

ELDER LAW: UNDERSTANDING FILIAL PIETY – A PRECURSOR***Dr Jaspal Kaur Sadhu Singh****

A man growing old becomes a child again.

- Sophocles

Personal experience and inspirational research is a great motivator. My personal circumstances as a carer¹ for an elderly parent, a conversation with Dr Subhajit Basu at Leeds Law School² of his research interest in this area of the law, and finally the current research work by my former personal tutor, Professor John Williams who leads the *Centre for Ageing, Abuse and Neglect* at my alma mater, University of Aberystwyth,³ motivated me to embark on this different and distinct area of research.

In a number of jurisdictions, “Elder Law” is an established area of law, a specialist branch of law and practice where lawyers, for example in the US, who are practitioners in this area of specialism are called “Elder law attorneys”. It covers, depending on the country, many aspects of gerontology law that interacts with the life of an elder (or interchangeably, the term senior citizen or old-aged person may be utilized) such as health care, carer system, pension, insurance and other aspects of filial piety laws. There are journals dedicated to the various issues arising in Elder Law. For instance, in the US, there is the *Elder Law Report*

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¹ The term “carer” is used to refer to a caregiver in the UK. Either terms – “carer” or “caregiver” may be used in discussing elder care.

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³ ‘£1.3m to study justice and elder abuse’ (Aberystwyth University, 15 June 2015) <<https://www.aber.ac.uk/en/law-criminology/news/archive/2015/june/title-182916-en.html>> Accessed 10 June 2016.

published by Aspen Publishers and the *Elder Law Journal* published by University of Illinois College of Law. The readings and information available on the Internet and legal sources were overwhelming.

In view of the breadth and width of the issues involved, this article serves as an introduction and overview. It elucidates on several aspects, namely, an understanding of filial piety in terms of its everyday meaning as well as philosophical and theological underpinnings; the nature and seriousness of the problem plaguing elder care; the premise for rationalizing a legal framework and an insight of filial piety laws.

Understanding Filial Duty and its Underpinnings

The word “filial” is an adjective meaning ‘of a son or daughter and filial duty/respect/affection’.⁴ A search on *Google* springs up a number of sources for definitions for the term. The Merriam Webster online dictionary provides both a simple and a full definition of filial – the former being ‘of or relating to a son or daughter: appropriate for a son or daughter’. The latter full definition is meant firstly, ‘of, relating to, or befitting a son or daughter’ including the phrase “filial obedience” and secondly, ‘having or assuming the relation of a child or offspring’.

The word “filial” is often coupled with the phrase “filial piety”, a noun that is defined as ‘reverence for parents considered in Chinese ethics the prime virtue and the basis of all right human relations’⁵ and in relation to Confucianism, ‘the important virtue and primary duty of respect, obedience, and care for one's parents and elderly family members’.⁶ Whilst the source of the term is linked to

⁴ *Cambridge Advanced Learner's Dictionary* (3rd edn, Cambridge) 528.

⁵ Merriam-Webster <<http://www.merriam-webster.com/dictionary/filial%20piety>> Accessed 10 June 2016.

⁶ Dictionary.com <<http://www.dictionary.com/browse/filial-piety>> Accessed 10 June 2016.

Confucianism where it is one of the fundamental elements,⁷ this is not to say that filial piety is not practised in other belief systems and traditions.

Moving away from theological underpinnings, Keller speaks of filial duty as “special duties” – special in the sense that these duties are not owed to others generally.⁸ Contemporary philosophers have outlined four theories that underlie this duty – the debt theory,⁹ the gratitude theory,¹⁰ the friendship theory¹¹ and Keller’s own, the special goods theory.¹² Each theory is not free from its supporters and critiques. Nevertheless, they attract sophisticated discourse particularly where an attempt is being made to rationalise establishing some type of legal obligation for filial duty and elder care.

