

APPLICATION OF MEDIATION IN RESOLVING ELDERLY FAMILY ISSUES IN MALAYSIA: LESSONS FROM CANADA AND AUSTRALIA

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ABSTRACT

Malaysia is expected to be an ageing country by 2030 when 15% of her populace will be in the category of the elderly. The elderly will face various issues and challenges, such as finance along with abuse and neglect. Generally, like in other disputes, the legal mechanism is the resort for resolution. However, litigation is less preferred in this type of cases as it does not address the emotional distress suffered by the parties involved. As such, litigation is not a suitable method as it may break the relationship between the parties. Conversely, mediation, a non-adjudicative dispute resolution mechanism, is considered a potential method of dispute settlement since it is effective in addressing the issues in a family conflict involving the elderly. Due to its effectiveness, the application of mediation as a means of resolving disputes has gained global attention. Considering its effectiveness, some countries, such as Australia and Canada, apply mediation in resolving family issues involving the elderly. The use of mediation in family disputes is not new in Malaysia, however, it is yet to be applied in elderly family disputes. The objective of this article is to explore the scope of the application of mediation in elderly family issues. As such, this study adopts the qualitative approach of research where primary and secondary sources of data were gleaned from various statutes as well as existing literature, respectively. In order to underline the potential of mediation in dispute resolution, the experiences of Australia and Canada have been shared in this article. The finding indicates that due to its intrinsic excellence and usefulness, mediation can excel in resolving the disputes related to the elderly.

Therefore, the paper recommends embracing mediation as a feasible dispute settlement mechanism involving the elderly in a family setting in Malaysia.

Keywords: family dispute resolution, elderly family issues, litigation, mediation, Australia and Canada

INTRODUCTION

The increasing number of elderly people is a global phenomenon (United Nations Department of Economic and Social Affairs 2019). In 2019, globally there were around 703 million elderly people aged 65¹ or over. The east and southeast Asian regions are home to the largest number of the world's elderly (approximately 260 million) after Europe and North America (over 200 million) (United Nations Department of Economic and Social Affairs 2020).

The United Nations (UN) refers to those aged 60 years and above as older persons and Malaysia has adopted this definition as stated in its National Policy for the Elderly 1995, revised in 2011. Malaysia's population in 2019 was 32.6 million (Department of Statistics Malaysia 2019). Some 10.3% of its population are those aged 60 years and above (Department of Statistics Malaysia 2019). In 2030, more than 15% of its population will comprise of the elderly, which will make Malaysia an ageing nation (Taher et al. 2018; Zainal Abidin, Muhamad Fadzil and Nadia 2020).

The first World Assembly on Ageing was convened in 1982, with 62 recommendations forwarded by the Vienna International Plan of Action on Ageing.² In 1991, the United Nations Principles for Older Persons was adopted, which enumerated 18 entitlements to the elderly.³ In 1992, a Proclamation on Ageing was adopted and the United Nations General Assembly announced the year of 1999 as the International Year of Older Persons. In 2002, the Madrid International Plan of Action on Ageing was adopted, which urged for changes in every aspect to acknowledge the huge potential of ageing in the 21st century. The Madrid Plan also emphasised the development of the elderly by promoting health and security into old age and ensuring a congenial atmosphere (United Nations 2002). The spirit of these international documents was enshrined in the National Policy for the Elderly introduced in 1995 and revised in 2011. The objective of this policy was to create a society of the elderly who possess a high sense of self-worthiness and dignity. This is achieved by optimising their potential and ensuring that they enjoy every opportunity as well as the care and protection of their families, society and the nation. The policy is implemented through the Plan of Action which

requires all government agencies to assist and empower the elderly so that they remain active and continue to contribute to national development. The Ministry of Women, Family and Community Development is responsible for implementing this policy. The ministry has formed various committees at the ministerial, state, and district levels to ensure that the aspiration of the said National Policy reaches as many elderly people as possible nationwide. Unfortunately, this policy does not have any legally binding effect, thus an effort to introduce specific legislation for the elderly is underway.

THE EXISTING LAWS REGARDING THE ELDERLY IN MALAYSIA

All the statutes of general application cover the elderly, just like anyone else. Article 5 of the Federal Constitution ensures that the right to life, which includes the right to livelihood, the right to health, water, housing and education, etc., is accorded to the elderly too⁴ while Article 8 of the Federal Constitution affords equality for everyone, with no discrimination and unfair treatment. In the event the elderly suffers from any domestic violence at the hands of family members, the Domestic Violence Act 1994 (DVA) can be invoked since the said Act refers specifically to the elderly. It has been documented that elderly abuse and neglect take place within the family or nursing homes; the family members are the primary carers, and if they are not able to care for them, nursing homes take on this role. There is increasing evidence that abuse in late-life results in premature mortality, with those physically and verbally abused being at higher risks of mortality (Raudah et al. 2017).

