

DISABLED ELDERLY IN MALAYSIA: AN ANALYSIS OF THE CURRENT LEGAL FRAMEWORK

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Abstract

Malaysia is fast approaching 2030 to become an aged nation, a status where the population of those above the age of 60 years surpasses 15% of the total population. Various factors are associated with the increase in the number of elderly in Malaysia, including the increase in life expectancy. This is contributed by better health facilities in the country. Realizing the importance being prepared to enter the 'aged nation' status, there are few issues pertaining to the elderly that requires serious attention by the government, especially the disabled elderly. Data shows that the number of elderly with disabilities are increasing, which then raises questions on the readiness of the government to embrace the new status in 2030. Thus, this article will explore important issues regarding the disabled elderly. This would include revisiting the Persons with Disabilities Act 2008, the need for a specific law for the elderly and also the maintenance of elderly.

Keywords

Aged nation, elderly, disabilities, maintenance.

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Introduction

Malaysia celebrates the 1st of October annually as the National Senior Citizens' Day, recognizing the contribution and sacrifices made by the elderly in the nation. Yet it is indeed disheartening to note that despite such recognition given by the nation to the elderly, there is no specific and focused legal framework to protect and

safeguard the rights and interests of the elderly. According to the Report of the Second World Assembly on Ageing by the United Nations, the average life expectancy at birth has increased by 20 years since 1950 to 66 years and is expected to extend a further 10 years by 2050.¹ This shows that the number of persons over 60 years of age will increase from about 600 million in 2000 to almost 2 billion in 2050 and is projected to increase globally from 10 per cent in 1998 to 15 per cent in 2025². As for now, the elderly population in Malaysia is increasing rapidly every year. In 2021, the population of those who are 60 years old and above was around 3.6 million persons³ compared to 2.4 million people in 2011.⁴ Malaysia is expected to become an aged nation by the year 2030, when the elderly population reaches 15.3% of the total population. The main factor that contributes to the growth is the increase in life expectancy.⁵ However, one thing to note is that the number of elderly with disabilities is also increasing every year. According to the United Nations:⁶

Currently, it is estimated that 15% of the population worldwide or some 1 billion individuals live with one or more disabling conditions. More than 46 per cent of older persons – those aged 60 years and over— have disabilities and more than 250 million older people experience moderate to severe disability.

This can be noticed in the total number of new registrations of the disabled elderly with the Department of Social Welfare. In 2015, there were 48,202 new registrations and the number of registrations increased in 2016 to 58,555⁷. The registration increased quite significantly in 2017 to 71,182 and dropped to 55,249 in 2018 and increased again to 72,831 in 2019⁸. The increasing number of elderly with disabilities in Malaysia needs to be looked at seriously as they require special needs compared to the disabled persons who are below the age of 60 years, by considering their age, mental and physical conditions. In the special report on the rights of the disabled elderly, it was mentioned that:

¹ Report of the Second World Assembly on Ageing. (2002). <https://undocs.org/A/CONF.197/9>

² *Ibid.*

³ Which represents 11.2 percent of the total population in 2021.

⁴ Kenyataan Media Bagi Penerbitan Jadual Hayat Ringkas, Malaysia. (2021). https://www.dosm.gov.my/v1/uploads/files/5_Gallery/2_Media/4_Stats%40media/4-Press_Statement/2021/7.%20Julai/PENERBITAN%20JADUAL%20HAYAT%20RINGKAS%2C%20MALAYSIA%2C%202019-2021-COMBINE.pdf

⁵ A new born baby in 2021 is expected to live almost five years longer to 75.6 years compared to babies born in 1991 which are expected to live to 71.2 years.

⁶ <https://www.un.org/development/desa/disabilities/disability-and-ageing.html#:~:text=Currently%2C%20it%20is%20estimated%20that,experience%20moderate%20to%20severe%20disability>. Retrieved 4 April 2022.

⁷ Portal Rasmi Jabatan Kebajikan Masyarakat. (2022). <https://www.jkm.gov.my/jkm/index.php?r=portal/articles&id=U0dpTUVpRXlyYUIFVFFLUmVnUVJUdz09>

⁸ *Ibid.*

Being old and with a disability often results in discrimination and specific human rights violations. This is due to the combined effect of ageism and ableism: two common forms of social bias that see older persons and persons with disabilities as naturally deserving less rights and agency. At the intersection of these and multiple other forms of discrimination based on gender, ethnicity and other factors, older persons with disabilities are among the most marginalized in the world. They are often denied their autonomy, and their role in the community is dismissed as irrelevant and burdensome⁹.

Hence, taking into account the increase in the elderly population in Malaysia as well as the fact that Malaysia would soon become an aged nation in less than a decade, it is trite that the legislators need to draft a specific law to protect the rights and interests of the elderly. At this juncture, it is to be noted that all the nations in the ASEAN region have passed laws on the elderly in their respective countries. Unfortunately, Malaysia seems to be the only nation that does not have a specific law on the elderly.