⁷ See Daniel Qin, ‘Confucian Filial Piety and the Fifth Commandment: A Fulfillment Approach’ (2013) 16(2) *AJPS* 139, 139-140. Qin comments: Filial piety is one of the founding pillars of Confucianism that shapes Chinese people’s mindset and lifestyle. It emphasizes the affection and duty of the children in parent-child relationships. Children are obliged to obey, support, and honor their parents. Filial piety is both a recognized virtue and a cultural norm. In other words, it is both an inward virtue that children should follow with sincere hearts and an outward etiquette toward their parents. Filial piety is commonly recognized by humanity as an inborn affection and a virtue... When Confucianism is considered as one of the cornerstones of East Asian civilization, Confucian filial piety has to be understood based on its particular characteristics and influence shaped by its historical and social context and at the same time it continuously shapes its environment through history.

⁸ Simon Keller, ‘Four Theories of Filial Duty’ (2006) 56(223) *The Philosophical Quarterly* 254.

⁹ ‘Your parents have done an enormous amount for you, and you owe them something in return: this is the thought behind the debt theory.’ *Ibid* 256.

¹⁰ ‘...when other people do good things for us, we are obliged to respond with acts of gratitude. The gratitude theory says that to fulfil your filial duties is to perform appropriate acts of gratitude in response to the good things your parents have done for you.’ *Ibid* 257.

¹¹ ‘The friendship theory is that the source of filial duty lies not in what parents have done in the past, but in the relationship shared by children and parents in the present. According to the friendship theory, the duties between grown children and their parents are the duties of friends.’ *Ibid* (n 8) 262.

¹² ‘...The approach draws upon two ideas: first, that filial duty needs to be understood on its own distinctive terms; secondly, that different forms of duty can fruitfully be understood by way of an understanding of different sorts of goods, as they arise within what ideally is a reciprocal relationship. What kinds of benefits, by which I mean improvements to the lives of individuals, are involved in a healthy parent-child relationship? While the children are young, they receive important goods from their parents. When the parents are old, they are likely to receive important goods from their grown children. But this is not the whole story. A healthy parent-child relationship adds value to the life of both parent and child for as long as it exists.’ *Ibid* (n 8) 265.

Filial responsibility or duty therefore means a duty that arises from a relationship between parents and family members, namely children, whereby the latter will act as care-providers.

In Malaysia, elders are senior citizens whose age group is 60 and above.¹³ In developed countries, an elderly or old-aged person is one who has attained the age of 65. There is no standard criterion that has been adopted say, for instance, by the United Nations. The definition of who is an elder is dependent on a set of localised factors that shape the notion of an ageing population.

The definitive notion therefore could be similar and distinctive in different parts of the world. Gorman commented that:

The ageing process is of course a biological reality which has its own dynamic, largely beyond human control. However, it is also subject to the constructions by which each society makes sense of old age. In the developed world, chronological time plays a paramount role. The age of 60 or 65, roughly equivalent to retirement ages in most developed countries, is said to be the beginning of old age. In many parts of the developing world, chronological time has little or no importance in the meaning of old age. Other socially constructed meanings of age are more significant such as the roles assigned to older people; in some cases it is the loss of roles accompanying physical decline which is significant in defining old age. Thus, in contrast to the chronological milestones which mark life stages in the developed

¹³ Lembaga Penduduk dan Pembangunan Keluarga Negara (National Population and Family Development Board), *The 5th Malaysian Population and Family Study* (2014), 8. <<http://www.lppkn.gov.my/index.php/ms/pusat-sumber/2016-02-26-02-25-15/2016-03-04-00-42-00/file>> Accessed 10 June 2016.

world, old age in many developing countries is seen to begin at the point when active contribution is no longer possible.¹⁴

In consideration of the above, it is therefore explicable that the differing constructs are dependent on attitudes as well as social and cultural referencing of a nation.