The DVA must be read together with the Penal Code (Act 574) since the said Act does not mention any penalty for domestic violence.⁵ According to the DVA 1994, “domestic violence” means physical harm, fear of harm, wrongful detention, and dishonestly misappropriating the victim’s property.⁶ The said unlawful acts must be committed by the accused or perpetrator against an incapacitated adult of the family. An elderly will fall under the category of an incapacitated adult.⁷ Even though the elderly are protected against abuse and neglect, there are no statistics available as to the seriousness of this issue. Now and again, there will be newspaper reports on elderly abuse and neglect (Sukumaran 2019). Aside from housing them at the nursing homes operated by either the government or private sector, there is no follow up in cases of abuse since no official report has ever been lodged by the elderly.

Among the elderly who have sufficient savings, they are vulnerable to financial abuse and exploitation due to the reduced decision-making ability that comes

with age (Raof and Abdullah 2017). In the case of *Lim Kim Hua v. Ho Chui Lan & Anor*,⁸ an uneducated older woman having weak memory was dependent on the respondent (granddaughter) for her daily activities and household chores. However, the granddaughter abused her trust and their relationship. Using her undue influence, she coerced her grandmother to transfer part of the ownership of her shop house to her name. Consequently, the transfer was declared void. Financial abuse and exploitation are not confined to just family members. They are also committed by businesses and scams, for instance, the Macau Scam (*The Sun Daily* 28 May 2020).

The abused elderly can be protected through the issuance of the Emergency Order, Interim Protection Order, Protection Order, counselling, and awarding compensation under the 1994 DVA. The perpetrators can be punished with imprisonment or fines or with both under the Penal Code. Even though there are laws to protect the elderly against domestic abuse, reported cases are hard to find. Since elderly abuse and neglect are penal offences, the elderly is reluctant to lodge a report against their family members, opting to suffer in silence. Sometimes, they do not have the capacity to lodge police reports due to medical impairment, or fear of rejection and abandonment by the family (Siti Zaharah, Chuan and Taher 2015) and the stigma of being judged by society as not being good parents who did not teach their children noble values.

The law on financial assistance for elderly parents is a widely debated topic. The elderly's financial assistance usually comes from two main sources: (1) pensions or Employee Provident Fund (EPF) if they have worked in the formal sector, and (2) maintenance from their children (filial piety). If they do not have either, they will then receive financial assistance from the government through the Elderly Financial Assistance or *Bantuan Orang Tua*, a monthly financial assistance administered by the Social Welfare Department. Only the first source is mandated by the law – Pensions Act 1980 (Act 227) or Employees' Provident Fund Act (Act 452); the second source is available for Muslims through the state Islamic Family Enactment. The same is not available for non-Muslims, since the Law Reform (Marriage and Divorce) Act 1976 (Act 164) is confined to maintenance between ex-spouses or parents and their children. It is not extended to cover elderly parents. The redress is only available if Muslim elderly parents bring their application against their children to the syariah court.

THE CURRENT DISPUTE RESOLUTION MECHANISM FOR THE ELDERLY IN MALAYSIA

The Malaysian legal system is based on common law, which favours the adversarial and confrontational method. The law is responsible for according to liability and protection to the parties. A person is liable if he or she is at fault while a person is protected if he or she can prove that he or she falls within the protected group. The current dispute resolutions for the elderly depend very much on the issues. If the issue touches on elderly abuse and neglect, it is considered criminal in nature under the DVA 1994 and the Penal Code. There is no provision in the DVA 1994 regarding the offence of elderly abuse and neglect since the offences are provided in the Penal Code. The DVA 1994 provides for several remedies including Protection Orders,⁹ reparation for harm or loss encountered by the victim¹⁰ and issuance of orders to parties involved in reconciliatory counselling, psychotherapy or reintegration counselling sessions.¹¹ Nevertheless, to benefit from the remedies, the elderly must lodge a police report against the perpetrator, who is most often a member of their family. The reluctance on the elderly's part to pursue the remedies under this Act can be attributed to various factors including that the punishment is punitive in nature, the fear of being abandoned and rejected, being viewed as bad parents or inability to do so due to their disabilities (Siti Zaharah, Chuan and Taher 2015). Since it is criminal in nature, the accused will only be found guilty if all the requirements for *actus reus*, *mens rea*, concurrent and causation is fulfilled, and the accused cannot raise any defence against the charge (Siti Zaharah et al. 2019a). This may not be easy to accomplish if the victim is an elderly, who may not be able to recall certain incidents and their details. The fact that the case may take a long time to be completed is not in favour of the elderly.

