

Legal Exploration of Right to Health

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ABSTRACT

The right to health is recognised as a fundamental human right in the World Health Organisation (WHO) Constitution. In Malaysia, the enjoyment of the highest attainable standard of physical and mental health is a fundamental human right without discrimination for every human being. Consequently, the principle of the “right to health,” regardless of the legal status of an individual, is the driving force in creating acceptable standards of health care for all citizens. Even for individual who suffers from Covid-19, he still has a fundamental right to health. The issue of the right to health is whether the patients have any rights of their health? If they do have the right to health, the next issue is whether

the hospitals are legally bound to follow such right, i.e. the right to health of the patients. Therefore, this paper aims to analyse and discuss the issues regarding the rights to health of the patients. Without the legal mechanism in recognising the right to health, it pointed out that is no such right. The method employed in this paper is qualitative based. The paper finds that although Malaysia does not have any specific legal framework about the right to health, the application of international legal mechanism can be referred to a guideline.

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Thus, it is important to have a specific legal framework by applying international legal mechanism in order to address this issue.

Keywords: Covid-19, medical treatment, international law, human rights, legal mechanism, medical law and ethics

INTRODUCTION

It is well known that the right to health is being accepted as a basic human right in the WHO (Rahman, 2008). It shows there is always initiative of government in upholding the rights to health in this country. In general, Malaysia has an efficient and widespread healthcare system that can be seen as a two-tiered healthcare system consisting of a government-based universal healthcare system and a private healthcare system that coexists. Malaysia has a well-known healthcare network. There is increasing awareness that safety is a precondition for growth. According to Rahman, investing in health is investing in development (Rahman, 2008). Whereas in the Malaysian case, Malaysia's Ministry of Health has launched numerous health initiatives over the years to improve patient safety and the welfare of the population (Has an along with the private healthcare system (Health Care in Malaysia, 2010).

METHODS

This paper adopted a pure legal research methodology by using qualitative analysis on the right to health in Malaysia. By using content analysis, this paper analysed the phenomena of right to health, particularly focusing on the legal analysis in Malaysia.

Referring to Krippendorff (2004), analysis of content can range from simple word counting to thematic analysis or conceptual analysis. The data collected based on primary and secondary sources, concentrating on secondary sources.

INTERNATIONAL LEGAL MECHANISM

There are a number of international conventions that have proven that every human being has a right to health and that this right should be protected. This paper will, therefore examine the international legal mechanism relevant to the protection of the right to health, which can be taken from the perspective of the Malaysian. The WHO Constitution 1946 envisages the highest attainable health level as a basic right of every human being (National Economic & Social Rights Initiative, 2018). Considering health as a human right imposes a legal duty on states to ensure sufficient quality access to appropriate, reasonable and accessible healthcare for the basic determinants of health, such as clean and drinking water, sanitation, food, housing, health information and education and gender equality (World Health Organisation, 2017).

Carel Vasak, the Czech jurist, split human rights into three separate generations according to the French Revolution such as Liberty, Freedom and Fraternity. First-generation people are concerned about civil and political rights. The first generation consists of the right to life, citizenship, and protection of individuals, freedom of speech, freedom of association and religious

freedom. Economic, social and cultural rights are the focus of the second generation. Since the Stockholm Declaration on the Human Environment, the third generation begins with the United Nations. The third generation comprises collective and group rights, such as the right to self-determination (autonomy), the right to the environment and the right to development.

Health is an essential prerequisite for enjoying certain human rights that are generally limited to the right to life (Karim, 2010). All human rights include such acts as the right to life, human protection, the right to water, the right to knowledge, the right to education, the right to food and nutrition, freedom of movement, freedom from discrimination, the right to privacy, the right to vote, harmful traditional practices, freedom from abuse, torture and slavery (Karim, 2010; WHO, 2018).