The Nature and Seriousness of the Problem Surrounding Elder Care

The need for elder care has arisen fundamentally owing to two reasons – firstly, the change in the family structure and, secondly, the rate of an ageing population.¹⁵

With reference to the former, the *5th Malaysian Population and Family Study* indicates that there are increasing number of elders living alone or living alone with their partners, the consequences flowing from this is the “empty nest” syndrome.¹⁶ The study also highlighted the high percentage of senior citizens suffering from loneliness.¹⁷

With reference to the concern of an ageing population, it is viewed as one of the most important demographic events of the 21st century.¹⁸ An ageing population phenomenon ‘occurs when the proportion of older people relative to younger generations increases.’¹⁹ Wan-Ibrahim and Zainab comment on this:

¹⁴ Mark Gorman, ‘Development and the rights of older people’ in J Randel, T German and D Ewing (Eds) *The Ageing and Development Report: Poverty, Independence and The World's Older People* (Earthscan 1999) 3-21.

¹⁵ See Sarafuddin Abdul Syahid Sowell, ‘A Study on Laws and Policies on Filial Responsibility in Malaysia’ (MCL Dissertation, International Islamic University Malaysia 2014) 2.

¹⁶ *Ibid* (n 13) 35.9% of Malaysian senior citizens live alone and 20.9% live with their spouses/partners.

¹⁷ *Ibid* 37. 34.2% of Malaysian senior citizens suffer from loneliness.

¹⁸ WA Wan-Ibrahim and I Zainab, ‘Some Demographic Aspects of Population Aging in Malaysia’ (2014) 30(7) *World Applied Science Journal* 891, 891.

¹⁹ Jill Quadagno, *Ageing and the Life Course* (McGraw-Hill 1999). Cited in (n 18) 892.

Although the number of older persons aged 60 and over in Malaysia is still small, there are signs the population of Malaysia is moving towards aging. In 1970 the population aged 65 and over was 316, 852 and it has increased to 788,000 persons in 1995. The number of older persons aged 60 and over has increased from 3.1% (1970), to 3.9% (1995), increased further to 4.2% (2000) and 7.3% in 2020. In 2020, older person aged 65 and over in Malaysia is projected to be 7.3%.²⁰

Malaysia is expected to become an ageing population country by 2030²¹ whilst others report that it will attain the said status by 2035 whereby 15% of its population would be 60 years and older.²² The concern of an increasing ageing population is phenomenal in countries like China where it is predicted that there will 480 million citizens above the age of 60.²³ It is a global concern. In the United Nations Secretariat's Department of Economic and Social Affairs, there is a dedicated division called the Population Division which provides the international community with information on population and development.²⁴ It has produced the *World Population Ageing* reports since 2002, the latest one – the fifth in a series – in 2015.

The report provides research findings in levels and trends of ageing population and specific findings provide insight in areas such as, the link between ageing, poverty and economic growth; the need to ensure social protection for older

²⁰ *Ibid* (n 18) 892.

²¹ See 'M'sia to become ageing population country by 2030' *The SUNDAILY* (Petaling Jaya, 17 March 2015) <<http://www.thesundaily.my/news/1357641>> Accessed 10 June 2015.

²² 'Malaysia heading towards ageing nation status' *The Star Online* (Petaling Jaya, 15 January 2016) <<http://www.thestar.com.my/news/nation/2016/01/15/malaysia-heading-towards-ageing-nation-status/>> Accessed 15 June 2016.

²³ 'New filial law' *Beijing Review* (Beijing, 11 July 2013) 5 <www.bjreview.com> Accessed 10 June 2016.

