

# Intellectual Discourse

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# *Intellectual Discourse*

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# **Mediation as an Alternative Mechanism to Resolve Family Disputes in Malaysia: A Comparative Analysis with Australia and New Zealand**

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**Abstract:** Settlement of disputes outside of the court is quite popular nowadays as it gives more advantages compared to litigation. Many mechanisms can be applied under the umbrella of Alternative Dispute Resolution (ADR), including mediation. Mediation is a suitable dispute settlement mechanism for family issues, where it seeks to preserve the familial relationship. Family issues are sensitive, as they involve children, maintenance, and matrimonial properties. The reason for recommending family mediation is to avoid the glare of publicity and keep the family disputes low-key and private. Discussion between the parties is confidential as to the terms of the settlements. This article discusses and explains the principles and process of mediation and how it is best applied in the settlement of family disputes. It also highlights the need for a family court

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in Malaysia. Applying qualitative research methodology, this article managed to gather and analyse the meaning, concept, historical background, structure and application of mediation. This article comparatively analyses family mediation practices in Australia and New Zealand. Family mediation as practised in these two countries can be a reference for the Malaysian government to learn from their experiences to establish a good and practical family mediation model in Malaysia.

**Keywords:** Mediation, Alternative Dispute Resolution, Family Disputes, Family Court

**Abstrak:** Artikel ini bertujuan untuk mempromosikan penyelesaian alternatif untuk menangani masalah atau perselisihan keluarga di Malaysia, yang dikenali sebagai mediasi. Mediasi adalah mekanisme penyelesaian alternatif yang paling sesuai untuk perselisihan keluarga, di mana objektifnya adalah untuk menjaga hubungan kekeluargaan. Isu keluarga adalah sesuatu yang sensitif, kerana ia melibatkan anak-anak dan harta hasil dari perkahwinan. Ini kerana peningkatan dari segi statistik mengenai konflik yang berlaku antara pasangan suami isteri di media sosial. Alasan untuk mengesyorkan mediasi keluarga adalah bagi mengelakkan publisiti dan perselisihan mereka diketahui umum. Perbincangan dan syarat-syarat penyelesaian pihak-pihak yang terlibat adalah sulit. Artikel ini membincangkan dan menjelaskan tentang prinsip dan proses mediasi dan bagaimana cara terbaik yang perlu diterapkan dalam penyelesaian perselisihan keluarga. Artikel ini juga menekankan perlunya keadilan perlu ditegakkan dalam menangani isu-isu keluarga. Dengan menggunakan analisis kandungan teks, artikel ini mengumpulkan dan menganalisis makna dan konsep, latar belakang dan sejarah serta struktur mediasi. Kajian ini membandingkan proses dan aplikasi mediasi keluarga di Australia dan New Zealand dengan Malaysia. Mediasi keluarga seperti yang dipraktikkan di negara-negara ini dapat menjadi rujukan bagi Malaysia bagi mewujudkan model mediasi keluarga yang praktikal di Malaysia.

**Kata kunci:** Mediasi, Penyelesaian Pertikaian Alternatif, Pertikaian Keluarga, Mahkamah Keluarga

## Introduction

The two-year Covid19 crisis has caused numerous challenges, not just in the economy, social interaction, and politics but also in family relationships. A great, strong relationship between family members, in general, indicates love and respect between them and can help to maintain family peace (Nasrul et al., 2017). However, when the

government announced the Movement Control Order, it limited people from moving around and meeting each other, including their own families. Kamaruddin et al. (2020) stated that Malaysia is a country of people of many ethnicities, religions, and customs, all of which are used in family-related subjects. Understandably, the order was made to stop the virus from spreading but unfortunately has increased the number of disputes among the family members, to the extent that they wanted to sever and the husband-wife ties. Dissolution is often the result of conflict, which may lead to a slew of other difficulties, such as child custody, asset distribution, and all financial issues. While it is intended to be the last resort for couples, the divorce rate among Muslims and non-Muslims has been steadily growing in recent years, albeit the proportion varies significantly from one group to the next (Md Hashim et al., 2017). When there is a decrease in love and affection between the spouses, they tend to fight over even minor issues, which leads to the increasing number of divorce cases registered in court day by day. It is proven that the number of divorces in Malaysia grew by 12.0%, from 50,862 in 2018 to 56,975 in 2019 (DOSM, 2019).

Meanwhile, Australia, a country of paradox (Black, 2019), also had to face the same situation. Australia has a massive population of citizens; however, it is sad to know that relationship disputes, especially from young couples, are unpredictable, often arising, and financially disruptive in many situations (Whitbourn, 2018). Statistically, Australia had 113,815 weddings with a record of 49,116 divorces in 2019, but provisional data from January to June 2020 reveals a 31.9 per cent drop in marriages due to the COVID-19 restriction such as no wedding ceremonies, social distancing with all the standard operating procedures that need to be observed (ABS, 2020). From the data, it can be concluded that each couple wishes for a satisfying relationship filled with romantic gestures and conversations, culminating in a happy marriage. However, the never-ending conflict also may occur in reality. It is impossible to deny that disputes happen in every relationship. Although it is called a family, a small argument may lead to separation, resulting in terrible consequences.