The purpose of this article is two-fold, the first is to examine the current legal framework on the rights of the disabled elderly in Malaysia, and secondly to make a comparison with other jurisdictions, i.e., Singapore, United Kingdom and India, in order to observe the possibility of incorporating the same in our jurisdiction in the near future.

Malaysia Legal Framework

In Malaysia, the current National Policy on Elder Persons 2007 acknowledges the fact that older persons, as citizens with varied background and experiences, have the right to enjoy a comfortable and respected life and contribute to the development of the nation.¹⁰ The National Policy on Elder Persons 2007 is the Government's commitment to create older persons who are independent, with dignity, high sense of self-worth and respected by optimizing their self-potential through a healthy, positive, active, productive and supportive ageing to lead a well-being life.¹¹ Unfortunately, there is no specific statute on the elderly in Malaysia currently. Nevertheless, fortunately we have a specific statute for persons with disabilities, the Persons with Disabilities Act 2008 (PWD Act). Hence, it is submitted that the disabled elders could resort to the PWD Act 2008 pertaining to their rights and interests.

⁹ United Nations Report on the rights of older persons with disabilities. (2019). <https://www.ohchr.org/en/calls-for-input/report-rights-older-persons-disabilities>

¹⁰ Mohd Fazari Mohd Salleh. (2017). Ageing In An Inclusive Society: Social Support System For Older Persons In Malaysia, https://www.kpwkm.gov.my/kpwkm/uploads/files/Muat%20Turun/MOST/S4_P1_Tuan%20Hj_%20Fazari.pdf

¹¹ Ibid

The PWD Act was enacted when Malaysia became a signatory to the Convention on the Rights of Persons with Disabilities on 7 April 2008 and ratified it with reservations on 19 July 2010¹². The PWD Act was passed on 24 December 2007, gazetted on 24 January 2008, and was enforced on 7 July 2008. One of the main objectives of the PWD Act is to recognize that persons with disabilities are entitled to equal opportunity and protection and assistance in all circumstances and subject only to such limitations, restrictions, and the protection of rights as provided by the Federal Constitution.¹³ Section 2 of the PWD Act define persons with disabilities as:

“persons with disabilities” include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society.

Based on the above definition, clearly, a person with disabilities requires special needs to participate actively in the society, moreover if it involves the disabled elderly. Part IV of the PWD Act provides several rights for persons with disabilities. Among these are the right to public facilities¹⁴, right to public transport¹⁵, access to education,¹⁶ employment,¹⁷ access to information, communication, and technology,¹⁸ access to cultural life¹⁹ and lastly, access to recreation, leisure, and sport²⁰. Furthermore, for those with severe disabilities, the PWD Act has mentioned that the Government shall provide the necessary lifelong protection and social support systems, including ensuring that they are not affected after the death of their parents or caregivers to enable people with severe disabilities, living a better quality of life.²¹ This protection is important, especially to the disabled elderly who might not be able to support themselves and rely on their children.

Although it is commendable that the PWD Act confers the rights as mentioned above, it is indeed disheartening to note that due to the existence of section 41 in the said Act, the Act could be described as a ‘toothless tiger’.²² This section expressly provides the government is protected from any form of court action for failure to carry out any provision under the PWD Act if it is done in good

¹² The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) on 13 December 2006.

¹³ The Preamble to the PWD Act.

¹⁴ Section 26 PWD Act.

¹⁵ Section 27 PWD Act.

¹⁶ Section 28 PWD Act.

¹⁷ Section 29 PWD Act.

¹⁸ Section 30 PWD Act.

¹⁹ Section 31 PWD Act.

²⁰ Section 32 PWD Act.

²¹ Section 38 PWD Act.

²² Magdalene C.H. Ang. (2014). “Do Persons with Disabilities Act (2008) and Organizational Culture Influence Managerial Intention to Hire Persons with Disabilities? The Malaysian Perspective” *Jurnal Pengurusan*, 41 . pp. 81-89. ISSN 0127-2713 - <http://journalarticle.ukm.my/8371/>

faith.²³ With such an immunity conferred on the government by the PWD Act itself, the said Act has merely become an administrative legislation, without the ability to enforce its provisions effectively. Although section 3 of the PWD Act establishes the National Council for Persons with Disabilities, which is chaired by the Women, Family and Community Development Minister, unfortunately it has no power to compel other ministries to streamline their laws to be consistent with the objective of the PWD Act. This will further weaken the objective of the PWD Act, which is meant to protect and recognize the rights of the persons with disabilities.²⁴ Thus, after 14 years of the enforcement of the PWD Act, it is time to shift the focus from an advocacy based statute, which might be the initial intention of the PWD Act, to human rights based. This is important to ensure that the objectives of the Act can be achieved and to protect the well-being of persons with disabilities, in particular the disabled elderly.

