforts is to create specialization within courts.

Based on information obtained during a study visit conducted in April 2012, when cases are filed at the Kuala Lumpur Family Court, cases will be categorized into a number of codes. Code 33 is for contested divorce case, code 33A for uncontested divorce cases, code 24 for originating summons, such as application for custody and code 34 for declaration of legitimacy. Other than that, the Court also deals with interlocutory matters and application for variation orders.

The family court employs two mechanisms to help the court in clearing backlog of cases. These are mediation and joint petition. The current trend amongst the litigants is to file a joint petition for divorce. This is indicated by the fact that almost two-third of the petitions filed are jointly made by the parties, which means uncontested cases. Once it is filed, the judge will screen through the petition and if everything is in order, the judge will grant order in terms, which means, divorce is granted according to the terms that the litigants have asked for. These include the terms for custody, care and control of children, the access term, maintenance for wife and children and division of matrimonial assets. The disposal of cases is much faster if it is uncontested because the parties have agreed on their own terms. Based on study visits conducted on 2 April 2012 and 7 May 2012, it was observed that the family court was able to close 45 cases in one day and 40 cases another day.

The remaining one-third, which is about 800 to nearly 1000 per year, are the contested cases where the Court has to conduct full hearing. However, if the Court manages to encourage them to settle on their own or through mediation, then only 5% to 10% will go for full hearing. Those are for divorce petition or petition for judicial separation. However, there are other cases which are highly contested which the judge deals with in chambers. These are the originating summonses for orders such as maintenance, custody, care and control. These cases are not heard in the open court. Instead, they are heard in chambers based on affidavit evidence. The judge also interviews the children and considers the wishes of the parents and children according to the law, and subsequently grants custody order.

The court also deals with a lot of interim or interlocutory matters, which do not involve full trial, but takes a lot of court's time. This is where, until the cases are ready for hearing, the litigants apply for interim application such as striking out, interim maintenance, interim custody and interim injunction. In addition, there are also a lot of cases for variation of order. The law allows for variation of custody, care and control orders. Thus, some parties keep coming to the court for variation. For instance, if at the time the right to custody, care and control is given, the child is one year-old, parties may keep coming up until the child reaches the age of 18. Therefore, the file must be kept until the child is 18 years old. Since the introduction of e-filing in 2010, the number of physical files has been reduced, leaving only those which were filed before 2010.

The family court also deals with enforcement and execution cases, where the husband has refused to pay maintenance ordered by the Court, to the wife or children. In this situation, the wife will apply for various ways of forcing the husband to pay maintenance. There is a situation where the wife gives up, because even after trying so much, nothing works. Therefore, the wife wants to apply for committal, to

commit the husband to prison. There is also contempt of court proceedings because of refusal to hand over the child. Therefore, the Court is dealing with new cases and old cases until the child reaches the age of 18.

For mediation, based on the practice of the Kuala Lumpur Family Court, mediation may be conducted by a family court judge provided that the parties give their consent. During this session, the judge shall put aside all the proceeding notes and observe the etiquettes of mediation. Recent trend indicates that mediation has become a very useful tool that helps the court to clear backlogs and expedite the matters. This has been confirmed by a former family court judge, during an interview with her, as she mentioned that if the parties are willing to go for mediation with the judge, registrar or deputy registrar or through the Mediation Centre, then at least it will help the court to close the cases. According to the Judge, the success rate of mediation conducted at the Kuala Lumpur Family Court is about 80% to 90%. In supporting for mediation, the Deputy Registrar of the Family Court added that, "If you mediate you are moving forward, but if you litigate you are moving backward".

However, some parties might not be comfortable to undergone mediation in the family court because the same judge who hears proceeding in the court is also conducting mediation. In this situation, the parties may choose other alternatives of mediation, either to go to the newly established Mediation Centre at the Kuala Lumpur High Court, or Malaysian Mediation Centre or hire a private mediator.

When the Kuala Lumpur Family Court was first started in 1999, the average number of new cases filed was around 1200 to 1400 per year. However, started in 2012, there were almost 2500 new cases filed every year. Despite the fact that the volume of cases is going up, the family court managed to fast track all the cases brought before the Court. As at the date the interview was conducted (2 April 2012), the family court has reached, for the first time, the situation where the Court only deals with current cases, i.e., the 2011 and 2012 cases only. The Court has put much effort and worked really hard to double the clearance and have been the role model or model of court for the other judges throughout the country for handling family cases. All backlog cases from 2001 have been disposed and at the time the interview was conducted, there were only two 2010's cases left out, one of them was delayed because it was a complicated case involving millions of dollars and share transactions.

### **6.5. Issues and challenges faced by the Family Court**

It is observed that in terms of case management, the Kuala Lumpur Family Court is handled very efficiently, such as by having fast tracking system; the Court can meet the urgency; and the Court also has the expertise, experience and the maturity to handle cases. A high number of cases have been settled or heard, disposed and much backlog has been cleared. Since 2010, the family court has been able to clear more than 2000 cases every year. Based on those aspects and the court's performance in dealing with backlogs, it is justified to say that the family court is very effective.