There may be many reasons for having disagreements with one another, including child's welfare, relationship property, or any form of violence. As for New Zealand, the police investigated 118,910 cases of domestic violence in 2016. In more extreme cases, family violence

has resulted in death, with 92 Intimate Partner Violence (IPV) deaths reported between 2009 and 2015. Women were the principal victim in 98 per cent of mortality occurrences when there was a known history of abuse or mistreatment by their male partner with patterns of harmful behaviour (Family Violence Death Review Committee, 2017). Although family violence is a secret crime, occurring behind closed doors with only the victim and offender as witnesses, New Zealand is not exempted from the problem (Glazebrook, 2015). When two parties are disputing, it is understandable that they cannot even look each other in the eyes and converse pleasantly. The situation is quite stressful; therefore, no conversation is possible. The emotional and mental conditions were not conducive to making the best decisions.

After all, when conflicts exist, the court is no longer suitable for the spouse to settle it down, as it involves feeling and emotion (Ahmad & Abdul Hak, 2010), but the mediation centre should be fit. If ten years ago, the status of mediation in Malaysia was said to be not widely accepted by the people, unlike other developing countries (Norman Zakiyy Chow Jen-T'chiang, 2010), but nowadays, it can be said to be well known among the public, with many efforts done from the government to spread the awareness. For instance, it can be seen from the current practice when the government recently launched the Covid-19 Mediation Program in 2020, and it was a landmark moment for mediation (Abraham, 2021). The government specifically introduced the Mediation Centre for Covid-19 (PMC-19) to assist the public in resolving their dispute in respect of any inability to perform contractual obligations (PMC19, 2020). Instantaneously, it emphasised the importance of mediation in resolving disputes among citizens. The functions and advantages of mediation have also been continuously announced throughout the media so that people are more alert to the need for mediation to resolve disputes quickly and efficiently, being more accessible and less expensive for the parties involved in the conflict than going to court.

Therefore, this research would like to examine the current practice of family mediation in Malaysia as one of the alternative dispute resolutions while helping the court process be more efficient and effective in reducing backlog cases. In practising the best family mediation, the paper also will compare and analyse the method of other countries in handling family disputes through the mediation mechanism. As Australia and

New Zealand are well known for their efficient and excellent service in practising mediation, these two countries are referred to as benchmark countries to improve the process and procedures of mediation in Malaysia. Additionally, there is an excellent opportunity to promote the concept of mediation as the most suitable dispute settlement mechanism for family disputes, where it seeks to preserve the close relationship.

### **Mediation: History and Definition**

Mediation is an out-of-court method of resolving disputes, acting as one of the alternative ways to solve the conflict. In recent decades, this subspecies of the broader Alternative Dispute Resolution (ADR) genus has gained global attention, gaining significance in legal practice and academics (Reza, 2017). Among the examples of contemporary ADR are arbitration, cooperation, negotiation, conciliation and ombudsman. The term “alternative” refers to a procedure in which disagreeing parties opt to resolve their disagreement outside of the courtroom, either voluntarily or in response to a court order (Ibrahim & Maidin, 2020).

Mediation is not a new concept; instead, it has been practised informally for so long since ancient times. In other words, mediation has been a familiar concept of dispute resolution in Asia since the older days. Surprisingly, many Eastern societies, such as the Chinese, Arabs, Indians, and Malays, have used mediation as a standard method of conflict settlement for ages (Abdul Hamid and Nik Mohammad, 2016; Ibrahim & Maidin, 2020). However, the current practice uses the modern mediation practice, which carries the influence of ADR movements and patterns from the United States, Australia and the United Kingdom. There are numerous different types of ADR, but mediation appears to be the most prevalent.

The Oxford Dictionary of Law (2015) defines mediation as “a form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict.” In general, mediation is portrayed as the process of handling two parties in any dispute, and there is a middleman to resolve the disputes, known to be a mediator. Mediation is used to investigate the parties’ underlying interests and requirements. It works best when the disagreeing parties are ready to talk about their issues and work together to find a solution. Malaysian law recognises mediation as an alternative form of conflict

settlement under the Mediation Act 2012 [Act 749] (Ab Halim & Hambali, 2021).

Mediation is often involved in civil cases and not criminal matters such as financial disputes, landlord and tenant disputes, and company management. For this paper, the focus shall be on family disputes, be it arising from children, the divorce process, or other matters. Coleman et al. (2015) supported it when they identified that mediation might occur in various settings, including family mediation, higher education mediation, organisational mediation, labour mediation, community mediation, international mediation, and laboratory simulations. Negotiation is becoming an essential strategy for resolving conflicts within the family setting, as the essence of many family disagreements is self-assertion and compromise. As a result, as one of the most effective negotiating methods, mediation has much potential for resolving family conflicts (Ibrahim & Abdul Hak, 2017).