²⁴ Population Division, Department of Economic and Social Affairs, United Nations. See <<http://www.un.org/en/development/desa/population/>> Accessed 10 June 2016.

persons and the sustainability of pension systems; and the essential promotion of health and well-being at older ages.²⁵

In its introductory paragraph, the report highlights the importance of addressing the ageing population concern:

The world's population is ageing: virtually every country in the world is experiencing growth in the number and proportion of older persons in their population. Population ageing—the increasing share of older persons in the population—is poised to become one of the most significant social transformations of the twenty-first century, with implications for nearly all sectors of society, including labour and financial markets, the demand for goods and services, such as housing, transportation and social protection, as well as family structures and intergenerational ties. Preparing for the economic and social shifts associated with an ageing population is thus essential to ensure progress in development, including towards the achievement of the goals outlined in the 2030 Agenda for Sustainable Development. Population ageing is particularly relevant for the goals on poverty eradication, ensuring healthy lives and well-being at all ages, promoting gender equality and full and productive employment and decent work for all, reducing inequalities between and within countries, and making cities and human settlements inclusive, safe, resilient and sustainable.²⁶

²⁵ Population Division, Department of Economic and Social Affairs, United Nations, *World Population Ageing 2015*, 17-19. Available at <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf> Accessed 10 June 2016.

²⁶ Population Division, Department of Economic and Social Affairs, United Nations, *World Population Ageing 2015*, 1. Available at <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf> Accessed 10 June 2016.

With the above in mind, the responsibility for the wellbeing of senior citizens has attracted much attention in mainstream media in Malaysia and the region with the rise of cases of abandonment highlighted. The *5th Malaysian Population and Family Study* undertaken in 2014 highlights the concern of loneliness and the “empty nest” syndrome as requiring attention as it translates to emotional, health and economic consequences that plague senior citizens.

Rationalizing a Legal Solution and the Framing of Rights and Duties

Elder Law which deals with the care for elders and their rights is premised to a certain extent on filial responsibility. This is not to say that all aspects of Elder Law are based on filial piety or responsibility. There could be moral, social and economic undertones to rationalise elder care and Elder Law.

Whilst certain quarters may feel that strengthening the family institution may be the best approach,²⁷ however, it cannot be viewed as the only approach on the simple premise that the problem is a rather complex one. It requires a multifarious approach. The family institution could be strengthened based on duty and religion but when that institution of family fails to care for whatever reason, the matter has to be resolved through other means.

As far back as 2007, the late Karpal Singh highlighted both the increasing number of senior citizens being placed in old folks home and the concerns of an ageing population. He made a call that the government should enact a Maintenance of Parents Act ‘to oblige adult family members to provide for the maintenance of their parents’.²⁸

²⁷ This was one of the conclusions drawn from a roundtable discussion organised by Institute of Islamic Understanding Malaysia, IKIM for short. *Ibid* (n 21).

²⁸ Karpal Singh, ‘Government should give first priority to the enactment of the Maintenance of Parents Act: Media Statement’ (DAP Malaysia, 12 March 2007) <<http://dapmalaysia.org/english/2007/mar07/bul/bul3260.htm>> Accessed 10 June 2016.

The idea of a law of such a kind has raised many voices in support and in opposition.²⁹ The media has highlighted cases of abandonment in the news.³⁰ Cases of abandonment and paltry care of elders are also frequently carried in the media in a number of countries such as India and Singapore where it is part of national conversation. The sentiments are universal. The lack of elder care legislation is frequently bandied about as a “knee-jerk” reaction to such atrocities.

Where legislation may establish a clear duty for adult children who are financially capable of providing care for their elderly parents, for instance in the form of a maintenance claim made by elder parents or their caregivers from adult children, it may not, however, criminalise abandonment of elders. The role of the State as a caregiver also requires consideration in relation to elders who are childless – or should the duty to provide care extend to “relatives”? Another argument proffered is parents ought to be responsible in ensuring that they are secure in their old age and not rely on their children as a retirement plan. This brings us to the responsibility of the state to educate, create awareness as well as introduce financial retirement plans scheme that are both affordable and sustainable. Therefore, it not surprising that legislative initiatives have adopted models with varying mechanisms.