Maintenance for the elderly who are disabled is an important issue that will be highlighted in this article. This is due to the fact that the disabled elderly are in dire need of support, either from their families for those who have a family, and the state for those who do not have a family. Unfortunately, currently there is no specific statute that addresses the above issue. However, for the Muslims there is a provision where the elderly and disabled parents can apply for an order from the court to get maintenance from their children.²⁵ For example, section 60 of the Islamic Family Law (Federal Territories) Act 1984, which provides that:

The Court may order any person liable thereto according to Hukum Syarak, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order²⁶.

The above provision provides a venue for Muslim parents to ask for maintenance from their children²⁷. Furthermore, the provision is not only specific to

²³ The Public Authorities Protection Act 1948 [Act 198] shall apply to any action, suit, prosecution or proceedings against the Government, Council or any member of the Council, any member of a committee or agent of the Council in respect of any act, neglect or default done or omitted by it or him in such capacity (Section 42 of the PWD Act).

²⁴ Section 9 PWD Act.

²⁵ Badruddin Hj Ibrahim & Azizah Mohd. (June 2014). "HAK IBU BAPA TERHADAP NAFKAH DALAM PERUNDANGAN ISLAM" KANUN (1), 24 - *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=http%3A%2F%2Fjurnalkanun.dbp.my%2Fwordpress%2Fwp-content%2Fuploads%2F2014%2F08%2F2-Nafkah-Ibu-Bapa-2.pdf&clen=538130&chunk=true*

²⁶ Islam places an obligation on each child to provide support to his or her parents. This duty has been clearly expressed in the Al-Quran, 2: 215:

They ask you as to what they should spend. Say: Whatever wealth you spend, it is for the parents and the near of kin and the orphans and the needy and the wayfarer, and whatever good you do, Allah surely knows it.

²⁷ *Khalil bin Ahmad v. Kamal bin Khalil* (2003) 16 JH 19; *Kassim bin Othman & Fatimah binti Salleh v. Raja Suzana binti Raja Kasim & Zul Azli bin Hashim* (2010) 30 JH(2), 299.

the maintenance of parents, but also includes maintenance of other family members who are incapacitated and unable to earn a livelihood themselves. The issue of maintenance for Muslim parents can be seen in the case of *Khalil Ahmad v. Kamal Khali*²⁸. In this case, the father (Plaintiff) claimed from the son, i.e., the defendant, for maintenance for an amount of RM36,000 after his son failed to provide him with financial assistance for 10 years. The plaintiff also claimed an additional RM2,000 for medical expenses for his wife, namely, the defendant's stepmother, who was also responsible for his upbringing. The Syariah High Court of Negeri Sembilan held that the defendant had to pay RM200 per month starting from 1998 and to pay an additional RM2,000 for medical expenses of his stepmother.²⁹ However, for the non-Muslims, there is no specific statute that addresses the issue of maintenance of parents or elderly who are unable to earn a living and depend on their children. Currently there are two statutes that deal with maintenance for non-Muslim wife and children, i.e., the Law Reform (Marriage and Divorce) Act 1976 and the Married Women and Children (Maintenance) Act 1950. However, both these Acts do not stipulate for the maintenance of the elderly. This makes it difficult for elderly who are unable to support themselves and who need to ask for assistance or maintenance from their children.

A disabled elderly might face difficulties in life and might be dependent on his or her family or children. This situation might increase the risk of the disabled elderly of becoming a victim of abuse. The World Health Organization (WHO), from their research, identifies several risk factors which will increase the risk of becoming a victim of abuse, which include functional dependence/disability, poor physical health, cognitive impairment, poor mental health, and low income.³⁰ Due to this, a proper legal framework is needed to protect the elderly, especially the disabled elderly from becoming victims of abuse.

Currently, the Malaysian government, through the Social Welfare Department, provides an allowance to persons with disabilities, including the disabled elderly at the rate of RM500 per month.³¹ This is an initiative by the government to assist the elderly and their family members. However, as discussed above, maintenance for a disabled elderly is highly needed as most of them are incapable of taking care of themselves for various reasons.

In Malaysia, the Domestic Violence Act 1994 (DVA) contains certain provisions that will help and protect the elderly from being abused. The DVA will protect incapacitated adults, who are defined in section 2 of the DVA as a person who is

²⁸ [2004] 1 CLJ (Sya) 451 8,

²⁹ Refer to the case of *Kassim Othman & Satu Lagi v. Raja Suzana Raja Kasim & Satu Lagi* [2010] 3 LNS 8.