As for the issue of maintenance, the non-Muslim elderly will not have any recourse in law to bring this matter to court. The Law Reform (Marriage and Divorce) Act 1976 only covers maintenance between husband and wife and their children. The said Act does not include any provisions on the maintenance of elderly parents by their adult children. There is nothing in common law on the legal duty of the children to pay maintenance to their parents (Stuifbergen and Delden 2011) while the Women and Children Maintenance Act 1957 deals with maintenance for the wife and children only. Without a specific provision on this in the Act and nothing in common law¹² to fall back on, there is no remedy available for the non-Muslim elderly parents. The position is different for Muslim elderly parents since all the Islamic Family Law Enactments¹³ provide for the right of the parents to apply for maintenance from their children. The elderly parents will have to file a case at the syariah court for the said remedies.¹⁴ Regretfully, bringing the case to court

would affect the relationship between the parties. Thus, not many elderly parents are willing to take this route.

On the distribution or usage of the elderly's properties, it will be treated according to the circumstances,¹⁵ whether it is a trust, gift, will, or inheritance, and any dispute will be settled through litigations. Aside from general legislations, Muslims are governed by the specific legislation applicable to them since the issue on distribution or usage of the property is governed by *hukum syarak* and legislation.¹⁶ Nevertheless, this is rarely discussed since it is always associated with death. Therefore, most of the time, it will be dealt with upon the death of the elderly. The understanding, especially within the Malay community, that *harta pusaka* particularly the ancestor's lands should not be sold, but be left to the children, has an impact on the elderly financially (Yun 2019). Research has shown that the elderly in Malaysia is asset-rich but cash poor (Sulaiman and Mohammed Ishak 2016). The unwillingness to utilise their properties by the elderly for their old-age comfort is something that needs to be addressed by the family.

Litigation is not only expensive, but it also takes more time to be concluded since the case will go through a full trial in an open court. There is a need to engage a lawyer to conduct the case, documentations to be prepared, and witnesses to be called to attend the trial. The parties must be prepared to deal with the delay and adjournment since their lawyers and the courts are handling numerous cases. The time and money spent on litigation will also affect the relationship between the parties; once the decision to litigate is taken, it means that both parties have agreed that the relationship is over. If the case is a criminal one, the perpetrator will be subjected to punitive punishment such as a fine or imprisonment. The court proceedings additionally are very formal, and the atmosphere is not pleasant given that litigation is adversarial in nature (Sharifah Suhana and George 2002).

Since litigation seems to be the most popular route to resolve conflicts involving the elderly and their family, it is not surprising that the latter prefer not to bring this matter into an open court. They prefer to suffer in silence. Nevertheless, it is important to work on the basis that no children would intentionally hurt their elderly parents or vice versa. Family sanctity must always be the underpinning principle in dealing with this complicated issue. Hence, litigation is not a suitable method as it damages familial relationships. Thus, it is important for Malaysia to find a suitable method to deal with this as the country edges towards becoming an aged country in 2030.

METHOD

This article adopted a traditional legal method (Amin 1992), namely qualitative research using the library-based or doctrinal approach. This method is suitable for studying theoretical, doctrinal or pure legal reviews involving the sources of law (Anwarul 2007). The primary sources of law for this study were statutes, regulations, selected cases and international documents. The secondary sources of law were textbooks, articles from journals, law reviews and sources from internet websites. In addition to using Google Scholar, scholarly publications on mediation have been sourced from various databases, such as HeOnline, SAGE Journals, Taylor & Francis Online, and Wiley Online Library. A discussion referring to the other jurisdictions, such as Canada and Australia, are included to offer suggestions for the future development of elderly mediation in Malaysia. The application of Canadian and Australian law is subject to limitations, which means their law will be considered only when local statutes covering the same matter is absent and “in so far as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary” [Sections 3 and 5 of the Civil Law Act 1956 (Act 67)].

ALTERNATIVE DISPUTE RESOLUTION IN MALAYSIA

Litigation is not the only way to resolve a legal dispute. The dissatisfaction as to the litigation process has pushed for an alternative dispute resolution (ADR) to be developed. The ADR is a process used to resolve disputes, either within or outside the formal legal system, without adjudication or decision by a judge. The ADR process covers dispute management, negotiation, facilitative processes, advisory processes and determinative processes (Hak, Oseni and Mohamed 2016). The process is based on voluntariness and the willingness of the parties to participate and abide by the decisions reached at the mediation. The process is a closed process, with a confidentiality element, ensuring that the discussions are not disclosed to others. Mediation and arbitration are two examples of ADR.

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. If the contract signed by both parties include an arbitration clause and a dispute arise, the dispute can be referred to an arbitrator who can issue a decision that is binding on both parties. In Malaysia, the general arbitration process and practices are governed by the Arbitration Act 2005 (Act 646). It is the preferred method of ADR for commercial dispute resolution, such as contract, financial matters between service providers and their clients (Financial Mediation Bureau), capital markets

(Security Industry Dispute Resolution Centre) and Islamic financial technology (Rajoo 2020). Since arbitration is more focused on commercial disputes, it may not be the best resolution method involving conflicts between the elderly and their family.

