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**PROPOSING THE APPLICATION OF MEDIATION IN RESOLVING  
ELDERLY FAMILY ISSUES IN MALAYSIA: LESSONS FROM OTHER  
JURISDICTIONS**

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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. With the increasing of age, the elderly face various issues and challenges such as financial issues along with elder abuse and neglect. Generally, like in other disputes, the legal mechanism is the resort to resolve a dispute on any issue related to the elderly. However, litigation is less preferred in elderly issues because of its lack of ability to respond to 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*

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*addressing the issues in an elderly's family conflict. Due to its effectiveness, the application of mediation as a means of resolving disputes has gained attention all over the world. Considering its effectiveness, some countries such as Australia and Canada apply mediation in resolving elderly family issues. The use of mediation in family disputes is not new in Malaysia, however, it is yet to be applied in elderly family disputes. In this context, 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 law have been gleaned from various statutes as well as existing literature respectively. To underline the potential of mediation in dispute resolution, the experiences of Australia and Canada have been shared in this paper. The paper finds that, due to its' intrinsic excellence and usefulness, the mediation can excel in resolving the disputes related to elderly issues. Therefore, the paper recommends embracing mediation as a feasible dispute settlement mechanism for elderly family issues in Malaysia.*

**Keywords:** Dispute resolution, elderly family issues, litigation, mediation

## **INTRODUCTION**

The increasing number of elderly people is a global phenomenon (World Population Ageing 2019). Universally, there were around 703 million elderly people aged 65<sup>1</sup> or over in 2019. The east and southeast Asian regions are home to the largest number of the world's elderly people (approximately 260 million) after Europe and North America (over 200 million) (United Nations Department of Economic and Social Affairs 2020, World Population Ageing 2019).

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

As part of the preparation for an ageing population, the first World Assembly on Ageing was convened in 1982, with 62 recommendations forwarded by the Vienna International Plan of Action on Ageing.<sup>2</sup> In 1991, the United Nations Principles for Older Persons was adopted, which enumerated 18 entitlements to

the elderly.<sup>3</sup> 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 21<sup>st</sup> century. The Madrid Plan also emphasised the development of the elderly by promoting health and security into old age and ensuring a congenial atmosphere (Madrid Plan of Action and Its Implementation 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 is to create a society of 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 by 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. To implement the policy, the responsible ministry is the Ministry of Women, Family and Community Development. 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 nationwide. Unfortunately, this policy does not have any legally binding effect, thus an effort to introduce specific legislation for the elderly is being done.

## **THE EXISTING LAWS REGARDING THE ELDERLY IN MALAYSIA**

All the statutes of general application are applicable to the elderly, just like anyone else. Article 5 of the Federal Constitution ensures that the right to life, which include the right to livelihood, the right to health, water, housing and education, etc., is accorded to the elderly too<sup>4</sup> 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. Elderly abuse and neglect takes place within the family since the family is the primary carer, and in institutions, if the family is not able to care for them. 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 (Yunus et al. 2017).

The DVA must be read together with the Penal Code (Act 574) since the said Act does not contain any offences for domestic violence.<sup>5</sup> According to the DVA 1994 'domestic violence' means physical harm, fear of harm, wrongful detention, and dishonestly misappropriating the victim's property.<sup>6</sup> The said unlawful act must be committed by the accused person or perpetrator against an incapacitated adult of the family. An elderly will fall under the category of an incapacitated adult.<sup>7</sup> Even though the elderly are protected against abuse and neglect, there is

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no statistics available as to the seriousness of this issue. Now and again, there will be newspaper reports on elder abuse and neglect (Sukumaran 2019). Aside from housing them at the old folks' home operated by either the government or private sector, there is no follow up as to what happens to the perpetrator since no official report was lodged by the elderly.

Among the elderly who have sufficient savings, they are vulnerable to financial abuse and exploitation due to the decrease in decision-making ability that comes with age (Raof and Abdullah 2017). In the case of *Lim Kim Hua v Ho Chui Lan & Anor*,<sup>8</sup> 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 the relationship of reliance. By undue influence, she made the old lady transfer a part of her shophouse in favour of herself, the granddaughter. Consequently, the transfer was declared void. Financial abuse and exploitation are not confined to just family members, it is committed by businesses and scams, for instance, the Macau Scam (The SUNDAILY 2020).

The abused elderly can be protected through the issuance of Emergency Order, Interim Protection Order, Protection Order, counselling, and awarding compensation under the DVA 1994. 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, nevertheless reported cases were hard to find. Since elder abuse and neglect are penal offences, the elderly are reluctant to lodge a report against their family members, opting to suffer in silence. Sometimes the elderly do not have the capacity to report due to medical impairment, or fear of rejection and abandonment by the family (Jamaluddin, Chuan and Taher 2015) and the stigma of being judged by society as not being good parents.