³⁰ World Health Organization, Abuse of older people. (2022). [https://www.who.int/news-room/fact-sheets/detail/elder-abuse#:~:text=Individual%20level%20characteristics%20which%20increase,mental%20health%20and%20low%20income.&text=Social%20support%20and%20living%20alone,of%20elder%20abuse%20\(5\)](https://www.who.int/news-room/fact-sheets/detail/elder-abuse#:~:text=Individual%20level%20characteristics%20which%20increase,mental%20health%20and%20low%20income.&text=Social%20support%20and%20living%20alone,of%20elder%20abuse%20(5)) Accessed 29 August, 2022.

³¹ Jabatan Kebajikan Masyarakat, Bantuan Warga Emas, <https://www.jkm.gov.my/jkm/index.php?r=portal/left&id=dmp5dm5raUhvVSt6SVk4MWRmZkswdz09>, Accessed 29 August, 2022.

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. In criminal matters, the DVA must be read together with the Penal Code. The said Act also provides protection and civil remedies, such as a protection order,³² compensation³³ and interim protection order.³⁴ Section 11 of the DVA, for example, allows the court to make an order that the parties concerned be referred to a conciliatory body, rehabilitation therapy, psychotherapy, or such other suitable reconciliatory counselling. Although the DVA is quite extensive in protecting family members, including the elderly, from being abused, it lacks an important mechanism to address cases of abuse and neglect, which is, the provision for mandatory reporting.³⁵ Without having any provision for mandatory reporting, the law will not be able to adequately protect the elderly from abuse and many cases will remain hidden. Past research finds that victims of abuse and neglect have three times greater risk of mortality compared with non-abused persons.³⁶ Further thereto, domestic violence crimes, including elder abuse, occurs behind closed doors. Thus, information from those with knowledge of such an incident is important to save the life of the victims. As such, mandatory reporting is crucial in protecting the elderly, especially disabled elderly from being abused.

Law in other jurisdictions

Singapore

Currently, Singapore does not have a specific statute pertaining to persons with disabilities (PWDs). However, there are several Acts that can be used to deal with issues surrounding PWDs in Singapore. For example, the Mental Capacity Act 2008, which was enacted in 2010, aims to safeguard those who lose their mental capacity, including persons with intellectual disability.³⁷ Furthermore, the Singaporean Government, through the Building Construction Authority's Code on Accessibility 2013, mandates buildings to incorporate requirements to cater to people with disabilities.³⁸ Regarding the right to employment of PWDs, Singapore has laws to protect those with disabilities, for example, the Employment Act (EA), Employment

³² Section 5 DVA.

³³ Section 10 DVA.

³⁴ Section 4 DVA.

³⁵ Siti Zaharah et al. (2019). "Elder Abuse and Neglect in Malaysia: An Overview" in *Elder Abuse and Neglect in Selected Asian Countries*, University Malaya Press, p 9.

³⁶ Lachs MS, Williams CS, O'Brien S, Pillemer KA, Charlson ME. (1998). "The mortality of elder mistreatment", *JAMA*. 428-32; <https://www.aafp.org/afp/2007/0301/p628.html#afp20070301p628-b3> - Accessed on 29 August, 2022.

³⁷ Laws to Protect Rights of PWDs. (2014). <https://www.msf.gov.sg/media-room/Pages/Laws-to-protect-rights-of-PWDs.aspx> - Accessed on 29 August, 2022.

³⁸ *Ibid*.

Claims Act (ECA) and the Retirement and Re-employment Act (RRA).³⁹ In addition to that, Singapore also initiated the Employment Support for Persons with Disabilities programme, aimed to enhance employability and increase employment options for PWDs. Apart from that, the Maintenance of Parents Act 1996, provides a venue for disabled elderly to seek maintenance from their children if they are unable to provide for themselves.⁴⁰ Pursuant to the Maintenance of Parents Act 1996, the Tribunal for the Maintenance of Parents was established.⁴¹ The establishment of the Tribunal for the Maintenance of Parents will provide an opportunity for elderly parents to apply for support from their children especially when they are unable to support themselves.⁴²

Hence, it could be said that in this respect, Singapore is one step ahead of Malaysia as they have a specific statute for the maintenance of the elderly parents, whereas Malaysia has none, especially for the non-Muslims. Protection against abuse, neglect or self-neglect is also well protected in Singapore through the Vulnerable Adults Act 2018. The Vulnerable Adults Act 2018, which came into force on 19 December 2018⁴³, defines "Vulnerable Adult" in section 2 as:

"vulnerable adult" means an individual who —

- (a) is 18 years of age or older; and
- (b) is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect or self-neglect;

From the above definition, it is to be observed that the Vulnerable Adults Act 2018 covers adults who are above 18 years of age, suffering from mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect or self-neglect⁴⁴. Hence, this would include the disabled elderly. Thus, it is submitted that although Singapore does not have a specific statute on elderly or persons with disabilities, the above-mentioned statutes show the initiatives taken by the government to ensure that the rights and welfare of the disabled elderly are protected. It strengthens the existing legal frameworks for vulnerable adults, including elderly and disabled people.