²⁹ For an overview of different viewpoints, see Victoria Brown, ‘Netizens feel need for filial piety law’ *The Star Online* (Petaling Jaya, 15 January 2014) <<http://www.thestar.com.my/news/nation/2014/01/15/filial-piety-law-netizens-views/>> Accessed 10 June 2016. See also ‘Groups against law forcing kids to look after parents’ (Petaling Jaya, 14 January 2014) <<http://www.thestar.com.my/news/nation/2014/01/14/groups-against-law-forcing-kids-to-look-after-parents/>> Accessed 10 June 2016.

³⁰ See ‘Number of abandoned aging parents on the rise’ *The Star Online* (Petaling Jaya, 17 May 2015) <<http://www.thestar.com.my/news/nation/2015/05/17/number-of-abandoned-aging-parents-on-the-rise/>> Accessed 10 June 2016; ‘Comment: Dangers faced by a country of old people’ *Free Malaysia Today* (Petaling Jaya, 29 May 2015) <<http://www.freemalaysiatoday.com/category/opinion/2015/05/29/dangers-faced-by-a-country-of-old-people/>> Accessed 10 June 2016; Brenda Ch’ng, ‘Old, abandoned and alone’ *Selangor Times* (Shah Alam, 30 March 2012) <<http://www.selangortimes.com/index.php?section=insight&permalink=20120330145102-old-abandoned-and-alone>> Accessed 10 June 2016.

The history of filial piety laws can be traced back to the English Poor Laws established in the 16th century³¹ which provided for the care of the poor and the marginalised prior to the establishment of the welfare state in the UK after the Second World War. In the US, its elder laws were based on the English Poor Laws from the colonial times and such laws remain on the statute books of 29 states but all are not enforced. One of the most recent discussion in the US centres on the legal framework adopted by the State of Pennsylvania. The Pennsylvania Act 43 of 2005³² is seen as resurrecting the old filial support laws that imposes the responsibility for elderly care to the adult children. Except where the adult children are financially incapable of doing so or where they were abandoned as children,³³ they will have the ‘responsibility to care for and maintain or financially assist an indigent person, regardless of whether that person is a public charge’.³⁴ This law therefore allows hospitals, nursing homes and care-providers to make a claim for medical and care cost. The law further provides that the indigent parent may petition the adult child directly.³⁵ This has led to a rise in the number of such cases in the state namely the frequently cited case of *Health Care & Retirement Corporation of America v Pittas*.³⁶

Faced with an ageing population and concerns as a result of incidents of elder abuse and neglect³⁷ led Singapore to enact the Maintenance of Parents Act 1995.³⁸ It provides for a basis whereby an elder who is aged 60 and above, or alternatively, a relative or caregiver, may claim maintenance from their child who is financially capable of doing so either involving a monthly amount or a lump

³¹ Lynn Hollen Lees, *The Solidarities of Strangers: The English Poor Laws and the People 1700-1948* (CUP 1998).

³² 23 Pa C S, Chapter 46.

³³ *Ibid* § 4603(a)(2)(i) and (ii).

³⁴ *Ibid* (n 32) § 4603 (a) (1).

³⁵ *Ibid* (n 32) § 4603(a)(1)(ii) and (c)(1).

³⁶ Pa Super Ct (2011) No. 536 EDA (7 May 2012).

³⁷ See Wing-Cheong Chan, ‘The Duty to Support An Aged Parent in Singapore’ (2004) 13(2) *PacRimLPolyJ* 547

³⁸ Act No. 35 of 1995. The Act was amended in 1996 (Chapter 167B).