In addition, the duty of a State to uphold the right to health, including by allocating the maximum available resources, in order to slowly realise this goal, which is reviewed through various international human rights mechanisms (World Health Organisation, 2017). The right to health has also been adopted into domestic law or constitutional law (World Health Organisation, 2017). The right to health must be enjoyed on the basis of race, age, ethnicity or any other status, without discrimination (National Economic & Social Rights Initiative, 2018). The right to the highest acceptable quality of health means a specific set of legal responsibilities on states to ensure appropriate conditions for all citizens to enjoy health without discrimination.

The right to health is one of a number of human rights principles agreed globally. This means ensuring the right to health is essential to achieving other human rights, food, housing, jobs, employment, awareness and participation (National Economic & Social Rights Initiative, 2018). Like with most freedoms, the right to health requires both liberties and entitlements. The freedoms include the right to regulate one's health and body, such as sexual and reproductive rights, and to be free from coercion such as torture-free and testing and non-consensual medical care. The entitlements take account of the right to a health protection system that offers every person equal chances to enjoy the highest attainable health level.

The equipment, products, and services must be certified scientifically and medically. Quality is a crucial component of the Universal Health Coverage, which covers both the experience which health care understanding. Health care services have to maintain quality. There are seven principles of quality that need to be maintained. Quality health services should be safe. This first concept means preventing accidents to people intended for the treatment. Second, quality. It means delivering healthcare programs that are focused on facts for those who need them. The third is focused on men. It means caring for individual preferences, needs and values. Fourth is opportune. It means reducing waiting times and delays which are sometimes harmful. Fifth is equal. This means delivering quality care that does not vary due to gender, race,

geographic location, and socioeconomic status. Sixth is put in. This means offering care which will make the full spectrum of health services accessible over the course of life. The last is an important one. This means optimising the value of the resources available and eliminating waste (World Health Organisation, 2017).

Besides WHO, the concept of the right to health appeared in the Committee on Economic, Social and Cultural Rights, United Nations Human Rights Office of the High Commissioner (ICESCR, 1976). The right to health is an inclusive right given to the Committee on Economic, Social and Cultural Rights, applying not only to timely and sufficient healthcare, but also to the fundamental determinants of health, adequate provision of nutritive food, nutrition and housing, such as access to safe and potable (clean) water and sufficient sanitation, good work-related and environmental conditions and access to health-related education and information (ICESCR, 1976).

For instance, the Supreme Court of India has taken an expansive view of the right to life to include an individual's right to health and medical care (*Lim Meng Suang and Another v Attorney General*; and another appeal and another matter [2015] 2 LRC 147 at page 152, [2014] SGCA 53, Singapore). This approach must be understood in the context of India's social and economic conditions (*Yong Vui Kong v Public Prosecutor* [2011] 1 LRC 642 at page 83-84). Each Constitution was supposed to reflect the social mores of the society from

which it emanated (*Lim Meng Suang and Another v Attorney-General* [2015] 2 LRC 147 at page 152). Such social mores possibly will and frequently will change over time (*Lim Meng Suang and Another v Attorney-General* [2015] 2 LRC 147).

In general, the *Universal Declaration of Human Rights* (UDHR) 1948 is one of the focal instruments governing matters in relation to human rights (UDHR, 1948). The right to health is guaranteed as stated where "everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, and medical care" (Paper 25 of the UDHR, 1948). Whereas, in relation to Paper 12 of *The International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1976 states "the States being Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Paper 12 of the ICESCR 1976).

The *Universal Declaration on the Human Genome and Human Rights of 1997* contains similar provisions relating to health (UN General Assembly, 1999). It can be seen that the standard of living is connected to health under Paper 25 of the UDHR. These international human rights instruments should be applicable to all people, including patients henceforth, making them as beneficiaries of the rights. Most of the instruments deal with physical health, while the ICESCR includes both physical and mental health (Paper 12 of the ICESCR, 1976). Meanwhile, *The*

International Covenant on Civil and Political Rights (ICCPR) describes that right in terms of the highest standard of health attainable (ICCPR, 1976). In the European region, according to Part I of the *European Social Charter of 1961* provides that “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable” (Paper 11 of the European Social Charter, 1961).

