

HEALTH AND HUMAN RIGHTS WITHIN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS LAWS AND THE MALAYSIAN CONSTITUTION

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ABSTRACT

Health rights, unlike political and economic rights, until recently has not received sufficient attention that it truly deserves despite being equally important as other aspects of human rights. It is timely that the right to health be given serious attention and more coverage by the media, legal fraternity and the authorities as well as by the public at large. Unfortunately, the Malaysian Constitution does not have any express provision which recognizes health right and no laws in the country so far acknowledged such right. Hence, this research is done to supplement the gap. This is a legal research which applies qualitative approach focusing on rights relating to private and public health. It is a doctrinal and jurisprudential study and examines international and national laws, especially the Malaysian Constitution. Health is essential for a good life of any human being. Without it a person cannot have a quality life. Although it cannot be expected that government must guarantee everybody will be healthy it cannot be denied that among the functions and obligations of the governments are to provide healthcare services to the community and ensure that facilities and avenues for medical treatments are available to the people. This right has been firmly established in international human rights laws. Its realization has been the subject and objective of various international conventions and policies. It is believed that right to health is ingrained in the constitution of the country and should be recognized by the courts and the governments.

Keywords: health, human rights, constitution, international law, life.

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HAK KESIHATAN DAN MANUSIA DALAM KONTEKS UNDANG-UNDANG HAK ASASI MANUSIA ANTARABANGSA DAN PERLEMBAGAAN MALAYSIA

ABSTRAK

Hak kesihatan, tidak seperti hak-hak politik dan ekonomi, masih belum mendapat perhatian yang sewajarnya sehingga kini walaupun ia sama penting dengan pelbagai aspek hak asasi manusia yang lain. Hak kesihatan sepatutnya diberikan perhatian serius dan perlu diberikan liputan yang lebih meluas oleh media, golongan undang-undang dan pihak berkuasa serta seluruh masyarakat. Malangnya, Perlembagaan Malaysia tidak mempunyai peruntukan yang secara jelas mengiktiraf hak kesihatan dan tidak ada undang-undang di negara ini yang mengiktiraf hak tersebut. Penyelidikan ini dibuat untuk mengkaji permasalahan disebabkan kekurangan tersebut. Ini ialah satu kajian undang-undang menggunakan kaedah kualitatif yang memberi fokus kepada hak yang berkaitan dengan kesihatan persendirian dan awam. Ia merupakan kajian doktrin dan jurisprudens, dan meneliti undang-undang antarabangsa dan tempatan, terutamanya Perlembagaan Malaysia. Kesihatan merupakan asas kepada kehidupan yang baik dan tanpa asas ini, manusia tidak dapat menikmati kehidupan yang berkualiti. Walaupun tidak dapat diharapkan supaya pemerintah bertanggungjawab memastikan semua orang sihat, tidak dapat dinafikan bahawa antara fungsi dan kewajipan pemerintah adalah untuk menyediakan perkhidmatan penjagaan kesihatan kepada masyarakat dan memastikan bahawa kemudahan dan rawatan perubatan tersedia untuk rakyat. Hak ini telah ditegaskan dalam undang-undang hak asasi manusia antarabangsa. Pelbagai konvensyen antarabangsa dan dasar telah dirangka bertujuan untuk merealisasikannya. Adalah diyakini bahawa hak ini terkandung dalam perlembagaan dan sewajarnya diiktiraf oleh mahkamah dan kerajaan.

Kata kunci: kesihatan, hak asasi manusia, perlembagaan, undang-undang antarabangsa, kehidupan.