Aside from domestic abuse, the law on financial assistance for elderly parents is widely discussed. At present the elderly's financial assistance may come from two main sources; namely their pensions or Employees' Provident Fund Savings (EPF) if they worked in the formal sector and 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), while the second source is available for Muslims through the respective Islamic Family Enactment of the State. 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



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parents. Once again, the redress will only be 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 liability and protection to the parties. A person is liable if he is at fault while a person is protected if he can prove that he falls within the protected group. The current dispute resolutions for the elderly depend very much on the issues. If the issue touches on elder abuse and neglect, it will be criminal in nature under the Domestic Violence Act (DVA) 1994 and the Penal Code. There is no provision in the DVA 1994 regarding the offence of elder abuse and neglect since the offences are provided in the Penal Code. The DVA 1994 provides for several remedies including Protection Orders,<sup>9</sup> reparation for harm or loss encountered by the victim<sup>10</sup> and issuance of orders to parties involved to join reconciliatory counselling, psychotherapy, or reintegration counselling sessions.<sup>11</sup> Nevertheless, to benefit from the remedies, the elderly must lodge a police report against the perpetrator, who is a member of their family. The reluctance on the elderly's part to pursue the remedies under this Act can be attributed to various facts including that the punishment is punitive in nature, the fear of being abandoned, rejected, being viewed as bad parents or inability to do so due to their disabilities

(Jamaluddin, 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 (Jamaluddin et al. 2019). This may not be easy to accomplish if the victim is an elderly, who may not be able to recall the 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 did not include any provisions on the maintenance of elderly parents by adult children. There is nothing in common law on the legal duty on the part 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. As such without a specific provision on this in the Act and nothing in common law<sup>12</sup> 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 Enactments<sup>13</sup> 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.<sup>14</sup> Regretfully, bringing the case to court would affect the relationship

between the parties. Thus, not many elderly parents are willing to proceed with this avenue.

On the distribution or usage of the elderly's properties, it will be treated according to the circumstances,<sup>15</sup> whether it is a trust, gift, will, or inheritance, any disputes will be settled through litigations. Aside from general legislations, Muslims will be 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.<sup>16</sup> Nevertheless, the issue of distribution and usage of the properties are 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*' especially the ancestor's lands should not be sold, but be left to the children, has an impact on the elderly financially (Yun 2019). Research shows that the elderly in Malaysia are asset rich but cash poor (Sulaiman and Mohammed 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 too.

Litigation is not just 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, 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 case, the perpetrator will be subjected to punitive punishment such as a fine or imprisonment. Besides, the proceedings in the court are very formal and the atmosphere in court is not pleasant given that litigation is adversarial in nature (Ahmad and George 2002).

Since litigation seems to be the normal way to resolve the elderly's issues, it is not surprising that the elderly prefer not to bring this matter into open court. As such they opt to suffer in silence. Nevertheless, it is important to work on the basis that no children would intentionally hurt their elderly parents or the parents towards their children. Family sanctity must always be the underpinning principle in dealing with elderly family issues. As such, litigation is not a suitable method for it will damage the relationship between the parties. Thus, it is important for Malaysia to find a suitable method to deal with this in light of becoming an aged country in 2030.

## **METHOD**

The researchers have adopted a traditional legal method (Amin 1992), a qualitative research approach, with a library-based or doctrinal approach. This

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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 taken from the statutes, regulations, selected cases, and international documents. The secondary sources of law for this study were taken from textbooks, articles from journals, law reviews and sources from internet websites. In addition to using Google Scholar, scholarly publications on mediation have been collected 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 the law from Canada and Australia is subject to limitations, which means that law will be adopted, 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. 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. 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, perhaps it is not that suitable to be considered as the ADR method for disputes resolution between the elderly and his family.

On the other hand, mediation may be a suitable approach to resolve disputes between the elderly and their family. Mediation 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 on (i) voluntary; (ii) neutral; (iii) negotiation; (iv) mutual acceptable settlement. The mediator is the main figure to resolve the dispute amicably between the parties (Knickle, McNaughton and Downar 2012). Besides, the roles of the mediator are to, *inter alia*, participate in constructing the problem, reframing and relabelling the problem, reshaping history by changing plots and making the future by constructing new plots (Cobb 1991).