To sum up, the international legal mechanism such as by referring to WHO, UDHR, ICESCR, ICCPR and *European Social Charter of 1961*, there is a need to protect the right to health of all people. Nobody should be discriminate his or her right to health, especially when he or she goes to the hospital to get his or her medical treatment. Plus, the treatment must be treated fairly and equally.

RESULT AND DISCUSSION

Based on the literature, in Malaysia, the right to health is protected indirectly under the Malaysian Federal Constitution (Razak & Nordin, 2017). This is to confirm that enjoying the highest possible physical and mental health standard is a fundamental human right of every human being without discrimination (Human Rights Commission of Malaysia, 2018). This description was ratified in Malaysia by SUHAKAM and worldwide by WHO. Consequently, the concept of the “right to health,” irrespective of the legal status of a person, is the guiding force in establishing adequate standards of health care for all (Human Rights Commission of Malaysia, 2018).

The question of the right to health in general in relation to public health is protected by the Federal Constitution of Malaysia, with no in-depth emphasis on particular classes. Papers 5 to 13 of Part 2 of Malaysia’s Federal Constitution provide for the fundamental rights of citizens and noncitizens. Paper 5 (1) provides that “No person shall be deprived of his life or personal liberty, save in accordance with the law” (Papers 5 (1) of the Federal Constitution of Malaysia, 1957). This is arguable that the provision in the Federal Constitution of Malaysia includes the right to health (Razak & Nordin, 2017). According to Islam, the right to health is guaranteed by the Federal Constitution of Malaysia (Islam, 2013). Health is a crucial condition which interpreted indirectly within the right to life (Islam, 2013). In the situation to protect the health, the right as to protect health needs to be considered because it encompasses the very fundamental of the human rights which is the right to life (Sulaiman et al., 2018).

In the case of *Suzana bt Md Aris v DSP Ishak bin Hussain & Ors* [2011] 1 MLJ 107, the judge has given a generous interpretation of the provision point out in Papers 5 (1). The judge mentioned at page 121 and 122 that “nothing can buffer the harsh reality that a person who is being deprived of his liberty is in a more vulnerable position of being deprived of life when his plea for medical help falls on deaf ears and is being brushed aside as being a nuisance.” This matter can be seen that everybody has the rights to medical attention and assistance (including health attention), and it falls under the

said generous interpretation. Further, in the case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan and Anor* [1996] 1 MLJ 261, the Court of Appeal mentioned that Paper 5(1) of the Federal Constitution of Malaysia and held that the term “life” does not refer to mere human existence, but it also “incorporates all those facets that are an integral part of life itself and those matters, which go to form the quality of life.” It further held that the term extended to “the right to live in a reasonably healthy and pollution-free environment.” This section concerns certain rights which are enforceable by the courts, subject to such limitations as those provided for in such laws. If any of these rights are violated, the person who is a victim shall make a claim before the High Court (Papers 5 (1) of the Federal Constitution of Malaysia, 1957). While, according to the Paper 9 of the Federal Constitution, the freedom of movement of a Malaysian citizen can be restricted by the enactment of the law if he is considered by the government to be a threat to public health (Papers 9 of the Federal Constitution of Malaysia, 1957).

The thoughtful debate indicates the value of health problems, even though the guarantees for such freedoms are not enforceable by the courts. This demonstrates that the right to health is implicitly covered and acknowledged by Malaysian law, but the issue that may be posed here is whether the right to health in Malaysia concerns the right to health on the basis of public health or just focused on a specific group or not. This is because there is no such provision

under the Federal Constitution of Malaysia that clearly state in a phrase pertaining the right to health specifically to the specific person, including the patient.