INTRODUCTION

Health and human rights issues nowadays are global problems. An obvious example of this is the outbreak of the novel coronavirus (2019-nCoV), which has been officially named as 'COVID 19',¹ that recently caused health alerts worldwide. The Emergency Committee of the World Health Organization (WHO) initially² decided not to declare the outbreak a Public Health Emergency of International Concern (PHEIC)³ despite countries in the four continents had already taken various measures to contain the spreading of the virus which initially has no specific cure or vaccine.⁴ Governments have been warned that it may become a worldwide pandemic if a coordinated international response and stringent measures are not taken immediately. Before this, since 2009, there have been five PHEIC declarations but none of them caused by the novel coronavirus.⁵ A week later WHO reversed its decision. Speaking at a news conference in Geneva, WHO Director General Dr. Tedros Adhanom Ghebreyesus described the virus as an "unprecedented outbreak" that has been met with an "unprecedented response" and

¹ "WHO Director-General's remarks at the media briefing on 2019-nCoV on 11 February 2020", <https://www.who.int/dg/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020>.

² "Statement on the Meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) on 23 January 2020", [https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

³ The term 'Public Health Emergency of International Concern' (PHEI) is defined in the International Health Regulations (IHR) 2005 as "an extraordinary event which is determined, as provided in these Regulations: to constitute a public health risk to other States through the international spread of disease; and to potentially require a coordinated international response".

⁴ Now vaccine for COVID-19 has been found. In fact, various vaccines have been developed and distributed worldwide.

⁵ The declarations were made in order to deal with the H1N1 (or swine flu) pandemic in 2009; the polio declaration in 2014; the Ebola outbreak in Western Africa in 2014; the Zika virus epidemic 2015–16, and, as of 17 July 2019, the Kivu Ebola epidemic which began in 2018.

told that the "main reason for this declaration is not what is happening in China but what is happening in other countries" due to the concern that it could spread to countries with weaker health systems.⁶ Once the novel coronavirus gets a significant foothold in such countries, then it would be incredibly difficult to contain and has caused a large number of fatalities. The pandemic has affected economic and social rights of the global community and put the lives of millions of people at stake. These epidemics and pandemics exemplify how health and human rights are explicitly intertwined and have tremendous implications to global politics, economy and safety.

Political and economic rights issues consistently receive tremendous coverage by mainstream and social media. Health rights and issues are equally important to the people and human civilization, yet it has not received sufficient attention that it truly deserves. It is timely that the right to health be given serious attention and more coverage by the media, legal fraternity and the authorities as well as by the public at large. Discussion on health rights issues should be encouraged and made more frequent, open and inclusive. There should be more sense of health awareness not only from the medical viewpoint, but also from legal and constitutional perspectives. Human rights need protection, and this can be done when people claim such rights regardless of whether their rights have been violated or not. They should not have to wait to claim their rights only when they are violated or when the damage has been done. By claiming their rights before any violations occurred, they are taking pre-emptive measures against such violations. When the rights are claimed and recognized then they are protected. Thus, by claiming such rights they are protecting themselves. On this note this article explores rights relating to health in international human rights laws and its relevance to Malaysia.

At the initial stage it may be worthwhile to note that a distinction needs to be made between the rights under international human rights laws and the rights under national constitutions. Not all

⁶ Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

rights stated under all these laws are *ipso facto* legally enforceable. First, let us consider the rights under international human rights laws, treaties or conventions. Legally, an international convention is not binding on the state unless it has been ratified by the state. Generally, when a state subscribes to an international convention through ratification, accession or succession, it has a legal obligation to take a number of steps to ensure that everyone under its jurisdiction can enjoy the rights set out in the treaty. Even if an international convention has been ratified it has to be checked and determined whether there is any reservation made by the state in any part of the convention. The state is not bound by any provision of the convention that it has made a reservation. Furthermore, an international convention ratified only becomes legally binding and enforceable automatically in countries that adopt the monist legal system. In such countries international law is considered as being one with and part of the internal legal order of such a state. On the other hand, there are countries that adopt the dualist legal system. For these countries, international law stands apart from national law and for it to have any effect on rights and obligations at the national level, international law must be domesticated through legislative process.⁷ In Malaysia, the rights mentioned in the Federal Constitution are not only legally enforceable but stands above ordinary law and must be effected by the state as it is the supreme law of the country.⁸ No ordinary law can deny or limit the constitutional right, and any action by a state organ that impede or restrict the right will be acting unlawfully against the constitution.⁹

Health rights, unlike political and economic rights, until recently has not received sufficient attention that it truly deserves despite being equally important as other aspects of human rights. It is timely that the right to health be given serious attention and more

⁷ Carolyn A. Dubay, “General Principles of International Law: Monism and Dualism”, International Judicial Monitor, 2014, http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html.