On the other hand, mediation may be a suitable approach to resolve disputes between the elderly and their family. It can be defined as “the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, [and] who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute” (Moore 2014). The definition emphasises voluntary, neutral, negotiation and mutual acceptable settlement. The mediator is the main figure to resolve the dispute amicably between the parties (Knickle, McNaughton and Downar 2012). The roles of the mediator are, for example, participating in constructing the problem, reframing and relabelling it, reshaping history by changing plots and making the future by constructing new plots (Cobb 1991).

In Malaysia, the practice of mediation is not new; it has been applied in Tanah Melayu (Malay Land, a term used before independence) before the initiation of civil court procedures. The mediation process is applied in marital issues among the locals (Raihanah 2010). It is governed by the Mediation Act 2012 (Act 749) but it is not applicable in constitutional law, prerogative writs, temporary or permanent injunctions, election petitions, proceedings under Election Offences, land acquisition proceedings, judicial review, appeals, revision, native court and criminal matters [Section 2(a) of the Mediation Act 2012]. Once an agreement is reached between the parties, it shall be reduced to writing and signed by the parties and it will be binding on both parties. The provisions under the Mediation Act 2012 are rather limited and focuses on general aspects, such as agreements, appointment and termination of mediators, costs, and others. This general approach enables the process to be tailor-made to suit the needs of the industry or area of dispute. Currently, Malaysia has a few different mediation institutions established to provide mediation services to the public, such as the Malaysian Mediation Centre (MMC) and the Asian International Arbitration Centre (AIAC).

MEDIATION AS THE ALTERNATIVE DISPUTE RESOLUTION FOR THE ELDERLY

Nowadays, mediation as a dispute resolution method has been used in various settings, such as in conflicts between family members in caring for patients (Knickle, McNaughton and Downar 2012; Khan, Bastiampillai and Mon 2020),

family disputes (Kamenecka-Usova 2016), workplace conflict (Kenny 2014) and community disputes (Craver 2015). Mediation is now being extended to address conflicts involving the elderly too (Crampton 2013; Braun 2013). Since mediation focuses more on negotiation with the aim of achieving an acceptable outcome by both parties, it may indirectly protect the sanctity of the family relationship, in contrast to litigation.

Mediation requires both parties to voluntarily agree to a negotiated agreement, and this would require the mental capacity of the elderly to be addressed. In order for mediation to be successful, the elderly must have the mental capacity to make their own decision. At present, in Malaysia, “mental capacity” is governed by the Mental Health Act 2001 (Act 615). It allows an application to be made to the court for a declaration that a person is mentally disordered and incapable of managing their personal affairs. Thus, another person can be appointed to take over the management of the affairs.¹⁷ As long as the elderly can understand the nature and consequences of their decision, their autonomy to decide must be respected. Mediation will allow their input to be considered in deciding any issue in relation to their life, be it for their wellbeing, health or even their assets.

Principles of Mediation

Generally, the principles of mediation are regarded as the fundamental rules that govern the interaction between the parties, including the mediator (Surma 2018). The fundamental principles of mediation include: (1) voluntariness, (2) confidentiality, (3) neutrality and fairness of the mediator and (4) equality and mutual cooperation among the parties (Surma 2018). These principles will ensure that both parties are heard in a more conducive environment compared with litigation. In any family disputes, emotions, such as anger, sadness, and disappointment, will layer them, and no amicable solution will be achieved unless these emotions are first dealt with. Love and care underpin the family relationship; sometimes the parties need a bit of a nudge or push to be able to see them. The mediation process is confidential, thus allowing the parties to protect their privacy compared with litigation, which is heard in an open court. The mediator is not the decision-maker but only the facilitator, assisting and empowering the parties to arrive at a settlement, voluntarily (Crampton 2013).

The mediation for elderly disputes can be approached in two ways: community mediation and professional mediation. Community mediation is suitable to resolve minor disputes before they escalate into formal ones. The goal of the community dispute resolution movement is to teach people to resolve conflicts through cooperation, negotiation and mediation, thereby empowering the participants,

relieving court caseloads and preventing the escalation of disputes (Zander 2017). This approach is not new to Malaysian society. The practice of referring disputes to those who are respected within the society was the norm, especially within the village community. Those who were respected within the society include the village head (*penghulu*) or religious heads, such as the *imam*, priest, or the learned persons (Wall and Callister 1999). This practice may still be relevant in villages, but not in the cities.