³⁹ Employment for the Disabled in Singapore: Laws and Schemes (2021). <https://singaporelegaladvice.com/law-articles/employment-disabled-singapore-laws-schemes/> - Accessed on 29 August, 2022.

⁴⁰ Mohamed Abu Taher et al. (2017). "In Quest of a Legal Framework Addressing Elder Abuse and Neglect in Malaysia: Lessons from the Asean and International Perspective" in Siti Zaharah et al, *Protecting The Elderly Against Abuse and Neglect: Legal and Social Strategies*, University of Malaya Press, Kuala Lumpur, page 27.

⁴¹ Section 13 Maintenance of Parents Act 1996.

⁴² Section 14 of the Maintenance of Parents Act 1996.

⁴³ Chan Wing Cheong. (2017). "Adult Protection Laws in Singapore" in Siti Zaharah et al, *Protecting The Elderly Against Abuse and Neglect: Legal and Social Strategies*, University of Malaya Press, Kuala Lumpur, page 145.

⁴⁴ Section 2 of the Vulnerable Adults Act 2018.

United Kingdom

The Convention on the Rights of Persons with Disabilities was adopted by the United Nations (UN) General Assembly on 13 December 2006⁴⁵ and the United Kingdom ("UK") signed the Convention on 30 March 2007 and ratified the same on 8 June 2009.⁴⁶ After the UK became part of the convention, it enacted the Disability Discrimination Act 1995 ("DDA 1995") which made it unlawful to discriminate against people in respect of their disabilities⁴⁷. The DDA 1995 was the first British law to protect disabled people from various forms of discrimination and came into force in 1995. The DDA 1995, defined disability under section 1 of the Act, as a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Based on the definition, it protects people with disabilities against discrimination in areas such as employment, the provision of goods and services, education and transportation⁴⁸. Thus, during employment, discrimination against disabled people is illegal and employers are specifically required to identify obstacles to employment and to implement "reasonable" adjustments to overcome them.⁴⁹ However, the DDA 1995 has been repealed and replaced by the Equality Act 2010 ("EA 2010") which came into force on 1 October 2010.⁵⁰ One of the primary difference between the DDA 1995 and EA 2010, is that the latter protects persons with disabilities against direct discrimination in areas beyond the employment field and it also provides improved protection from discrimination that occurs due to matters connected to a person with disability.⁵¹ Under the EA 2010, it is against the law to discriminate against someone because of age, disability, gender, reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.⁵² It could be observed that the protection under the EA 2010 directly enhances the protection and rights of PWDs from being discriminated against in the UK legal framework. Although the EA

⁴⁵ United Nations Treaty Collection

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en#End

Accessed on 29 August, 2022.

⁴⁶ *Ibid.*

⁴⁷ The long title to the DDA 1995 provides that:

An Act to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises, to make provision about the employment of disabled persons; and to establish a National Disabilities Council.

⁴⁸ Liz Sayce & Jed Boardman. (2003). "The Disability Discrimination Act 1995: implications for psychiatrists" *Advances in Psychiatric Treatment*, vol. 9, 397–404; www.cambridge.org/core/services/aop-cambridge-core/content/view/18F22A97E61E0D5288B3DDD243BB5409/S1355514600000791a.pdf/disability_discrimination_act_1995_implications_for_psychiatrists.pdf; Refer to the Part II of the DDA 1995.

⁴⁹ *Ibid.*

⁵⁰ The Equality Act 2010 repealed various legislation covering discrimination, including the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disabilities Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Age) Regulations 2006, Part 2 of the Equality Act 2006 and Equality Act (Sexual Orientation) Regulations 2007.

⁵¹ Difference between the DA and the DDA, <https://www.st-andrews.ac.uk/hr/edi/disability/definition/ea-dda/> Accessed on 29 August, 2022.

⁵² Section 4 of The Equality Act 2010.

2010 does not specifically mention the rights of the disabled elderly, they are included in general, as section 6 of the EA 2010 defines a person as having a disability if he or she has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal and day-to-day activities. It is submitted that although as to date, the UK does not have a specific statute for the elderly, the elderly rights are recognized under the Human Rights Act 1998 in general.⁵³ Besides that, the Mental Capacity Act 2005 protects people (including disabled elderly) who lack capacity to make certain decisions for themselves. For example, section 44 of the Mental Capacity Act 2005 makes it a criminal offence to wilfully neglect or ill-treat a person lacking mental capacity to make relevant decisions.⁵⁴ The Domestic Violence, Crime and Victims Act 2004 also provides some additional protection of the rights of "vulnerable adults", including older people, in the UK. Section 5 of the Domestic Violence, Crime and Victims Act 2004 provides that it is an offence to cause the death of a child or vulnerable adults.⁵⁵ "Vulnerable adults" is defined in section 5(6) of the Domestic Violence, Crime and Victims Act 2004 as a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise. In addition to the legislations discussed above, other legislations in the UK that also protect the elderly are the Health and Social Care Act 2008 and the Care Homes Regulations 2001.