⁸ Article 4(1), Federal Constitution of Malaysia, 1957.

⁹ Khairil Azmin Mokhtar and Siti Aliza binti Alias, “The Doctrine of Separation of Powers: Judicial Review as a Check and Balance Tool,” in *Constitutional Law and Human Rights in Malaysia. Topical Issues and Perspectives*, ed. Khairil Azmin Mokhtar (Petaling Jaya, Selangor: Thomson Reuters (Sweet & Maxwell Asia), 2013), p. 8-13.

coverage by the media, legal fraternity and the authorities as well as by the public at large. Unfortunately, the Malaysian Constitution does not have any express provision which recognizes health right and no laws in the country so far acknowledged such right. Hence, this research is done to supplement the gap. This is a legal research which applies qualitative approach focusing on rights relating to private and public health. It is a doctrinal and jurisprudential study and examines international and national law especially the Malaysian Constitution.

RIGHT TO HEALTH IN INTERNATIONAL HUMAN RIGHTS LAWS

Lack of express constitutional and legal recognitions of right to health in Malaysia would not be keeping in line with various existing international human rights conventions and laws. The lack of it also causes legal discrepancies and ultimately pressed the government to rely on emergency power.¹⁰ Expression and deliberation on rights relating to health could be seen in various international human rights laws. Although Malaysia has ratified most if not all of these laws so far, no real effort has been made by the government for the incorporation of similar provisions in the constitution. The relevant parts of the relevant international laws relating to health are deliberated to provide hindsight of what the Malaysian constitution is lacking.

The formulation of health as a human right at the international level was initiated at a United Nations' conference.¹¹ In the memorandum submitted by the Brazilian delegation during the United Nations Conference on International Organization at San Francisco in 1945 it was stated that: "*Medicine is one of the pillars of peace*".¹²

¹⁰ Muhyiddin Mohd. Yassin, "Speech Text of The Special Announcement of Emergency", Prime Minister's Office of Malaysia Official Website, <https://www.pmo.gov.my/2021/01/teks-ucapan-pengumuman-khas-darurat>.

¹¹ <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>.

¹² World Health Organization, *The First Ten Years of the World Health Organization* (Geneva: World Health Organization, Palais Des Nations, 1958), p.38.

Later a joint declaration was made by the Brazilian and Chinese delegations calling for the early convocation of a general conference for the purpose of establishing an international health organization. The declaration reads:

The delegations of Brazil and China recommend that a General Conference be convened within the next few months for the purpose of establishing an international health organization.¹³

The San Francisco Conference 1945 unanimously approved the above declaration.¹⁴ The effort then led to the insertion of a reference to health in Article 55 of the United Nations Charter which reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The above article has been regarded as being ‘ahead of its time’ by ‘making the link between peace and security, and socio-economic development and respect for human rights’.¹⁵ The effort also caused for the adoption of a declaration on the establishment of an international health organization, namely the World Health

¹³ World Health Organization, *The First Ten Years of the World Health Organization* (Geneva: World Health Organization, Palais Des Nations, 1958), p. 38.

¹⁴ Javed Siddiqi, *World Health and World Politics: The World Health Organization and the UN System* (Columbia: University of South Carolina Press, 1995), p. 56-7.

¹⁵ Nico J. Schrijver, “The Future of the Charter of the United Nations,” in *Max Planck Yearbook of United Nations Law, Volume 10*, eds. A. von Bogdandy and R Wolfrun (The Netherlands: Koninklijke Vrill N.V., 2006), p.10.