It is noted that mediation may be used in many sectors (Ambaras Khan & Abdul Hak, 2014), but when it comes to family conflicts, the third party should be an expert in family affairs, whether it is all about the interaction between husband and wife, children, parents, or any other issue that arises from the family conflict. Therefore, the problem may be resolved quickly, and disputing parties may be reconciled or separated in a good way. Mediation will result in a more organised and structured development of the civil justice system. Mediation will become more prominent as a means of progress (Abdul Hamid and Nik Mohammad, 2016).

### *The Enactment of the Mediation Act 2012 in Malaysia*

The Malaysian Mediation Act 2012 (MMA 2012) was passed in the House of Representatives on 2 April 2012 and in the House of Senate on 7 May 2012. The royal assent was given on 18 June 2012, gazetted on 22 June 2012 and came into force on 1 August 2012. The long title is an Act to promote and encourage mediation as a method of ADR by providing for the mediation process, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters. There are a total of 20 sections and one schedule in this Act. There are seven parts: preliminary, the commencement of mediation, mediator, mediation process, the conclusion of mediation, confidentiality and privilege, and miscellaneous.

Section 3 of the MMA 2012 states that mediation is “a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute.” As mentioned in section 9, a mediator is responsible for facilitating mediation and determining how it will be done. A mediator can help the parties achieve an acceptable resolution of their disagreement and provide ideas for resolving it. The mediator must operate freely and impartially to accomplish these goals (Halsbury).

Interestingly, Malaysia chooses not to follow the other commonwealth countries such as Australia and New Zealand but instead takes a different approach for the government to legislate a statute on mediation. The fact that mediation falls within the ambit of ADR, it should be a flexible and not rigid process as it is based on the voluntariness of the disputing parties to refer their disputes to mediation, as compared to litigation. The Act can impose unnecessary limits on the mediation process, which contradicts the primary purpose of having alternative dispute resolution. Nevertheless, the Malaysian government believes that the Act was created and essential to raise awareness and keep up with global trends, as well as to offer a predictable legal framework, address the question of legitimacy, and promote Malaysia as an international conflict resolution hub (Lee, 2012). Furthermore, the application of mediation under this Act shall not prevent the commencement of any civil action in court or arbitration, nor shall it act as a stay of, or extension of any proceedings, if the proceedings have been commenced, as mentioned in section 4(2). This is very important to emphasise that it only acted as ADR but not for replacement of the court proceeding. Even the case of *Menaka Deivarayan v Pentadbir Tanah Daerah Bagan Datuk, Perak & Ors* [2021] 1 CLJ 577 noted that courts at all levels encourage parties to try to resolve issues through other mechanisms like mediation, with litigation being used only as a last option. In other words, mediation should be enforced and applied first in handling disputes.

Furthermore, the Act may protect a mediator’s liability by stating that a mediator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as a mediator unless the act or omission is proven to be fraudulent or involves willful misconduct. These are some of the benefits of implementing the Act; it ensures that contesting parties cannot act as they like when a judgement is not made on their behalf.

Although this Act is a good move for the mediation process in Malaysia, flaws and shortcomings are inevitable. Until the present, no specific restrictions have been enforced by the Minister. The available mediation regulations are created by the Mediation Centre itself, such as the Malaysian Mediation Centre of the Bar Council, and the Putrajaya Community Mediation Centre created its own set of rules (Ab Halim & Hambali, 2021).

### *The Australian Legal Perspective*

It is agreed that the state has a role in enacting family law in supporting relationships, creating conditions in which people can exercise their autonomy in relationships and protecting those who are disadvantaged or harmed as a result of relationships (Herring, 2014). Therefore, in governing the family matter, the Australian government enacted the Family Law Act 1975 (FLA 1975) to ensure that all families are governed by the same the legal system in administering disputes. The passing of this national law abolished all previous laws from the ancient period in Australia. The relevant section can be seen in section 48(1), which states that the sole ground for divorce under the FLA 1975 is that the marriage has irretrievably broken down. However, a counselling requirement exists for parties who seek divorce within the first two years of marriage. This is because section 44(1B) of the Act emphasises that a divorce application cannot be filed within two years unless a prescribed counselling certificate accompanies the application.

Moving forward, in 2006, the Australian government introduced a series of changes to the family law system, which may bring generational change in family law and a cultural shift in the management of parental separation, away from litigation and towards cooperative parenting (Kaspiew et al., 2009). These included changes to the FLA 1975 and the family relationship services system. The 2006 reforms addressed such concerns by allowing for parenting orders to be granted in favour of non-parents and applications to be filed by anyone “concerned with the care, welfare, or development of the child” as stated under sections 64 B(2) and 65(C) of the Act (Black, 2019). The system also changed to include a number of 65 Family Relationship Centres (FRCs) around Australia, the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO), financing for new relationship services, and extra money for current relationship services. The 2006 family

law amendments had a beneficial impact, particularly in providing for children's voices in cases involving them since it will positively influence results for children and their parents. Also, the Family Law Amendment (Shared Parental Responsibility) Act 2006 codified the concept of shared parenting in Australia, updating the Family Law Act 1975. The new Act encourages separated parents to get involved and play a significant role in their child's life, with parents collaborating and agreeing on parenting arrangements outside of the judicial system to protect the child's welfare (Ali et al., 2017).