⁵³ Rohaida Nordin et al. (2017). "Legalising of Maintenance of Parents: Malaysia as a Case Study" in Siti Zaharah et al, *Protecting the Elderly Against Abuse and Neglect: Legal and Social Strategies*, University of Malaya Press, Kuala Lumpur, page 143.

⁵⁴ Section 44 of The Mental Capacity Act 2005 said:

44 Ill-treatment or neglect

Subsection (2) applies if a person ("D")—

has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity, is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or

is a deputy appointed by the court for P.

D is guilty of an offence if he ill-treats or wilfully neglects P.

A person guilty of an offence under this section is liable—

on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;

on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine

⁵⁵ Section 5 of the Domestic Violence, Crime and Victims Act 2004 provides:

A person ("D") is guilty of an offence if—

(a) a child or vulnerable adult ("V") dies [F1or suffers serious physical harm] as a result of the unlawful act of a person who—

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

(d) either D was the person whose act caused [F2the death or serious physical harm] or—

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

India

As a signatory to the Proclamation on Full Participation and Equality of Persons with Disabilities in the Asian and Pacific Region in 1992, India has enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 ("Act 1995").⁵⁶ The 1995 Act was enacted to give effect to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asia-Pacific Region and is an important step to ensure equality of opportunity for persons with disabilities in India.⁵⁷ This Act could be described as a significant step by the Indian Government to ensure equal opportunities for PWDs in India. Section 2 of Act 1995 defines a "person with disability" as a person suffering from not less than forty per cent of any disability as certified by a medical authority. The Act 1995 lists seven conditions of disability, including blindness, low vision, cured leprosy, hearing impairment, locomotor disability, mental retardation, and mental illness.⁵⁸ Some of the rights provided to the disabled elderly are the right to employment,⁵⁹ aids and appliances to persons with disabilities,⁶⁰ recognition of the institutions for PWDs⁶¹ and social security.⁶²

In 2007, India became a signatory to the Convention on the Rights of Persons with Disabilities and ratified the said Convention on the 1st of October 2007. To give effect to the said Convention, India enacted the Rights of Persons with Disabilities Act, 2016 ("Act 2016") which came into force on 19 April 2017. Act 2016 replaced the existing Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The salient feature of Act 2016 could be said to be the responsibility that has been given to the Government to take effective measures to ensure that the PWDs enjoy their rights equally.⁶³ Section 2(s) and (t) of the Act 2016 provide two definitions of a person with disability. First, is the definition of a "person with disability" which covers long term physical, mental, intellectual, or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others. The second definition is about a "person with disability having high support needs." The said definition provides that the phrase refers to a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support⁶⁴.

⁵⁶ Act 1995 came into force on February 7, 1996.

⁵⁷ Refer to the Preamble of Act 1995.

⁵⁸ Section 2 Act 1995.

⁵⁹ CHAPTER VI Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

⁶⁰ CHAPTER VII Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

⁶¹ CHAPTER X Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

⁶² CHAPTER XIII Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

⁶³ CHAPTER II on the Rights and Entitlement under The Rights of Persons with Disabilities Act, 2016.

⁶⁴ Section 58 of The Rights of Persons with Disabilities Act, 2016 said:

The Act 2016 adopts a human rights-based approach to recognize that PWDs have equal rights as other able-bodied persons. This can be seen in section (1) of Act 2016 which provides that the appropriate Government shall ensure that the PWDs enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.⁶⁵ Section 3 of the Act 2016 also states that no disabled person shall be subject to discrimination on grounds of disability, unless it is shown that the alleged act or omission is a proportionate means of achieving a legitimate purpose. At this juncture, it is pertinent to note that unlike the PWD Act in Malaysia, the rights embedded under the Act 2006 are enforceable and recognized by the Court.⁶⁶ This is something that is sadly lacking in Malaysia. Thus, it is respectfully submitted that the PWD Act in Malaysia should emulate the Indian Act 2016 concerning the enforcement of the PWDS' rights. This would then show Malaysia's commitment in ensuring that the welfare and rights of PWDs are efficiently and adequately protected.⁶⁷

Based on Act 2016, disabled elderly will have the rights in general like the any other PWDs. In addition to Act 2016, it is indeed commendable to note that, India has also enacted The Maintenance and Welfare of Parents and Senior Citizens Act 2007 ("Act 2007") in order to assist those who are not able to support themselves. Although, based on traditional Indian family systems, the focus is on the importance and value of parents and it is expected that the children will support their parents when they are old or unable to maintain themselves, social changes such as urbanization and industrialization have changed the family system in many ways. Thus, the issue of maintenance of parents became crucial and the objective of the Act 2007 is primarily focussed on the maintenance of parents and senior citizens.⁶⁸

Procedure for certification. — (1) Any person with specified disability, may apply, in such manner as may be prescribed by the Central Government, to a certifying authority having jurisdiction, for issuing of a certificate of disability.