Organization (WHO).¹⁶ The organization, which was founded on 7 April 1948, is based on the principle that ‘health is a human right and all people should enjoy the highest standard of health’.¹⁷ Right to health is proclaimed in the preamble of the Constitution of the World Health Organization wherein it is stated that:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.¹⁸

The text above has inspired the recognition of health as a right as can be found in the various human rights treatises made subsequently. The earliest international human rights declaration that included such right is the Universal Declaration of Human Rights 1948 (UDHR) which has been regarded as a milestone document in the history of human rights because it sets out, for the first time, fundamental human rights to be universally protected and common standard of achievements for all peoples and all nations. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).¹⁹ Article 25 (1) of the UDHR states

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

¹⁶ <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>.

¹⁷ <http://www.euro.who.int/en/about-us/organization/who-at-70/milestones-for-health-over-70-years>.

¹⁸ Preamble of the Constitution of The World Health Organization.

¹⁹ <https://www.un.org/en/universal-declaration-human-rights/>.

Almost twenty years after the declaration of UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976. The aims of the ICESCR are to ensure the protection of economic, social and cultural rights.²⁰ The right to health is specifically and clearly established in the Covenant. Article 12 of ICESCR states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Based on the above article the authority or government has to take several measures in order to promote conditions in which people can lead a healthy life, *inter alia*, the improvement of environmental hygiene, preventive health care and the prevention of occupational diseases. The correct approach on the right to health requires a comprehensive and holistic view on the matter. In other words, the right to health involves a wide range of socio-economic factors which are underlying determinants of health, such as food, housing, potable

²⁰ Disagreement amongst states at the time of drafting led to the provisions within the ICESCR being classed as ‘second generation’ rights subject to ‘progressive realisation’. This was in contrast to civil and political rights, which were termed ‘first generation’ rights and subject to immediate realisation.

water, safe and healthy working conditions, as well as a healthy environment.²¹

Right to health also has been embedded subsequently in several international conventions which have been created in order to protect certain groups that needs extra care and attention. Any country or state that ratifies a human right treaty is legally obliged to give effect to the rights contained in it. The state must ensure that the rights can be exercised within their jurisdictions. For instance, Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights underlines that States have the obligation to progressively achieve the full realization of the rights under the Covenant. There are several world-wide accepted conventions which Malaysia has acceded including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),²² the Convention on the Rights of the Child (CRC)²³ and the Convention on the Rights of Persons with Disabilities (CRPD).²⁴ The main objective of CEDAW is to eliminate discrimination against women so that they can enjoy full human rights including equal access to opportunities in areas such as political and public life, health, education and employment. Article 12 of the Convention stipulates the right to health care for women. Under the article, the state is required to ensure appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. The Convention also declares the right to protection of health and safety for women in working conditions²⁵ and the obligation of the state to ensure that rural women have "*access to adequate health care facilities, including information, counselling and services in family planning*".²⁶ The CRPD aims to ensure that disabled people enjoy the same human rights as everyone else and that they can participate fully in society. The Convention, which was ratified by Malaysia on 19 July 2010, requires early intervention and treatment of disabilities, and further, that health

²¹ Para 11, Para 9, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

²² Malaysia ratified CEDAW 1979 on July 5, 1995.

²³ Malaysia ratified CRC 1989 on Feb 17, 1995.

²⁴ Malaysia ratified CRPD on 19 July, 2010.

²⁵ Article 11(1)(c) CEDAW.

²⁶ Article 142(d) CEDAW.

facilities be as close as possible to the communities of disabled people. The Convention also mandates non-discriminatory treatment and specialized services for disabled people.²⁷

Another convention which has been ratified by Malaysia is the CRC. Article 24 of the CRC, which in some ways is similar to Article 12 of the ICESCR, contains an elaborate provision on the right to health of children. The article recognizes the right of children to have “*the highest attainable standard of health*”. The scope of right to health for children in the CRC is broader than the right of women in Article 12 of the CEDAW because the right provided for in Article 24 of the CRC goes beyond health care facilities. It also covers the right to adequate food, drinking water, environmental health, access to information and prohibition of harmful traditional practices.