### *The New Zealand Legal Perspective*

In the 1980s, New Zealand's substance and method for resolving family conflicts underwent significant changes. Previously, no particular legislation governing family matters, but numerous legislations have been established specifically to address concerns related to family law. Therefore, Kate (2018) agreed that New Zealand is entitled to clear, definite, and fit-for-purpose legislation, given the growing complexity of social and familial connections. The Family Proceedings Act 1980, among others, altered the whole approach to a family dispute with its emphasis on counselling, conciliation, and mediation (Henaghan et al., 2011) to promote the resolution of as many issues as possible by the parties themselves with the assistance of the third party.

### **The Practice of Family Mediation**

Generally, family is defined as a set of relations where all persons are related by blood or marriage. Whether the person acted as the parent or a child to a spouse, all of them constituted family members and fundamental units in every society. Family ties are still solid in Malaysian society, and as such, when matrimonial disputes arise and marriages are on tenterhooks, parties often seek assistance from family members to save the marriage.

According to the Oxford Dictionary, a family consists of one or two parents, their children and close relations. A family is a long-term, exclusive connection in which individuals identified as related to one another, generally by lineage, marriage, or adoption, with emotionally and financially devoted to one another. The fundamental rights of a man and a woman to marry and start a family underpin the existence of family law, which may be found under Article 12 of the Malaysian

Federal Constitution, ensuring that such a right exists. In *Hyde v Hyde (1866) LR P&D 130*, the judge defined marriage as a voluntary union between a man and a woman for life to exclude all others. It consists of the formalities required to establish the relationship between a husband and a wife and the need for each party to have the legal capacity to marry.

It is not unusual for people of various origins, religious beliefs, or political allegiances to have significant misunderstandings and disagreements. However, in a strong connection such as a family, this issue cannot go unnoticed. According to Woods (2019), family disputes can be a type of mediated negotiation in which the parties directly negotiate with one another. By engaging directly with the parties, a neutral third-party mediator supervises and facilitates the mediation. Family mediation allows the parties to “exchange their perspectives in a safe environment.” In addition, Senija Ledic (2018) also noted that mediation by a third party has the potential to prevent or at least mitigate the negative consequences of parental conflict, particularly in terms of the children-parent relationship and the mutual relationship between the parents, as indivisible emotions and permanence mark these relationships.

Unlike other types of mediation, family mediation is essential since everyone in this world is likely to have a family, which later may be entangled with any form of dispute. Since a court is not an appropriate venue to address hurt and sensitive feelings, family mediation has become a more popular alternative (Ahmad & Abdul Hak, 2010). Md Hashim et al. (2017) agreed that when there is family conflict, there is a need for someone capable of coping with emotional stress and delicate interpersonal issues.

#### *How far does Malaysian practice it?*

In general, it is acknowledged by all that families in Malaysia abide by the law that is needed to regulate any arising matter that influences the family in general. Relating to issues on responsibility and rights, a few relevant Acts are referred which include the Law Reform (Marriage & Divorce) Act 1976 (LRA 1976), that is enacted particularly for non-Muslims in Malaysia, relating to civil marriage and matters incidental thereto, besides the Guardianship of Infants Act 1961, Child Act 2001, Married Women Act 1957, and some other relevant Acts too. Under

the LRA 1976, all marriages, other than Muslim and native customary marriages, may only be dissolved by the provisions under the LRA 1976. Referring to section 106 of the LRA 1976, the parties must go through the reconciliation process before any divorce petition is heard by the court (Ahmad & Abdul Hak, 2010), reflecting the mediation process's importance. Meanwhile, for Muslims, Part V of the Islamic Family Law (Federal Territory) Act 1984 has provided a few sections relating to the dissolution of marriage either through *khuluq*, *talaq* or *ta'liq*. These are the three types of divorce in Islam which are highlighted in the said Act.

Surprisingly, during the Covid-19 period, a huge number of divorce cases were reported. For instance, the Johor Islamic Religious Council (JAIJ) reported 2,625 divorces in the first six months of the movement control order (The Star, 2020). In 2019, according to Chief Statistician from the Marriage and Divorce, Department of Statistics, Malaysia, 45,502 Muslim divorces were registered, up 13.0% over the previous year's figure of 40,269 divorces (2018). Similarly, the number of non-Muslim divorces by 8.3%, from 10,593 in 2018 to 11,473 in 2019 (Department of Statistics Malaysia, 2019). The evidence indicates that family feuds do exist. If one partner believes that spending all their time together would lead to a happy relationship, this has not been the case for the others. Therefore, a third party or mediator is usually required to ensure their marriage does not end in separation. Their desire to maintain the connection and the mediator's expertise may aid in effectively resolving such conflicts.