The issue which may arise here is whether patients have adequate right to health and if they do, are the hospitals legally bound to follow them? It is crucial to take into account that the right to health as a human right has always been embodied within the right to life (Razak & Nordin, 2017). However, the right to health has been neglected by Malaysia (Razak & Nordin, 2017). This paper expects to initiate a discussion about the right to access healthcare as a human right. Since Malaysia’s Independence Day as of 31 August 1957, the Malaysian government has passed many health and healthcare laws. Such laws were enacted to serve various functions, to make citizens aware of specific illnesses, to set up medical institutions and to control the health sector’s human capital. Having numerous acts and laws that concerned with public health, Malaysia arguably could be said as devoted to protecting the right to health (Razak & Nordin, 2017). The legislations that can be seen to provide for the right to health in Malaysia are the *Penal Code* (Act 574) (Malaysia); the *Criminal Procedure Code* (Act No. 593 of 2012) (Malaysia); the *Local Government Act 1976* (Act 171) (Malaysia) and the *Town and Country Planning Act* (Act No. 172 of 1976) (Malaysia) which contain provisions with elaborations on the right to health. According to Section 13(1) of the *Food Act 1983* (Act No. 281 of 1983)

(Malaysia), it provides that any person shall be liable for selling or preparing food with poisonous ingredients that may harm and cause injury (Section 13(1) of the *Food Act 1983* (Act No. 281 of 1983) (Malaysia).

For instance, the *Hydrogen Cyanide Act 1953* (Ordinance No. 22 of 1953) (Act 260) (Revised 1981) (Malaysia) states in Section 4 that the Minister concerned should be informed of any accident which occasions the loss of human life or personal injury. In terms of charges for medical treatment, one law that has been enacted and gazetted by the Federal Government of Malaysia is the *Fees (Medical) (Cost of Services) Order 2014* (Malaysia) that can be charged for foreign patients who are treated in the hospitals in Malaysia. Whereas, the *Prevention and Control of Infectious Diseases Act* (Act No. 342 of 1988) (Malaysia) provides that an authorised officer is governed by this Act to medically examine any vehicle, person and animal at any time upon its arrival in Malaysia. The *Environmental Quality Act* (Act No. 127 of 1974); *Human Tissues Act* (Act No. 130 of 1974) (Malaysia); *Protection of Public Health Ordinance 1999* (Malaysia); *Medical Act* (Act No. 50 of 1971) (Malaysia); *Telemedicine Act* (Act No. 564 of 1997) (Malaysia); *Child Act* (Act No. 611 of 2001) (Malaysia) and the *Mental Health Act* (Act No. 615 of 2001) (Malaysia) also provide for the protection of public health which can be seen to uphold the right to health of people.

According to the Malaysian Medical Association (MMA), there are eight of patient's right that need to be protected

(Malaysian Medical Association (MMA, 2017). First, the right to health care and humane treatment. Second, the right to choice of care. Third, the right to acceptable safety. Fourth, the right to adequate information and consent. Fifth, right to redress of grievances. Sixth, the right to participation and representation. Seventh, right to health education. Eighth, the right to a healthy environment (Malaysian Medical Association (MMA), 2017). This guideline can be seen that there is an effort that in Malaysia, there is a paradigm that wants to protect the right of the health of the patients in private and public hospitals.

In analysing, what can be experiential about the above laws and guideline is that the government of Malaysia does protect the right to health by regulating certain activities that may have an effect on public health in general. At the same time, all these laws only touch the surface of the right to health, especially in relation to public health. There is no laws or regulations in Malaysia that specifically mentioned and specifically protecting the right to health within the scope of the right to life of the people. The issue of whether patients have adequate right to health is very subjective and need a proper yardstick to measure. So far, there is no specific mention that the patients have adequate right to health. Therefore, there next issue of whether the hospitals legally bound to follow the right to health of the patients still vague. But, according to the literature, the rights to health, which arguably stated under the right to life and human rights, must be

respected. It appears that the right to health of the people, including hospital patients in Malaysia is protected in very general under the capacity as a person living in Malaysia. Their rights should be protected as they have human rights and right to life as a human being. Plus, according to Zahir et al. (2019a; 2019b) individuals have rights towards health care and medical treatment (Zahir et al., 2019a; Zahir et al., 2019b).