In addition to the abovementioned international conventions, Malaysia is also a signatory to the WHO Framework Convention on Tobacco Control (FCTC) which is the first global public health treaty. The Convention was developed by countries in response to the globalization of the tobacco epidemic. The main purpose of WHO FCTC and its implementation through national policies and laws is to protect public health. The objective of the Convention and its protocols “*is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke*”.²⁸ The WHO FCTC contains a broad framework of obligations and rights. It requires parties to implement effective tobacco control measures covering a range of topics such as including the reduction of demand for tobacco, the reduction of the supply of tobacco and protection of the environment. The convention confers legal obligations on its parties to protect people from exposure to tobacco smoke, to warn people about the dangers of tobacco, to ban tobacco advertising, promotion and sponsorship, and to offer people help to end their addictions to tobacco and others. In conclusion, the WHO FCTC and its implementation in Malaysia, apart from discharging its legal obligations under the convention, is to safeguard and protect the right to health of the people in the country in line with the ‘right to life’ of Article 5(1) of the Federal Constitution.

²⁷ Article 25 CRPD.

²⁸ Article 3 WHO FCTC.

There are several other international conventions which Malaysia has not ratified that contain provisions relating to right to health, such as the Convention of Migrant Workers (CMW) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In the Convention on the Elimination of All Forms of Racial Discrimination it is established that everyone has the right to enjoy, without distinction as to race, color, or national or ethnic origin, inter alia, the right to public health and medical care.²⁹ Meanwhile, under Article 28 of the Convention of Migrant Workers, all migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health. The state also cannot refuse to provide emergency medical care by reason of any irregularity with regard to stay or employment to them.

The Declaration of Alma Ata, which is regarded as a major milestone of the twentieth century in the field of public health, recognizes that “*health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right*”. It was made during the International Conference on Primary Health Care, Alma Ata, USSR on Sep 6–12, 1978 and attended by the representatives of all countries including from the Ministry of Health Malaysia, which is the main provider of health care services to the public in the country. In line with the commitment of the government to look after the welfare and well-being of the people, Malaysia has become one of the signatories to the declaration. The Malaysian government’s policy to provide health services to the country had started much earlier since its independence in 1957. This is demonstrated when it joined and became a member state to the WHO on Apr 24, 1958. Thus, the country shares the mission and vision to uphold the principle that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, and that governments have a responsibility for the health of their people as stated in the Constitution of WHO.

More recently Malaysia’s commitment to the right to health has been affirmed and renewed in the ASEAN Human Rights Declaration. The declaration was made in November 2012 during the

²⁹ Article 5(e)(iv) CERD.

21st ASEAN Summit in Phnom Penh, Cambodia. All heads of state and governments of ASEAN agreed to adopt the declaration which states that it is the ultimate and primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms,³⁰ and to treat all human rights as universal, indivisible, interdependent and interrelated.³¹ Right to health has been expressly recognized in Articles 28, 29 and 30. Under the Declaration every person has the right to an adequate standard of living for himself or herself and his or her family including the right to adequate and affordable food, freedom from hunger and access to safe and nutritious food; the right to clothing; the right to adequate and affordable housing; the right to medical care and necessary social services; the right to safe drinking water and sanitation, and the right to a safe, clean and sustainable environment.³² Also guaranteed are the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable healthcare services, and to have access to medical facilities. The declaration also imposes obligations on the state to create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases.³³ The right to social security which assists every person to secure the means for a dignified and decent existence is also guaranteed. Motherhood and childhood are entitled to special care and assistance. Mothers are given special protection during a reasonable period before and after childbirth. During such period, working mothers must be accorded paid leave or leave with adequate social security benefits.³⁴

As a democratic country with responsible government, the constitutional and legal obligations of the authority relating to right to health should be embedded in the Federal Constitution and incorporated in relevant legislations. The ongoing pandemic of COVID-19 clearly shows the detail and precise planning and strategy on the part of the authority in handling issues relating to public health and protection of right to health. In order to ensure life of the people

³⁰ Article 6 of ASEAN Human Rights Declaration.