The Older Person Activity Center (PAWE) was established under the Dasar Warga Emas Negara (DWEN) in 2001. The PAWE is an alternative development programme to address the issues and challenges faced by the elderly (Noraida, Zarina and Fatimah Zailly 2016). The Ministry of Women, Family and Community Development who is responsible for the welfare of the elderly planned to establish one PAWE in every constituent throughout Malaysia (Sarawakvoice.com 30 June 2019). The elderly who are active in PAWE can be recruited to be part of the community mediation. The elderly facing disputes may feel more comfortable discussing this with those they are familiar with. Resolving this dispute at this level would minimise the damage to the relationship. In Malaysia, the first community mediation project was introduced in 2007 to train the members of the Peaceful Neighbourhood (*rukun tetangga*) committee to be Community Mediators in their residential areas, in which they can play their role as a third party in helping the disputants/residents to resolve their disputes (Khan and Hak 2014). The members were required to undergo specific training to equip them for their new roles. There is no specific legislation introduced to regulate this particular community mediation project aside from the guidelines provided by the department that was responsible for it (Community Mediation Operating Procedure by the Department of National Unity).

If community mediation fails to resolve the dispute and it escalates into a legal dispute, then mediation by a professional mediator is needed. This type of mediation requires the said mediator be trained in mediation (Section 7 of the Mediation Act 2012) but also understand the social and legal issues faced by the elderly and their family. Social workers can be mediators since their training will be relevant. An additional 40 hours of training in mediation will equip them to oversee elderly mediation. Since Malaysia is a multicultural society, the mediator must be well-versed with different needs of the society, including the special needs of the natives of Peninsular Malaysia, and the natives of Sabah and Sarawak, wherever it is applicable.

THE ELDERLY AND FAMILY DISPUTES

Many elderly people suffer from difficulties, such as abuse and neglect, lack of proper healthcare facilities, and poor financial support. The national report on violence and health provides the definition of elderly abuse (World Health Organization 2006). Abuse and neglect towards the elderly are taboo subjects and are rarely discussed openly in Malaysian society. Due to this, the abused and neglected elderly will likely not receive much-needed care and protection assistance which is offered by both the government and the non-governmental organisations (NGOs).

The elderly sources of financial retirement are either from the pensions scheme if they were former public service employees or the Employees Provident Fund if they were working in the private sector. Nevertheless, those who used to work in the informal sector would not have any structured financial fund, and thus, they need to depend on their own savings. Without any such savings, unless they can continue working, they will have to rely on the assistance of their children, or the state through various social assistance, such as Bantuan Orang Tua. Having sufficient savings for old age is important as this will contribute to the quality of life for the elderly (Nur Amalina and Yarina 2017).

Health problems are synonymous with being old. Numerous chronic diseases for example, Alzheimer's, arthritis, lung disease, stroke, osteoporosis and malnutrition are associated with the elderly (Lunenfeld and Stratton 2013). Apart from physical health, psychological health problems, such as dementia and depression, are also common among the elderly (World Health Organization 2017). The elderly will need to seek treatment for these diseases, with frequent visits to hospitals. If they do not have any medical insurance, they will have to rely on public healthcare at the various government hospitals and clinics, where they will receive the services for free. Nevertheless, the waiting time is too long, which may deter them from continuing with the treatment (Su-Lyn 2017). This is further aggravated by an increase in the number of patients seeking treatment at government hospitals due to an increase in the cost of living (*The Malay Mail* 27 July 2017). If the elderly need assistance, especially long-term care, they will need to rely on their family members as the primary carer, or if they are financially independent, they will be cared for at a privately run old folks' home. In other circumstances, they will then be placed at the government-run old folks' home. With sufficient savings, the elderly will ensure that their health needs are taken care of. Hence, it is important for the elderly to plan their old-age finances by taking into account the cost of their health too.

The family is the primary carer for the elderly. If they are not able to care for themselves, the elderly will opt to stay with their children instead of being cared for at an institution. Filial piety is an important value among Eastern families. Even though Malaysians in general still observe filial piety in caring for the elderly, societal changes, migration trends and a decrease in the number of extended families have an impact on the ability of children to care for their elderly parents (Siti Zaharah et al. 2019b). These changes have forced both the elderly and their families to adapt and may lead to dissatisfaction on both sides. Caring for the elderly requires skills and patience, more so if the elderly person is not well, while the carer needs to work and care for her young family. Thus, the said tension and stress may lead to elderly abuse and neglect.

Research has shown that the family of the elderly is their primary carer. Even though litigation is available for the elderly to seek redress for these issues, nevertheless the literature suggests that resorting to mediation is more advantageous as compared to the litigation process (Alwi 2013). Mediation can minimise the negative impact of the dispute, allowing the parties to continue to have an amicable relationship (Jen-T'chiang 2010; Sa'odah, Rojanah and Muslihah 2022). This is important as one of the factors why the elderly is reluctant to litigate is the impact of such conduct on the relationship. Resolving these issues should not be treated as the end of the relationship, but as an opportunity to improve it. Hence, mediation will give both parties the chance to discuss and understand each other better (Sa'odah, Rojanah and Muslihah 2022).