In Malaysia, the practice of mediation is not new; rather it has been practiced in Tanah Melayu even before the initiation of the civil court procedure. The mediation process is applied in marital issues amongst the local people (Azhari 2010). The mediation process is governed by the Mediation Act 2012 (Act 749). This Act 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 the mediation agreement is reached by the parties, the agreement shall be reduced to writing and signed by the parties. The said agreement 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 areas 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, which is a discussion with the aim of achieving an acceptable outcome by both parties, perhaps it will also indirectly protect the sanctity of the family relationship, as compared to litigation.

Mediation requires both parties to voluntarily agree to the mediation, as such the issue on the mental capacity of the elderly needs to be addressed. 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). The Act 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.<sup>17</sup> 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 included in deciding any issue in relation to their life, be it for their wellbeing, health or even property.

### **Principles of Mediation**

Generally, the principles of mediation are regarded as the fundamental rules that administer the interaction among the parties including the mediator (Surma 2018). The fundamental principles of mediation include: (i) voluntariness; (ii) confidentiality; (iii) neutrality and fairness of the mediator; (iv) equality and mutual cooperation among the parties (Surma 2018). These principles will ensure that both parties are heard in a more conducive environment as compared to litigation. In any family disputes, emotions such as anger, sadness, and disappointment will layer the issues, 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

it. The mediation process is confidential, thus allowing the parties to protect their privacy as compared to litigation, which is being 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 two-fold; namely through community mediation, followed by mediation with a professional mediator. Community mediation is suitable to resolve minor disputes before the disputes escalate into formal ones. The goal of the community dispute resolution movement is to teach people to resolve conflict by 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 are respected within the society include the village head (*Penghulu*) or the religious head such as the *Imam*, priest, or the learned persons (Wall & Callister 1999). This practice may still be relevant in villages, but not so much in the cities. Nevertheless, the elderly have the Older Person Activity Center (PAWE), which was established under the Dasar Warga Emas Negara (DWEN) since 2001. PAWE is an alternative development program to address the issues and challenges faced by the elderly (Ibrahim, Saad and Ramly 2016). The Ministry of Women, Family and Community Development who is responsible for the welfare

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of the elderly planned to establish one PAWE in every constituent throughout Malaysia (SarawakVoice 2019). The elderly within PAWE can be utilised to be part of the community mediation. The elderly who are facing any dispute may feel more comfortable discussing this with those he is familiar with, as compared to a total stranger. If the dispute can be sorted out at this level, the damage to the relationship is minimised. 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 the 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 failed to resolve the dispute and the dispute escalated to a legal dispute, then mediation by a professional mediator is needed. The mediation by a professional mediator requires that said mediator must not only 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 multi-cultural society, the mediator must be well-versed with the different needs of the society, including the special needs of the natives of Peninsular Malaysia, and the natives of Sabah and Sarawak, whenever it is applicable.

### **THE ELDERLY AND FAMILY DISPUTES**

The elderly suffer from some difficulties such as, *inter alia*, elder abuse and neglect, lack of proper health care facilities, and poor financial support. The National Report on violence and health contains the definition of elder abuse (World Health Organization 2006). Abuse and neglect towards the elderly are taboo subjects and rarely discussed openly in Malaysian society. Due to this, the elderly who is going through abuse and neglect will not receive much-needed care and protection assistance which is offered by both the government and the non-governmental organisations (NGOs).

For the elderly who worked, their 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, for those who were once working in the informal sector, they would not have any structured financial fund, and thus 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 (BOT). Having sufficient savings for old age is important as this will contribute to the quality of life for the elderly (Aziz and Ahmad 2017).

Health problems are synonymous with being old. Numerous chronic diseases for example, “Alzheimer, arthritis, lung disease, stroke, and 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 Organisation 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 2017). If the elderly need assistance especially for 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 will be taken care of. As such it is important for the elderly to plan their old-age finances by taking into account the cost for 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. This option is closely related to filial piety which is part of the accepted values 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 (Jamaluddin et al. 2019). 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 elder abuse and neglect.

All these issues involved the elderly and their family members or carers. Research has shown that their family 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 (Wahab 2013). Mediation can minimise the

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negative impact of the dispute, allowing the parties to continue to have an amicable relationship (Jen-T'chiang 2010; Ahmad, Kahar and Hasbullah 2021). This is important since one of the factors why the elderly are 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. As such, mediation will give both parties the chance to discuss and understand each other better (Ahmad, Kahar and Hasbullah 2021).

Even though ADR is not new in Malaysia, the focus of it is limited to commercial and financial disputes or family disputes between husband and wife. ADR has been touted to be a suitable method to resolve family disputes in the administration of the estates (Nasrul et al. 2019). As such 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 is possible to be implemented.