³¹ Article 7 of ASEAN Human Rights Declaration.

³² Article 28 of ASEAN Human Rights Declaration.

³³ Article 29 of ASEAN Human Rights Declaration.

³⁴ Article 30 of ASEAN Human Rights Declaration.

could be protected and preserved by safeguarding their rights relating to health, the authorities must be empowered under the constitution to limit other rights. The extreme measure to do so that has been taken by the Malaysian government in combating COVID-19 is to use emergency power. Such drastic action could only be justified under extraordinary hardship and always be susceptible for ulterior motives or abuse. As a better alternative, specific constitutional provision recognizing right to health and sufficient reasonable and justifiable powers given to government to limit other rights in preserving life and health of the people would be more appropriate than the blanket use of emergency power. The provisions on the various declarations, conventions and treatises above could be the basis in framing suitable provisions for the Federal Constitution. The constitutional guarantee need not be too specific but must be wide enough to cover essential responsibilities and obligations of the government towards the people. It also must provide sufficient constitutional and legal power for the authority to rely on especially in dealing with any serious situations and pandemic.

THE NATURE AND SCOPE OF RIGHT TO HEALTH

In spite of wide and global recognitions that health is part of human right, the opinion is not shared by all.³⁵ The opponents of right to health make various claims such as there is no such right because nobody has the power to make everyone healthy. They also argue that even if the right is not to health but to healthcare, nobody not even the authority could ensure that everyone can be given the highest attainable standard. These views would hinder any effort to include constitutional provisions and legislation to that effect. Moreover, it would impede the judiciary from adopting human rights approach towards health in dealing with such issues. Thus, it is appropriate at this juncture to deliberate the nexus between health and human rights to provide the foundations and basis of the right to health in order to show that health is an essential or fundamental part of human rights.

³⁵ See Brudney, D. "Is health care a human right?" *Theor Med Bioeth* 37, 249–257 (2016). <https://doi.org/10.1007/s11017-016-9376-6> and Sreenivasan, G. "Health care and human rights: against the split duty gambit." *Theor Med Bioeth* 37, 343–364 (2016). <https://doi.org/10.1007/s11017-016-9375-7>.

Indivisibility, interrelatedness, and interdependency of human rights, which have been acknowledged generally³⁶ and recognized by the United Nations,³⁷ inevitably leads to the notion that human rights and right to health are indivisible. The nexus between human rights including right to health are indivisible and interdependent, and the realization of one right depends on other rights. Health is essential and central enabler for the enjoyment of human rights. For without good health no such enjoyment could be had. Sickness and illnesses will prove to be impediments for the enjoyment and realization of other rights. A healthy person is free to exercise his rights, but a sick person would be unable to exercise some rights. The more one's health deteriorates, the more the realization and enjoyment of that person's rights regresses. Hence, the quality of human rights that could be enjoyed is reliant upon the health condition of the individual.³⁸ The right to health means, "*the right to the highest attainable standard of physical and mental health*". The right to health neither means an unconditional right to be healthy nor the State has to guarantee good health of the people. The state cannot be made legally responsible to ensure that all people are healthy at all times because good health of an individual is influenced by various factors which are outside the direct control of States, such as the person's biological make-up and socio-economic conditions.³⁹ The actual meaning of the right to health is the right to the enjoyment of a variety of goods, facilities, services and conditions which are necessary for its realization.⁴⁰ Everyone has the right to the highest attainable standard of physical and mental health, which includes access to all medical services, sanitation, adequate food, decent

³⁶ For example, see Neves-Silva, P., Martins, G.I. & Heller, L. "Human Rights' Interdependence and Indivisibility: A Glance over the Human Rights to Water and Sanitation." *BMC Int Health Hum Rights* 19, 14 (2019). <https://doi.org/10.1186/s12914-019-0197-3>.