sum.³⁹ The legislation provides a criteria of measuring this sum whereby the variables include financial needs of the elder parent limited to basic amenities,⁴⁰ physical needs and medical cost, and, the financial position of the child.⁴¹ The legislation is not applicable if the child can establish that they were abused, neglected or abandoned by their parents when young. The legislation established the office of Commissioner of the Maintenance of Parents. The claim is heard at the Tribunal for the Maintenance for Parents,⁴² a tribunal established under the Act,⁴³ that falls within the administration of the Ministry of Community Development, Youth and Sports, whereby a maintenance order will be made by the tribunal.⁴⁴ Use of mediation is preferred in resolving the claims, failing which, the matter will be heard by the tribunal. Therefore, the tribunal has legislative powers to summon persons to attend before a Conciliation Officer for the purposes of mediation.⁴⁵ There is also a dedicated provision that deals with elder abuse. However, one of the major criticisms made against this provision is that it falls short in defining fundamental terms such as “abandon”, “abuse” and “neglect”.⁴⁶

India has also legislated along similar lines with the Maintenance and Welfare of Parents and Senior Citizens Act 2007.⁴⁷ The legislation provides for, *inter alia*, an application by the parent or an organisation authorised by the parent for a

³⁹ *Ibid* s 3.

⁴⁰ (n 38) s 3(4).

⁴¹ (n 38) s 5(2).

⁴² (n 38) s 14.

⁴³ (n 38) s 13.

⁴⁴ (n 38) s 5(1).

⁴⁵ (n 38) s 14(7)(b).

⁴⁶ Zh Loy Zhi Hao and PYX Soh, ‘How Can the Existing Legal Framework with Regard to the Maintenance of Parents and Protection for the Elderly from Neglect and Abuse Be Reformed?’ (School of Law, Singapore Management University) AGC-SMU Law Reform Essay Competition 2012

<<https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/2012-LLRD%20winning%20Essay.pdf>>
Accessed 10 June 2016.

⁴⁷ No. 56 of 2017.

maintenance claim against the adult children;⁴⁸ for the establishment of a Maintenance Tribunal to make the necessary orders;⁴⁹ for the use of conciliation and the appointment of a Conciliation Officer;⁵⁰ the establishment of old age homes in every district;⁵¹ adequate provisions be made by the state for medical care for indigent senior citizens;⁵² criminalising abandonment of senior citizens by their adult children;⁵³ and uniquely, a provision for the special protection of life and property of senior citizens. In respect of the last provision, setting out the relevant section 23 is necessary:

(1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

⁴⁸ *Ibid* s 4.

⁴⁹ (n 47) s 7.

⁵⁰ (n 47) s 5.

⁵¹ (n 47) s 19.

⁵² (n 47) s 20.

⁵³ (n 47) s 24.

The above provision is a clear response to the abuse suffered by elders at the hands of children and relatives who have taken advantage of their finances. Another provision of the Indian law worthy of a mention is the amount of importance placed on creating the necessary awareness related to the legislative initiative.⁵⁴ Further, importance is also placed on sensitisation and awareness training amongst officers, the police and members of the judiciary.⁵⁵

The Way Forward

The legal initiatives adopted in a number of countries⁵⁶ cover various and diverse aspects of elder care that provide for indigent elders or for the financial independence of elders. Whilst there are laws in Malaysia to assist in the latter such as the Employee Provident Funds Act 1991, the state has to ensure that such schemes can ensure sustainability and sufficiency of funds. Whatever the case, there are number of models legislators and policy makers may review. Whilst Malaysia is not a welfare state and is a developing country, state-sponsored initiatives to be adopted may not be as extensive as in developed countries. Nevertheless, inspiration can be sought from models adopted in countries which have similar economic status as Malaysia. In ensuring a workable legislative framework, factors such as practical and economic viability, quality of enforcement, creating awareness and socially engineering our citizens' mind-set is vital.

⁵⁴ (n 47) s 21(i).

⁵⁵ (n 47) s 21(ii).

⁵⁶ For review of other legislative initiatives, see Protection of the Rights of Elders Act 2000 (Sri Lanka), Protection of the Rights and Interests of the Elderly 1996 (China), Older Persons Act No. 13 of 1996 (South Africa).