## **Canada**

Like the mediation in case of other disputes, the mediation involving the elderly's issues is considered as private as well as confidential. In this mechanism, 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 & Trippe 2010). The mediation involving the elderly was introduced to resolve the issue of elder guardianship in Canada.<sup>18</sup> The guardianship issue deals with the mental capacity of the elderly in making decisions pertaining to their life. The law<sup>19</sup> respects the autonomy of the elderly in deciding for themselves as 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.'<sup>20</sup> For identification and clarification of the issues, elder mediation needs to develop communication as well as a commitment to the procedure. In order to determine the appropriateness of elder 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. As such, it is common to involve a lawyer for the elderly in the process of mediation. Based on their



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experiences, the lawyers and the experts on alternative dispute resolution mechanisms can draw a conclusion and reach an amicable settlement (Kardasis 2010).

Nevertheless, now elder mediation is widely used to resolve elderly's 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 along with 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 centered 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, as such, consider the mechanism of mediation as preferable to court (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, the scholars agree that specialised training is necessary for the mediators who will be engaged as elder mediators on adult guardianship as well as elder abuse (Braun 2012).

Just like any other process, there are concerns regarding elder 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 utilized in a broad spectrum of mediation aspects. However, this practice is particularly suggested for elder 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 a successful elder mediation (British Columbia Law Institute 2012).

### **Australia**

The elder mediation field to date has in many ways been driven by the needs of elder 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.<sup>21</sup> The mental capacity law is dealt with in the light of guardianship law, for example in South Australia (SA) Guardianship and Administration Act 1993, it 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.” In one of their research projects, the researchers of the University of South Australia adopted the method of confidential phone-in to get the opinions of older people regarding their 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, elder 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). As such, maintaining confidentiality in the process, mediation holds the relationship among the family members (Braun 2019).

Martin and Roberts (2020) have mentioned in their study that the National Plan to Respond to the Abuse of Older Australians (Elder 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 its steps toward developing a cohesive approach to elder mediation. The focus has been made mainly to promote the practice of a 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, elder mediation is not completely flawless. To address the challenges of mediation, the Elder Mediation Australasian Network (EMAN) has come 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 particular legislation for elder mediation in Malaysia to resolve elderly family issues. 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 1976<sup>22</sup> requires the married couple to undergo marriage

reconciliation sessions before they can petition for a divorce. The objective of the reconciliation method is to make a compromise between the discorded husband and wife and, as such, it is expected that unnecessary divorce will be possible to avoid (Zain, Hak and Sowell 2017). While for Muslims, the requirement for reconciliation is stated in the legislations<sup>23</sup> prior to the divorce, nevertheless, the fact that the husband can pronounce the *talaq* without the consent of the court has affected the importance of said reconciliation process. Aside from the reconciliation process, the Islamic Family Law also provides the conducting of *Sulh* (Jen-T'chiang 2010) in settling the dispute between the parties after the petition for divorce is filed.<sup>24</sup> In Arabic, *al-Sulh* indicates to end the fighting which suggests 'to come to a compromise'. However, from the Islamic point of view, it means an agreement between two Muslims in order to settle a dispute.<sup>25</sup> 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."<sup>26</sup> 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*.<sup>27</sup>

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 was, the 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 allowing mediation to be utilised for the elderly and their family 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, elder mediation began from the issue of guardianship of the elderly before being extended to other issues. For mediation to be introduced for elder issues, at least for the Muslims, a provision requiring mediation can be included in the existing Islamic Family Law Enactment, 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 to suit the needs of the circumstances for example the mediator must have the necessary qualifications including expertise on elder and family issues.

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On the other hand, community mediation which deals with the informal dispute between the elderly and their family can be introduced with the minimum of fuss. Following the approach taken by 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 for the members. The fact that PAWE is available at every constituent will benefit more elderly. 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 made above indicates that the elderly suffer in silence without resorting to court and legal mechanisms. In this aspect, mediation is regarded as cost-effective, time-saving 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 elder issues, as part of her preparation to be an aged nation. In most dispute resolutions, mediation is still a preferred option to court. 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 elder mediation.

## **NOTES**

1. World Population defined elderly as those who are 65 years and above.
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, *inter alia*, 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' "means 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. [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. Section 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 Islamic Family Law (State of Perlis) Enactment 2006, section 61 of Islamic Family Law (State of Penang) enactment 2004, section 61 of 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 in 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, Small Estates Distribution Act 1955.
16. Muslim Wills (Selangor) Enactment 1999, Muslim Wills (Malacca)Enactment 2005, 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, 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 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 on November 24,2020).
21. Guardianship and Administration Act 1986, Guardianship Act 1986, 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 on November 22, 2020.
26. Ibid.

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

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