Even though ADR is not new in Malaysia, its focus is limited to commercial and financial disputes or family disputes between husband and wife. It has been touted as a suitable method to resolve family disputes in the administration of the estates (Muhammad Amrullah et al. 2019). Hence, extending ADR, especially mediation, to resolve the dispute between the elderly and their family will still be within the realm of family disputes, albeit wider than what is available now.

LESSONS FROM OTHER JURISDICTIONS

Many countries, for example, Canada and Australia, have introduced elder mediation to resolve disputes involving the elderly. As such elder mediation is not something new and its implementation is possible.

Canada

Mediation involving the elderly's issues is considered private as well as confidential and the mediators facilitate the entire process where there is a possibility on behalf of the family members to disclose their concerns along with their interests. It is worth mentioning that under the mechanism of mediation, meetings are informally held in places that fulfil the requirements of family members. The meetings can be held in private homes, offices of the mediators, and/or caregiver centres (Kardasis and Trippe 2010). The mediation involving the elderly was introduced to resolve the issue of elder guardianship in Canada.¹⁸ The guardianship issue deals with the mental capacity of the elderly in making decisions pertaining to their life. The law¹⁹ respects the autonomy of the elderly in deciding for themselves in issues related to their property, health or place of residence. Mediation will only be relevant if the elderly person is proven to have the mental capacity to decide, using the "understand and appreciate test".²⁰ For identification and clarification of the issues, elder mediation needs to develop communication as well as commitment to the procedure. In order to determine the appropriateness of elderly mediation, there should be some preliminary assessments. As soon as it is found that the mediation is possible in case of a particular dispute then the process is structured in such a way so that the interests of all parties are served. Hence, it is common to involve a lawyer for the elderly in the process of mediation. Based on their experiences, the lawyers and the experts on alternative dispute resolution mechanisms can draw a conclusion and reach an amicable settlement (Kardasis and Trippe 2010).

Elder mediation is nowadays widely used to resolve elderly disputes. Elder mediation is generally perceived as a dispute settlement mechanism pertaining to the issues related to the elderly; for example, any of the parties will be elderly and/or the conflicting "issues will be ones of particular significance to older adults" (Canadian Centre for Elder Law 2012). It goes without saying that elder mediation involves various parties of multi-generation, often including the members of the family and encompassing household dynamics (Canadian Centre for Elder Law 2012). In Canada, the mechanism of mediation relating to elderly issues is grounded on the wellness model. This model "promotes a person-centred approach for all participants—tapping the collective creativity while exploring the many ways that will best work to enhance the rights of the older person" (Department of Justice of Canada 2016).

Elderly people prefer to maintain relationships with their family members and hence, consider the mechanism of mediation as preferable to court hearings (Braun 2012). In 2007, an act known as the Adult Guardianship and Planning

Statutes Amendment Act 2007 was passed in British Columbia. This Act mandates mediation for court-contested guardianship applications (Braun 2012). According to Section 6 of the Act, mediation is mandatory in case of guardianship disputes before the court. However, scholars agree whether specialised training is necessary for the mediators who will be engaged as elderly mediators on adult guardianship as well as elderly abuse (Braun 2012).

Just like any other process, there are concerns regarding elderly mediation. It goes without saying that these concerns can be ameliorated by the application of best practices. The existing literature indicates that “one such strategy is to hold meetings between the mediator and individual mediation participants prior to holding any joint sessions where all the parties are present” (Braun 2012). These meetings, generally known as “pre-mediation meetings”, are utilised in a broad spectrum of mediation aspects. However, this practice is particularly suggested for elderly mediation for the reason that the pre-mediation meeting gives the mediator a chance to define relationship dynamics. Indicating the significance of pre-mediation meetings, the British Columbia Law Institute identifies it as an area that can make a substantial impact on successful elderly mediation (British Columbia Law Institute 2012).

Australia

The elderly mediation field to date has in many ways been driven by the needs of elderly people with disabilities and their caregivers (Barry 2013). The elderly’s right to make their decision will depend very much on their mental capacity according to the law.²¹ The mental capacity law is dealt with in the light of guardianship law, for example the South Australia Guardianship and Administration Act 1993 requires “the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever” (South Australian Legislation 1993). In one of their research projects, the researchers at University of South Australia adopted the method of confidential phone-in to get the opinions of older people regarding financial abuse (Bagshaw et al. 2013). The researchers did it in order to develop family mediation and other tactics to prevent such types of abuse.

Mediation has been utilised in aged-care services, guardianship tribunals, elderly abuse services, hospital settings and family mediation where a family dispute arises from disagreements about how older persons with disabilities manage

their living arrangements and finances (Barry 2013). Elderly people often choose mediation instead of a formal legal process since it is considered as a more modest way of easing an obnoxious situation (Crampton 2013). Therefore, maintaining confidentiality in the process, mediation holds the relationship among the family members (Braun 2012).