(2) On receipt of an application under sub-section (1), the certifying authority shall assess the disability of the concerned person in accordance with relevant guidelines notified under section 56, and shall, after such assessment, as the case may be, —

(a) issue a certificate of disability to such person, in such form as may be prescribed by the Central Government;

(b) inform him in writing that he has no specified disability.

(3) The certificate of disability issued under this section shall be valid across the country.

⁶⁵ Under section 2 (b) of the Rights of Persons with Disabilities Act, 2016, the "appropriate Government" means,—

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonments Act, 2006 (41 of 2006), the Central Government;

(ii) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government.

⁶⁶ *Suchita Srivastava & Anor. vs Chandigarh Administration* (2009) 14 SCR 989: CHAPTER XVI The Rights of Persons with Disabilities Act, 2016.

⁶⁷ Section 41 of the Person with Disability Act 2008 (Malaysia).

⁶⁸ Section 2 of the Act 2007 defined maintenance as:

"maintenance" includes provision for food, clothing, residence and medical attendance and treatment

Section 2 of Act 2007 defines a senior citizen as any Indian citizen aged 60 years or more. Other than addressing issues related to the maintenance of parents and senior citizens, Act 2007 provides for the establishment of old-age homes,⁶⁹ provisions for improving health care services for senior citizens,⁷⁰ and protection of life and property of senior citizens.⁷¹ Section 5 of Act 2007 provides a space for parents or senior citizens who, unable to maintain himself/herself, is entitled to make an application to obtain a maintenance amount from his/her children / legal heirs. These provisions are essential to the dignity and well-being of the elderly. Neglected parents, on the other hand, can claim maintenance from their children based on section 125 of the Code of Criminal Procedures, 1973, if required. Based on what has been discussed above, it could be noted that India has provided quite an extensive protection under their legal framework to PWDs, the elderly as well as disabled elderly.

Recommendation

As has been discussed above, Malaysia is yet to enact a specific legal framework for the elderly. At the same time, the National Policy on Elderly also needs to be very clear as to disabled persons who later become elderly. Although currently we have several specific statutes which can be used to protect the elderly from being abused, such as the Domestic Violent Act 1994 and the Penal Code, unfortunately we are still lacking in terms of having a specific statute which can be used to deal with various issues pertaining to the elderly such as maintenance and welfare of those with disabled elders. The Persons with Disabilities Act 2008, which specifically provides for the rights of PWDs, has its own weaknesses. The ouster clause in section 41, makes it a "toothless" provision as it provides protection from any form of court action against the government if it failed to carry out any provision under this 2008 Act if it is done in good faith. Hence, in order for the ouster clause not to be applicable to the said authorities, it is pertinent for the claimant to prove in court that the action complained of was done in bad faith or *mala fide*. This could be said to be an onerous task for the complainant, as usually the burden of proof to prove *mala fide* is quite heavy.⁷² Therefore, it is respectfully submitted that it is only in exceptional cases for any claimant to be successful in enforcing his or her rights against the authorities, where he or she manages to prove that the act complained of was indeed not done in good faith.

⁶⁹ CHAPTER III Maintenance and Welfare of Parents and Senior Citizens Act 2007

⁷⁰ CHAPTER IV Maintenance and Welfare of Parents and Senior Citizens Act 2007

⁷¹ CHAPTER V Maintenance and Welfare of Parents and Senior Citizens Act 2007; Thomas Gregor Issac, *et al.* (2021). 'Maintenance and Welfare of Parents and Senior Citizens Act 2007: A Critical Appraisal' *Indian Journal of Psychological Medicine*, Volume 43, Issue 5S, page 1075

⁷² Refer to the case of *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs Malaysia & Ors* [1975] 2 MLJ 279; *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468; *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309.

As such, it is time for Malaysia to enact a specific statute on the elderly to make sure that their welfare and wellbeing is protected. This is crucial as Malaysia is expected to become an aged nation in the year 2030, when the elderly population will be at 15% of the overall population. In addition, the number of those with disabilities is also increasing. At the outset, it needs to be clear that if one is talking about disabled elderly, then we are actually referring to disabled persons growing old, and the other category will be the elderly being disabled due to age factor.