RIGHT TO HEALTH IN THE CONTEXT OF COVID-19

Every year an expected 290,000 to 650,000 people pass away in the world due to complications from seasonal influenza (i.e. flu) viruses (Worldometers, 2020). This amount tallies to 795 to 1,781 deaths per day due to the seasonal flu (Worldometers, 2020). Today, as we have noted, the World Health Organization (WHO) has announced that an outbreak of the Covid-19 viral disease (Coronavirus Disease 2019), first detected in Wuhan in December 2019, had reached a global pandemic level on 11 March 2020. In reality, Covid-19 is a new infectious disease caused by a new coronavirus first described in December 2019 whereas, Coronaviruses are a family of viruses known to cause respiratory infections on the human being. By middle of May 2020, more than 150 countries registered cases of Covid-19, including Malaysia, and more than 200,000 cases worldwide were identified by the WHO. Based on the data, more than 7,000 people had passed away, and the numbers were continuing to

increase at a shocking rate. By the middle of May 2020, Covid-19 is affecting 213 countries and territories around the world and two international conveyances. In fact, 4,574,208 coronavirus cases, 305,055 deaths and 1,727,869 recovered in the world (Worldometers, 2020). Quoting trepidations with “the alarming levels of spread and severity,” the WHO called for governments to take vital and aggressive action to halt the spread of the virus (Human Rights Watch, 2020).

As anxieties raise over how the coronavirus crisis can threaten human rights around the world, the UN calls on countries to adopt a more supportive, worldwide and human rights-based approach to the pandemic (United Nations, 2020). Everybody has the right to health (United Nations, 2020). For instance, Advance Medical Directive (AMD) (also known as “Arahan Perubatan Awal” (APA) in the Malay language) makes an individual has a voice relating to his or her health in circumstances when he or she no longer has control over what is being done to him or her (Zahir, 2017; Zahir et al., 2017a; Zahir et al., 2017b; Zahir et al., 2019a). A document specifying the types of treatment that a patient will allow being administered to him and those that are not allowed when he has become incapacitated is AMD (Zainudin et al., 2015). As a consequence, AMD is a guideline that empowers a patient to maintain his or her right to make a decision as to what he or she wishes to do for care before he or she loses the opportunity to

do so (Sommerville, 1996). Therefore, he or she must be competent before making a decision regarding his or her health (Zahir et al., 2019b). This right to health shows that the individual plays roles relating to his or her health care using his or her autonomy. Jaafar et al. (2007) found that the right to health and principle of autonomy corresponded with its relation to Sustainable Development Goals 3 (SDG3) whereas maintaining a safe life and encouraging well-being for all, as it took healthcare as close as possible to where people lived and worked, which is a key part of the ongoing healthcare cycle (Jaafar et al., 2007). With the rapid spread of Covid-19, the Malaysian government has closely monitored the chain of positive cases and uphold the principle of patient's autonomy. Thus, contacts with positive cases are quickly screened while the public must keep a safe distance from the other and stay home to break the chain of the virus from spreading (Prime Minister's Office of Malaysia, 2020).

CONCLUSION

The literature shows health is a fundamental part of the enjoyment of human rights, and it is usually attached to the right to life. Whereas Covid-19 situation calls for the highest standard of health protection. With Covid-19 wrecking our communities, the time is now to have the discussions. Even for an individual who suffers from Covid-19, he is still has a basic right to health. Thus, health should be seriously considered as a human right at the national level as well as within the international legal framework to

ensure that health is protected and is given adequate attention. Health, as a fundamental human right, is considered to be the highest attainable standard of living by international legal instruments. The seven principles of quality health services, according to WHO can be referred as to fulfil the quality of services with regard to healthcare in the hospitals in Malaysia. In the Malaysian context, although there are few laws and guideline that speak about health and healthcare for the people and patients but, no laws or regulations in Malaysia that specifically mentioned and specifically protecting the right to health within the scope of the right to life of the people. It is still important to denote to WHO, UDHR, ICESCR, ICCPR and *European Social Charter of 1961*, in which there is a need to protect the right to health which related to the right to life and linkage between health and human rights of all people that may include the patients in the hospitals. Thus, this is important to have a specific proper legal framework by applying international legal mechanism in order to address this issue.

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