According to Martin and Roberts (2020), the National Plan to Respond to the Abuse of Older Australians (Eldely Abuse) propagates three key service models and case management and mediation is one of those models. However, it is worth mentioning that Australia has already taken steps towards developing a cohesive approach to elderly mediation. The focus is on promoting facilitative model of mediation. The Victorian Law Reform Commission (VLRC) in particular, has outlined a variety of options to be employed in advance of having a court hearing in order to expatiate the least restrictive options. Nonetheless, elderly mediation is not completely flawless. In order to address the challenges of mediation, the Elder Mediation Australasian Network (EMAN) came forward with a set of standards for mediators. Needless to say, “these standards will assist in deciding the training requirements, ethical codes of conduct, ongoing professional development and peer support needs that elder mediators in Australia will require” (Williams 2013).

THE WAY FORWARD FOR MALAYSIA

Mediation is not new in Malaysia. However, there is a scarcity of specific legislation for elderly mediation in Malaysia to resolve familial concepts. The concept of mediation in family disputes especially for marriages of both non-Muslims and Muslims is within the legal framework. The Law Reform (Marriage and Divorce) Act 1976²² requires the married couple to undergo marriage reconciliation sessions before they can petition for a divorce. The objective of the reconciliation method is to reach a compromise between the discorded husband and wife and, as such, it is expected that unnecessary divorce can be avoided (Najibah, Nora and Sowell 2017). The requirement for reconciliation is stated in the legislations²³ prior to divorce among Muslims. Nevertheless, the fact that the husband can pronounce the *talaq* without the consent of the court has affected the importance of the said reconciliation process. The Islamic Family Law also provides *Sulh* (Jen-T’chiang 2010) in settling the dispute between the parties after the petition for divorce is filed.²⁴ In Arabic, *al-Sulh* indicates an end to fighting which suggests “a compromise”. However, from the Islamic point of view, it means an agreement between two Muslims in order to settle a dispute.²⁵ In other words, the scholars of *fiqh* outline “*al-Sulh* as a binding agreement or a contract reached together to achieve a compromised peace between two or more parties which are in disagreement/

dispute.”²⁶ If after resorting to *Sulh* the parties fail to arrive at an agreement, they will be subject to a second process of arbitration known as *Hakam*.²⁷

It is a norm to resort to mediation as a means of dispute settlement among the members of a family. Mediation will be able to minimise the negative impact of the dispute, allowing the parties to continue to have an amicable relationship, since it normally involves divorce, custody and maintenance of children. This approach is in line with the assumption that “blood is thicker than water”, as such no matter how bad the dispute is, family ties will prevail. Extending the application of mediation to cover the disputes between the elderly and their family members pertaining to abuse and neglect and maintenance would not require a major overhaul to the existing system, since mediation is already being practiced in family disputes.

The main obstacle in setting up a mediation for the elderly is the absence of any written law on the elderly in Malaysia. Both the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law Enactments mandated mediation to the parties. Nevertheless, such requirement is not extended to the parents and their children. In Canada and Australia, elderly mediation began with the issue of guardianship of the elderly before being extended to other issues. In order for mediation to be introduced for elderly issues, at least for the Muslims, a provision requiring mediation can be included in the existing Islamic Family Law Enactments, instead of litigation. Unfortunately, for non-Muslims, this will only be possible if there is a new Statute that provides for this. As to the procedure for mediation, reference can be made to the Mediation Act 2012 as a guide with a few modifications based on the circumstances; for example, the mediator must have the necessary qualifications including expertise on elderly and family issues.

On the other hand, community mediation which deals with the informal dispute between the elderly and their family can be introduced with minimal fuss. Following the pilot project in 2007, the department responsible for the welfare of the elderly can design guidelines including the required training for the PAWE members to be mediators. The training can be conducted by various mediation institutes or any of the universities that offer such expertise. This will also enhance the role of PAWE. The fact that PAWE is available at every constituency will benefit more elderly people. This can be a stop-gap measure introduced while waiting for the specific law mandating mediation as a dispute resolution to be introduced in the future. At the very least, the community will encourage the elderly to speak about the disputes, even if not with the aim to find a solution, but a way to let others, his peers, know that they are facing some issues. This knowledge will enable the others to offer them assistance, so they do not have to suffer in silence anymore.

CONCLUSION

Because of their age, elderly people encounter various challenges and go through several issues in their lives. To address all these issues, a formal legal process may not result in an effective outcome. The discussion above shows that the elderly suffers in silence without resorting to court and legal mechanisms. In this aspect, mediation is regarded as cost-effective, timesaving and less cumbersome. More importantly, in the mediation process, parties are more empowered as they have control over the outcome. Therefore, it is high time for Malaysia to embrace mediation as a feasible dispute resolution for issues affecting the elderly, as part of her preparation to be an aged nation. In most dispute resolutions, mediation is still a preferred option to court cases. If mediation is to be introduced for elderly family disputes, it is important for Malaysia to introduce a legal framework, comprising provisions on best practices and policies on elderly mediation.