The current scenario in Malaysia demonstrates that mediation is used in various situations since Malaysians are fairly adapting to it. In 1999, the Bar Council established the Malaysian Mediation Centre (MMC) to encourage Malaysians to settle disputes through mediation, including family disputes. When parties cannot designate a Mediator, MMC has allocated some conflicts to its qualified mediators. Family disputes, contractual disputes, construction disputes, and medical malpractice are among the disputes that the MMC mediates (Kamaruddin & Shawkat, 2021). Other organisations that provide mediation services include the Asian International Arbitration Centre (AIAC), the Malaysian Association of Architects, the Legal Aid Department and the civil courts.

In Malaysia, all marriages must be registered for them to be considered valid. This is provided by the Law Reform (Marriage and

Divorce) Act 1976 for non-Muslims and the respected Syariah state laws for Muslims. It is acknowledged that marriage is a sacred one, and even considered as the most elongated type of *ibadah* in the religion of Islam, but when there are factors that can disrupt the marriage, such as poor communication, financial problems, lack of commitment towards the wedding, or up to physical and mental abuse, divorce will take place. This is where the role of the mediator comes into play, to see whether both parties can resolve their differences peacefully without having to split and go through a divorce procedure in court. It is understood that not all cases are suitable to be solved through mediation, but for ongoing relationships, it is the most appropriate dispute resolution process in family disputes because its concern is to preserve the connection from being destroyed or at least to control the damage which the consequence of adversarial proceedings is inevitable. Ibrahim & Abdul Hak (2017) highlighted that the agreement between spouses is becoming quite prevalent in marital property issues. The parties may achieve an agreement or settlement through the mediation procedure. Mediation empowers the parties to decide on a fair and just solution to their marital property issues. With their abilities and expertise, the mediator will help the parties to reach the best possible settlement for both sides.

Mediation is a process that has many advantages. A mediated agreement can incorporate interests and outcomes beyond the strictly legal and be broader than a court-imposed solution. Therefore, it sits more comfortably outside than within the court process. Ideally, mediation is explained as a structured form of negotiation (Ibrahim & Maidin, 2020). Acted as a mediator, he should clarify that he is neither a judge nor an arbitrator but rather a neutral person who will help the parties to find a mutually acceptable resolution to their dispute (Goldberg et al., 2017). An experienced mediator will know by heart to balance the ideal and the reality that is taking place (Ibrahim & Maidin, 2020). Therefore, before going to the court proceeding, a third party must understand what underlies the disputes between them.

The current research has suggested proposing that mediation be conducted online, as it suits the digital era. With the present advancement of technology, it is proposed that online family mediation be used, considering the scenario when the parties are unable to meet face to face. Kamaruddin et al. (2020) stated that many other countries have applied the online method to solve family disputes, following the

current trend. It is a good approach for mediation to keep practising so that the postponement may be avoided and the matter of the dispute shall be resolved quickly. In this internet age, it is acknowledged that an online conflict resolution system would bridge the gap between family law specialists and disputants in Malaysia (Kamaruddin et al., 2020)

With the emergence of technology, mediation may be upgraded to conduct through online mechanisms. Besides having a normal mediation process, the online mechanism can enhance the procedure to be efficient and speedier. After all, Ahmad and Abdul Hak (2010) underlined that mediation functions significantly better in Syariah Courts than in Civil Courts. Thus, Md Hashim et al. (2017) suggested that there is no need for non-Muslim and Muslims to have separate family dispute mediators since the abilities required to manage family disputes are similar regardless of the couple's religion. The government might consider combining resources and referring discorded couples to any qualified reconciliation committee. It is supported by Ab Halim and Hambali (2021). They recommended that sulh regulating laws be harmonised and that the Mediation Act 2012 be used as a reference to handle various forms of such procedures to improve practicability.

#### *Family Dispute Resolution in Australia*

Since families have always been regarded as the foundation of society, separated parents may seek assistance from various sources, including legal representation, family court proceedings, family therapy, and family mediation (Morris et al., 2018), to keep their relationship from deteriorating. Unless there is a history of the spouse or child abuse, parents in a parenting dispute must seek mediation before proceeding to court (Morris & Halford, 2014). Most of the time, individuals do not go to legal court proceeding to settle family problems. However, mediation has the power and flexibility to respond to the relational complexity of family lives while also supporting the parties and children's autonomy (Armstrong, 2015). Taylor (2019) concluded that to have a constructive conversation in family mediation, parties are frequently obliged to communicate their feelings and emotions towards the other party, even when the subject is delicate, such as an affair.