However, when being asked about the challenges faced by the family court, it was informed that that in most of the time, the judge and the other court officers at the Kuala Lumpur Family Court are much occupied in family work. The judge and court officers need to push hard and stretch to the maximum to keep pace with the bulk of cases that come in. Therefore, they have no time to deal with other peripheral issues which might be considered a luxury, which other jurisdictions such as Singapore,

have implemented. For example, there are social workers who work with the Family Court of Singapore to offer family services (I. Rajah, 2014). Nevertheless, despite the constraint of manpower faced by the Kuala Lumpur Family Court, the Court must make sure that justice is done, because the most important thing is that parties must be satisfied that they receive justice.

The former family court judge further revealed that the court is also responsible for court supervision for certain times of access of parents to children. This is when custody, care and control is granted to a certain parent while the other parent is given supervised access, particularly in cases where the relationship is very bad, that if they access outside the court, they will fight against each other to the point that they frighten the child. In this situation where supervised access is granted, they come to the court for court supervision. The registrar and senior assistant registrar, interpreter and staff in the family court, regardless of how busy they are, have to take time to supervise. If it is weekly access, for instance, then a lot of time is taken to supervise. Sometimes it becomes complicated when the husband and wife are fighting, or they bring along other person to have an access with them. A proper room for access is really needed because now they only have a play room for access to younger children, but for the teenagers, when the parents come to have an access, they cannot use the play room. Therefore, they hang around the corridor for access. Those are some of the constraint mentioned by the judge.

The other supporting services such as counselling room and other types of family court services are not available. There are cases where, pending for hearing, the wife and children are thrown out of the house by the husband and they do not have a place to go to and have no money. Basically, when this situation occurred, it is the duty of the Ministry of Women and Family Development to provide social welfare, for instance by giving food and accommodation. The family court and its officers are dealing with the cases, thus time is limited for them to do such work, as it is beyond their line of duties. The judges can do their work to the best of their ability, but it is not the judges or court alone. The Ministry and the other supporting department must also come to help improving the support system. The former family court judge even encourages them to have a building at the family court or somewhere near the court, so they can work together with the judiciary to provide better services.

As to the infrastructure and conditions, it is observed that the courtroom is generally similar to any other courtroom, where it is air-conditioned, equipped with a bench for the honourable judge, dock for witnesses, ample seats for lawyers, and four rows of chairs for the public. The security guard is there during the whole time of hearing. It is observed that some parents bring along their children into the courtroom. They are allowed to do so as long as they do not cause any nuisance that may distract the proceedings.

## **6.6. Recommendations**

Based on the above discussion, there are a number of recommendations that can be presented. Firstly, to confer a comprehensive jurisdiction to the family court to deal with all types of family cases, from matters relating to marriage and divorce, maintenance and adoption to domestic violence. In domestic violence cases, this will reduce the burden of domestic violence victims to go to different courts to obtain remedies. The family court is also able to look at the case as a whole and determine the appropriate remedies for the victims in such cases.



Secondly, in terms of staffing, the family court needs to have mediators and family counsellors including child counsellors. The existence of counsellors will allow the court to take into consideration the opinion and advise of the counsellors in its decision. Whereas, the existence of mediators in the family court will facilitate the litigants to negotiate and compromise, so that the disputes can be resolved in a harmonious way. This is also to reduce judge's workload, as the current practice is that mediation is conducted by the judge. It is also suggested that the time has come for Malaysia to have family courts that can apply the concept of therapeutic jurisprudence. This will provide the parties with supportive environment that can help the parties to achieve resolution. For this purpose, the family court needs to have judges and officers who understand and appreciate the concept of therapeutic jurisprudence.

Thirdly, to have a strong networking with the external family service providers. For instance, if the family court found that the litigant would suffer severe impact as a result of divorce and need extra support, it will refer the case for further treatment outside of the court. Therefore, this individual will be given more intensive and holistic remedies. This can be done through an active coordination and cooperation with the Ministry. Finally, in terms of physical infrastructure, there is a need to have a proper room for supervised access for a parent and child to spend a quality time together.

## 7. Conclusion

While vast literatures suggested that the philosophical background to the creation of family court is to provide holistic approach to the resolution of family disputes, the family court in Malaysia is established with the essential aim to deal with backlog of cases. Based on the study undertaken, it is clear that the Kuala Lumpur Family Court has been able to meet the objective of its establishment, i.e., to clear backlogs and reduce delay. The Court has, to some extent, tried as much as possible to avoid unnecessary complexities during the proceedings and opened wide opportunity for discussion by the initiative of the judge and registrar. Through this approach, the case can be settled by consent, or by narrowing down the issues to avoid prolonged hearing. The Court is able to take this measure because they are dedicated to handle family matters only, so they can give more focus and concentration to handle cases effectively. Nevertheless, in other courts throughout the country which have no specific family division, it is quite difficult for the Court to take such approach in dealing with family matters as they have other cases that are waiting for hearing.

The jurisdiction of the family court is not comprehensive enough to deal with all types of family disputes, and the notion of therapeutic jurisprudence might still be far to reach. However, it is hoped that the creation of the family court as a specialized division can act as a catalyst to develop a family court which is more conducive, holistic and therapeutic in dealing with family matters. The way family matters are dealt with should stemmed out from the family court's philosophy in the administration of justice that is to give appropriate remedies or decisions that are suitable with the kind of grievances suffered by the litigants, so that they can move forward with the new adjustment in family life.

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