NOTES

1. The world population defined elderly as those who are 65 years and above (United Nations Department of Economic and Social Affairs 2019).
2. The Vienna Plan of Action urged for various specific strategies on the issues surrounding the elderly. For example, health and nutrition of the elderly, the protection of the rights of elderly consumers, housing, as well as environmental facilities. Besides, specific action should be adopted related to elderly family issues, social welfare, along with income security and employment of the elderly.
3. These entitlements are related to items such as, independence, participation, and care along with dignity.
4. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* (1996) 1 MLJ 261. Reaffirmed subsequently in *Lee Kwan Who v. Public Prosecutor* (2009) 5 MLJ 301.
5. Act 521.
6. Section 2 of the Domestic Violence Act 1994.
7. Section 2 of the Domestic Violence Act 1994 defined incapacitated adult as “a person who is wholly or partially incapacitated or infirm, by reason of physical or mental disability or ill-health or old-age, who is living as a member of the offender’s family.”
8. *Lim Kim Hua v. Ho Chui Lan & Anor* (1996) 2 CLJ 299.
9. Emergency Protection Order, Interim Protection Order and Protection Order.
10. Section 10 of the Domestic Violence Act 1994.
11. Section 11 Of the Domestic Violence Act 1994.
12. Sections 3 and 5 of the Civil Law Act 1950.

13. Section 61 in the Islamic Family Law (Federal Territory) Act 1984, Section 61 in the Islamic Family Law (State of Selangor) Enactment 2003, Section 61 in the Islamic Family Law (Perak) Enactment 2004, Section 61 in Islamic Family Law (Kedah Darul Aman) Enactment 2008, Section 60 in the Islamic Family Law (State of Perlis) Enactment 2006, Section 61 of the Islamic Family Law (State of Penang) Enactment 2004, Section 61 of the Islamic Family Law (State of Malacca) Enactment 2002, Clause 61 of the Islamic Family Law (State of Johor) Enactment 2003, Section 61 of the Islamic Family Law (State of Pahang) Enactment 2005, Section 61 of the Islamic Family Law (Negeri Sembilan) Enactment 2003, Section 59 of the Islamic Family Law (State of Terengganu) Enactment 1985, Section 61 of the Islamic Family Law (Kelantan) Enactment 2002, Section 61 of the Islamic Family Law (Sabah) Enactment 2004, and Section 60 in Chapter 43 Islamic (Sarawak) Ordinance 2001.
14. *Kassim Othman & Satu Lagi v. Raja Suzana Raja Kassim & Satu Lagi* (2010) 2 Jurnal Hukum 299 (Syariah High Court, Negeri Sembilan); *Khalil Ahmad v. Kamal Halil* (2003) 1 Jurnal Hukum 19 (Syariah High Court, Negeri Sembilan).
15. Power of Attorney Act 1949, Trustee Act 1949, Inheritance (Family Provision) Act 1971, Distribution Act 1951, Wills Act 1959, Probate and Administration Act 1959, and Small Estates Distribution Act 1955.
16. Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Malacca) Enactment 2005, and Muslim Wills (Sabah) 2018.
17. *Tan Guek Tian and Anor v. Tan Kim Kiat @ Chua Kim Kiat* (2007) 3 MLJ 521.
18. Adult Guardianship and Planning Amendment Act 2017.
19. Mental Health Act, Adult Guardianship Act, Substitute Decision Act, and Health Care Consent Act.
20. The test for the legal capability is mentioned as a cognitive one. However, the mental aspect may vary as the two requirements must be present such as the capacity to realize the pertinent information as well as the capability to comprehend the possible outcomes. See Canada's Traditional Current Legal Capacity Laws, Law Commission Ontario at <https://www.lco-cdo.org/en/our-current-projects/the-law-and-persons-with-disabilities/disabilities-call-for-papers-january-2010/commissioned-papers-the-law-and-persons-with-disabilities/a-new-paradigm-for-protecting-autonomy-and-the-right-to-legal-capacity/v-canadas-traditional-and-current-legal-capacity-laws/> (accessed 24 November 2020).
21. Guardianship and Administration Act 1986, Guardianship Act 1986, and Mental Health Act 2014.
22. Section 106 of the Law Reform (Marriage and Divorce) Act 1976.
23. Section 47 of the Islamic Family Law (Federal Territory) Act 1984, as an example.
24. *Ibid.* Section 47(5).
25. The Process of Conducting *Sulh* Session at the Syariah Court at <http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BI/Portal%20E-Syariah%20Arahan%20Amalan/Portal%20E-Syariah%20Sulh/Portal%20E-Syariah%20Pengendalian%20Sulh> (accessed 22 November 2020).

26. Ibid.
27. Section 48 of the Islamic Family Law (Federal Territory) Act 1984.

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