At first, structured mediation was created to resolve civil and economic disputes rather than divorce and family disputes that concentrate on adults' problems (Parkinson, 2019). However, some

researchers have identified that family dispute resolution (FDR) produces better settlements than a legal method (Cleak, 2018; South West Sydney Legal Centre, 2010). FDR, or used interchangeably with the term 'family mediation' in Australia (Armstrong, 2015), requires the parties who could not agree on a post-separation parenting arrangement to attend the session. Through family mediation, Morris et al. (2018) believe that a professional mediator aids divorced parents in reaching an amicable co-parenting agreement. It has been defined under section 10F of FLA 1975 as a process for an independent FDR practitioner to help the person affected by the separation to resolve their disputes.

In Australia, one parent usually initiates mediation and attends an individual intake interview and assessment. The second parent is invited to participate in the mediation by the mediator and on an agreement to participate, attends an individual intake interview with the mediator. The intake interviews are an opportunity for each parent to independently describe their concerns about the co-parenting arrangement to the mediator and identify the areas of dispute between the parents (Morris et al., 2018). At the end of the session, the parties shall be given a certificate of attendance (Taylor, 2019) as proof of completing the session before they can proceed to the family court proceeding if needed.

Armstrong (2015) believed that it was necessary, particularly for people of minority cultures and faith backgrounds, to have a proper understanding of the needs of separated families, including children, so that mechanisms could be established to make it easier for parents to access family mediation for their children's best interests. In achieving that, some other organisations also help in preserving the family relationship. For instance, the Institute of Arbitrators and Mediators Australia (IAMA) is a national professional group that promotes and supports the settlement of disputes via arbitration, mediation, and other types of ADR. Second, the Australian Institute of Family Studies (AIFS) is concerned with learning about real-life circumstances via Australian family research. The National Alternative Dispute Resolution Advisory Council (NADRAC) has also attempted to establish a uniform set of terms for dispute resolution in Australia, provided expert policy advice to the Attorney-General on the development of ADR, and promoted the use of interdisciplinary dispute resolution. Furthermore, with the current situation, in conjunction with Western Sydney Community Legal Centre and MacArthur Legal Centre, the relationship with Uniting Counselling

and Mediation has been expanded to provide legally supported mediation remotely through online video to its Parramatta and Sydney customers (South West Sydney Legal Centre, 2020).

The purpose of encouraging parties to make a serious effort to settle their parenting problems through mediation is understandable; it is meant to demonstrate the seriousness with which the state regards the need to seek FDR and urge parties to achieve agreement. Even parties' responses to the emotional stresses of family dispute resolution are subjective and personal, but the introduction of mandatory mediation has been made to improve the family law system, as in section 60I(7) of the Family Law Act, which states that a court cannot hear an application for a parenting order unless a certificate accompanies it from an FDR practitioner.

#### *New Zealand Approach to Family Mediation*

In New Zealand, the FDR is a compulsory mediation service that further assists disputing parties in reaching an agreement with the children's other parent or guardian, except in urgent cases such as where family violence is involved. This is because each member of the family may experience the trauma of family violence both collectively and personally. If the trauma is not addressed, it is inherited by the descendants of those who witnessed it (Family Violence Death Review Committee, 2017). The unbiased mediator should facilitate the meetings, assisting them in identifying difficulties and ensuring that each participant has an opportunity to present their viewpoint. The mediator will assist in focusing on what is best for the children, but they will not be forced to agree to anything (Ministry of Justice, 2021).

The suggestions made by the Family Law Section of the Law Society of New Zealand are very practical, especially on matters related to mediation. In the researchers' opinion, mediation should not be within the court process as it is a non-compulsory dispute settlement mechanism. Since the New Zealand community consists of Maori, Pacific, Pakeha and other groups, some policies and rules have been made in different language to make the family court aborigines friendly.

During mediation, the mediator will assist the parties in resolving the disagreement by identifying the problems ~~at issue~~ and the interests of each party involved, particularly the interests of the children, which

are typically viewed as the most important. It may still be feasible to achieve a short-term deal or ~~settle~~ some concerns if an agreement is not reached. Following the mediation, a report to the court should be submitted as soon as feasible (Counsel-Led Mediation, 2011). Most of the time, mediation practice shows a high rate of successful cases. The ‘counsel-led’ mediation is much better than ‘judge-led’ mediation because lawyers are well-trained in mediation, whereas the judges, on the other hand, are trained to make decisions. After all, mediation is the best resort because only parties will make their own decisions, not the third party or stranger.

### **Does Family Court help?**

Malaysia is a multi-cultural federation with a Muslim majority and a Westminster-style constitution. The country’s justice system reflects its pluralistic and diverse society (Nawi, 2011). Generally, if a spouse is unable to reach an agreement, a court of law will be approached. This is particularly frequent in divorce situations if both parties cannot agree on the terms and conditions of the divorce. Custody fights may be psychologically and financially draining if a child is involved. Therefore, while so many family difficulties occurred, such as divorce and other related concerns, it has highlighted the necessity for the family court to be established. Historically, many countries lacked a specialised family court that dealt with matters pertaining to the institution of the family. However, the necessity for a family court became apparent as other courts grew overburdened with family law issues.