Maintenance is one of the issues surrounding the disabled elderly for years. Normally, the disabled elderly will have difficulties to support themselves and due to this, most of them will rely on their family members, for those who have a family and from the government for those who live alone and do not have any family members. The traditional family systems in Malaysia promote the importance and value of parents and senior citizens. As a result of that, traditionally it is expected that the children will support their parents when they are not able to maintain themselves or when they are getting old. But there are cases where children abandon their parents.⁷³ In India, they have the Maintenance and Welfare of Parents and Senior Citizens Act 2007. Singapore too has enacted the Maintenance of Parents Act 1996, which will provide a venue for the disabled elderly to seek maintenance from their children if they are unable to provide for themselves. Unfortunately, Malaysia does not have specific statutes that address this issue. Currently, only the Islamic Family Law Enactments in the respective states as well as the Islamic Family Law (Federal Territories) Act 1984 provide that Muslims parents (which include disabled parents) can apply for an order from the Syariah Court to obtain maintenance from their children.⁷⁴ Sadly, this is not the position for non-Muslims as there is no specific provision in any of the Acts that are applicable to them pertaining to maintenance. As discussed earlier, the Law Reform Act (Marriage and Divorce) 1974 which is applicable for non-Muslim only deals with maintenance of spouse and child. There is no mention in any of the statutes on maintenance of parents. Hence, this could be described as a lacuna in the Malaysian legal framework on the elderly.

Disabled elderly face various issues in their day to day living, especially accessibility that can hinder their social participation. This will result in physical and emotional suffering.⁷⁵ Thus, support from various parties such as the family members, non-governmental organisations (NGOs), the communities and the government are very important to alleviate their pain and suffering as well as boost their confidence.

The absence of the provision for the punishment in the PWD Act will make the Act stay as an advocating statute which will make it difficult to be enforced and

⁷³ Ajak ibu bersiar-siar sebelum ditinggalkan di rumah orang tua, <https://www.utusan.com.my/luar-negara/2021/11/ajak-ibu-bersiar-siar-sebelum-ditinggalkan-di-rumah-orang-tua/>

⁷⁴ Supra note 30.

⁷⁵ Jose Alvins Martins, et al. (2020). Older adults with physical disabilities: vulnerabilities relative to the body, the physical and social environment, <https://doi.org/10.1590/0034-7167-2019-0175>

administered sufficiently. After more than a decade (14 years to be precise) of being enacted, it is timely for the PWD Act to move on to the next level. It is submitted that we are beyond the stage of advocacy because after 14 years, the community should be alerted as to the needs of those with disabilities. Thus, it is timely for the PWD Act to shift from advocacy based to human rights based as it is quite ironic if we have provision for the rights of the PWDs in the statute but are not enforceable. Other countries such as India and Singapore have gone further by not just advocating but making it enforceable, where there is a penal provision in their respective statutes. This will enable the statute to uphold the rights of disabled and make the objective of the statute more meaningful. Thus, it is time for the PWD Act to cease being labelled as a 'toothless tiger', where it merely provides the rights of the disabled which are unenforceable. The noble intention of protecting the welfare of PWDs in Malaysia, which could be observed in the long title of the PWD Act, must be upheld. This will then be in line with Article 5(1) of the Federal Constitution (the supreme law of land), which guarantees the right to life.⁷⁶

Conclusion

Looking at the increasing number in the population of the elderly every year, including the disabled elderly, it is very important for Malaysia to formulate a robust legal framework to address the issues of this vulnerable group. Without a proper legal framework, Malaysia might face a problem when it becomes an aged nation in 2030. The importance of having a specific statute to address issues of the elderly in Malaysia is crucial. It is submitted that it is high time for Malaysia to have a specific statute for the elderly which should also cater disabled elderly. The specific statute should focus on every category of the elderly, whether living with their family members, living alone, being abandoned, disabled and others. The importance of having a specific statute can be seen by looking at the steps taken by most of our neighbouring countries which have enacted their own statutes, specifically on the elderly, such as Singapore which enacted the Maintenance of Parents Act 1995, India with the Rights of Persons with Disabilities Act, 2016, Bangladesh has the Parents' Maintenance Act 2013, Nepal with the Senior Citizens Act, 2006 and Thailand with its Act on the Elderly, B.E. 2546 (2003 A.D.).

In conclusion, it is respectfully submitted that the elderly, especially the disabled, in Malaysia are in dire need of a specific statute which would protect their rights and interests. Hence, it is high time that the Malaysian legislature pull up their socks and take immediate measures to enact a specific statute to protect and safeguard the rights of this vulnerable group, who have contributed to the development of this nation in their younger days. It would only be proper for the nation to appreciate them for all their sacrifices and contribution in the form of a specific statute which would protect them till they pass on.

⁷⁶ *Tan Tek Seng v. Suruhanjaya Pendidikan & Anor* (1996) 1 MLJ 261.

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