#### *Family Court Division in Malaysia*

In Malaysia, Practice Direction No. 10 of 2010 was issued to encourage attorneys and judges to participate in civil court mediation. The Kuala Lumpur Family Court has been following the Judiciary’s “Guidelines for Family Law Practice” since September 2011. Mediation in marital cases was done by the parties voluntarily under these guidelines (Ibrahim & Abdul Hak, 2017).

The proactive case management and close monitoring by the Family Court have successfully cleared the backlog with 2650 cases registered from 1 January 2012 to 31 December 2012 (Malaysian Judiciary Yearbook, 2012). Then, Practice Direction No. 4 of 2016 (Mediation Practice Direction) was issued in 2016. Effective from 15 July 2016,

all judges of the High Court and their Deputy Registrars, as well as all judges of the Sessions Court and Magistrates and their Assistant Registrars, may issue pre-trial case management orders directing the parties to facilitate the settlement of the matter before the court through mediation (Ibrahim & Abdul Hak, 2017).

However, some cases are not suitable to be tried in the family court, such as *Shobana a/p Perumal v Ganesh a/l Guna* [2016] MLJU 1108, where the judge held that the family court is not the appropriate forum for a civil matter since it is not empowered to go beyond the LRA 1976. As a result, the legal status of the property must be decided by the civil court. Also, in *Mark Sia Eng Joo (L) v Ong Wei Wei (P) (Lim Poh Tin (P), joint respondent) (Sai Yee @ Sia Say Yee & Ors, interveners)* [2020] 9 MLJ, it was mentioned that the family court did not have the jurisdiction under the LRA to grant the interveners the declarations they sought under section 41 of the Specific Relief Act 1950 as it was a civil matter that did not pertain to the matrimonial proceeding before the court. It was intended to establish third-party ownership right over assets not yet determined as marital assets in this court. In such circumstances, it was a civil proceeding within the domain of the civil court as opposed to a matrimonial matter before the family court.

The features of a family court are proposed by Che Soh (2013) that it must be a specialised court with specialised and trained officers, it must promote less adversarial trial, it encourages harmonious effective dispute resolution through mediation, it must be equipped with a counselling unit and also collaborates with social and welfare organisations and shall be consistent with the existing models as practised in other jurisdictions. It is high time for Malaysia to have its family court within the judicial system.

In addition, according to the Chief Registrar of the Syariah Court of Federal Territories, the current status of Syariah Court is also to have a Family division focusing on *hadhanah* and child support. Since the proposals do not require any legislative changes and can be implemented administratively, they were approved at the Cabinet Ministers Meeting on 8 May 2019. A working visit to the Family Court of Australia (FCA) was done to improve knowledge of the family law process, learn about the child support system, and identify best practices in dealing with

family matters (Abdul Hak et al., 2020). It is hoped that the ideas can be materialised soon.

### *Family Court in Australia*

It is noted that Family Court had been established under FLA 1975 to execute exclusive jurisdiction in handling matrimonial cases. As experts in child and family dynamics, the court's report writers are the most common source of expert evidence for parenting orders in family courts. According to section 62G of the Family Law Act 1975, these report writers are family consultants, not cultural experts per se, who are appointed by the family court to provide an assessment of the main issues concerning the child and parents for the first court hearing after which the judge may seek a more detailed family report. When the kid is indigenous or from an ethnic or religious minority, cultural expertise is added to their responsibility (Black, 2019). Under section 60CA, the "best interests of the child" criteria are used by the family courts to resolve disputes between parents. This idea was incorporated into Australian law by the Family Law Reform Act 1995, which was based on the 1989 Convention on the Rights of the Child. Following the paramount consideration in section 43C, the court must decide "in light of the unique facts and circumstances of the case," not "from the standpoint of the standards of certain parents or one sector of society" to establish what is in the best interests of the child (Harland et al., 2015).

In terms of shared parenting, Ali et al. (2017) discussed that if the court finds domestic violence or child abuse happened, the presumption of shared parenting may be rebutted since the child's welfare cannot be protected. In other circumstances, the courts will not provide shared parenting and instead award sole custody to the parent who the court feels is most equipped to obtain custody. Although shared parenting looks to be the best choice, courts will not hesitate to refuse it if it does not benefit the child; the court's primary concern is that the child's interests are appropriately protected.

The family court does not resolve all parental disputes. For the Muslim community in Australia, Black (2019) clarified that they would choose an Imam or a community-based tribunal of Muslim clerics to resolve conflicts based on Islamic principles, evading the Australian legal system. Some disputes, however, are so challenging to decide that they end up in court. When making parenting orders, the courts will

not apply Sharia law but will consider the parties' culture, religion, and customs as a factor to consider.

According to Kamaruddin et al. (2020), Australia has also employed online platforms to handle and resolve family issues. CoupleCARE, for example, is an online platform established in Australia. Couples are provided with a relationship education curriculum through this intervention programme, either through cassettes or guidebooks on themes about relationship development. Interestingly, Australia has traditionally used Online Dispute Resolution (ODR) to speed up divorce processes between divorced couples. During the divorce process, ODR techniques have been widely employed as a negotiating aid. Family Winner, Smartsettle, AdjustedWinner, and Split-Up are examples of online negotiation programmes used in Australia (Evered et al., 2011).

Nevertheless, the latest update reported by the news that the judge in charge of monitoring Australia's new family law system recently warned of a compliance crackdown in ex-partner disputes and promised to reduce the time it takes to deal with parents who disobey court orders. The federal government's long-held intention to merge the Family Court with the lower-level Federal Circuit Court, which also handles family law cases, has been realised. The new Federal Circuit and Family Court of Australia will begin in September 2021 (Whitbourn, 2021).

#### *Family Court in New Zealand*

The contemplation of marital breakup is a serious matter as it leads to doubt, stress, sadness, mixed feelings, and confusion which hinder the parties from decision-making. When the parties are constantly involved in the argument, and there is often a long history between them, indicating that the conflict is firmly established, the court process shall be the best solution. Before applying to the family court for assistance in making choices regarding their children's care, the parties must generally complete the Parenting Through Separation course and attend mediation. If they still cannot consider these options, they can petition the family court to decide for them. A family court may process additional complexities such as a history of domestic violence, alcohol and drug addiction, power and control concerns, and, most significantly, parties who are still minors, such as the children and parents (Powell, 2013).

Section 4 of Family Court Acts 1980 states that the family courts were established as divisions of the District Courts. It was established in 1981 and is a separate court with 42 specialised judges. The Family Courts Act 1980 created a new division of District Court with its atmosphere, specialised services, specialist personnel and specialist judges to deal with family cases (Henaghan et al., 2011). However, due to the Covid 19 pandemic alert Level 1, starting from 6 October 2020, the Chief District Court Judge has decided that all family court cases scheduled would be handled by the District Court. The family court deals with various concerns, from making orders for unborn infants to older persons who require care and protection. Separated parents can seek assistance outside of the court system to help them agree on how to care for their children. If they are unable to reach an agreement, they may seek help from the family court. The courtroom is often set up differently so that participants can speak more freely. The atmosphere is pleasant and conducive to discussion and communication.

Family court judges have been selected based on their experience, personal suitability, and commitment to conciliation, mediation, and non-adversary resolution of family disputes (Henaghan et al., 2011). The Family Court Act 1980 further strengthened a new form of justice by the enactment in 1989 of the Children, Young Persons, and Their Families Act which had the Family Group Conference at its heart. The Family Court's primary legislation has been frequently amended, requiring constant changes in practice and approach. According to the speech made by Chief Justice (2021), the Family Court has had to cope with registry reorganisations that have only worsened rather than solved existing issues. The digitalisation that the court needs to carry out its supervisory obligations concerning minors subject to care and protection orders and to advance its total workload has yet to materialise. The courtroom is still littered with tons of boxes of paper. The Chief Justice still congratulates all parties that give help to families at times of crisis and acknowledges that the court was quickly viewed as a success, with the result that it was given broader jurisdiction, including the relationship property jurisdiction.

## **Conclusion and Recommendations**

Family disputes are very common in society, particularly one involving child or property. Thus, relevant laws should be introduced to allow the

application of family mediation in Malaysia. In western countries, family mediation is a common intervention used to help separated families establish parenting arrangements. A standard regulation should be developed to govern the practice of family mediation. Family mediation should be performed by appropriately certified and experienced mediators, necessitating mediation training. As it is agreed that the preceding court cases demonstrate that the court's decision in marital property distribution is not always to the parties' satisfaction. Hence, mediation should be made available to the parties to reach an amicable agreement. The functions and advantages of mediation have also been continuously announced throughout the media so that people are more alert to the need for mediation to resolve disputes quickly and efficiently, being more accessible and less expensive for the parties involved in the conflict than going to court. Malaysia may try to observe how China had advanced when they decided to boom into reality television by launching many mediation shows, which have gained widespread and intense ratings, with 38 local channels broadcasting mediation shows of 30 minutes to increase awareness of mediation (Zhang & Chen, 2017).

Compared to Australia and New Zealand, Malaysia should also establish a competent family mediation system through government-backed agencies or non-governmental organisations that can cater to married couples in Malaysia and ensure a more extensive public reach. As a result, the present endeavour to offer mediation skills to the disputed family member should be activated to train the individuals with the skills needed to maintain their relationship even after the divorce. In doing so, it seeks to contribute to the development of good practice in resolving family disputes which will be of interest to policymakers, researchers, trainers, and practitioners in the field of family mediation, as well as to a broad range of family law professionals working with families from diverse backgrounds.

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