³⁷ See <https://www.unfpa.org/resources/human-rights-principles> and <https://www.ohchr.org/EN/pages/home.aspx>.

³⁸ Paras 1, 3, 5 8, 9 and 13 of General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

³⁹ Para 9, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

⁴⁰ Para 8, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

housing, healthy working conditions, and a clean environment.⁴¹ The right to health encompasses two aspects namely freedom and entitlements.

These freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment.⁴² The entitlements of the right to health include the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment and control of diseases; access to essential medicines; maternal, child and reproductive health; equal and timely access to basic health services; the provision of health-related education and information; and participation of the population in health-related decision making at the national and community levels.⁴³ The right is not limited to having access to health care and the building of hospitals. The right to health is an inclusive right, which means it includes a wide range of factors that can help us lead a healthy life. The Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, refers these factors as the ‘underlying determinants of health’. The wide-ranging factors cover safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; and health-related education and information, and gender equality.⁴⁴

The succinct explanation above clearly established that health is an intrinsic and integral part of human rights. It has been proven theoretically and jurisprudentially that right to health is a fundamental aspect of human life. Furthermore, this belief is shared by the global communities and by all countries as evidenced by the provisions in various international treatises and conventions. Thus, it is only prudent for the various branches of Malaysian government, namely

⁴¹ Article 25 of Universal Declaration of Human Rights.

⁴² Para 8, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

⁴³ Para 8, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

⁴⁴ Para 4, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

the executive bodies, the legislative bodies and the judiciary, to use whatever means within their capacities to further the cause and make right to health a reality.

STATE'S OBLIGATIONS RELATING TO RIGHT TO HEALTH

Right to health is not impossible and unrealistic. One of the common misconceptions prevailing among the opponents of right to health is that nobody, not even the government, can guarantee everybody or even a person to be healthy. It is simply beyond capability of any person or authority to ensure all persons are healthy. Thus, right to health is only illusory and impractical. This view is a misconception of right to health.

The state or government must be responsible on matters pertaining to health. The right to health must be distinguished from the right to be healthy. The government owes duties to the people, and one of the duties is to ensure that the people may freely exercise their right to health. The state accordingly is obliged to respect, to protect and to fulfil the right. The right to health gives rise to both the negative obligation to 'respect', as well as the positive obligations to 'protect' and to 'fulfil'.⁴⁵ The state must respect right to health by not interfering with the enjoyment of the right. It has to refrain from making any policy and from carrying out any action that could impede the exercise of the right to health or which arbitrarily restrict the scope of the right. The state also has the obligation to protect the right by taking necessary steps and reasonable measures which ensure that third parties could not interfere with the enjoyment of such rights by an individual. The state has the duty to take appropriate action against any person or institution that deprives other people or the community in exercising their right to health. The state's obligation to fulfil its duties towards the right means it has to take steps progressively towards the realization of the right. This obligation could be divided into the duty to facilitate and the duty to provide for

⁴⁵ Para 33, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4. See also Elvira Dominguez, *The Right to Health*, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>.

the realization of the right to health. In facilitating the realization of the right, the state has to engage proactively in activities that would strengthen people's ability to meet their own needs. The obligation to 'provide' goes one step further by involving direct provision of services if the right concerned cannot be realized otherwise i.e., providing assistance to groups that are unable to provide for themselves.⁴⁶

The Committee on Economic, Social and Cultural Rights stressed a core minimum obligation of four essential elements of the right to health under the Covenant namely availability, accessibility, acceptability and quality. Adequate healthcare infrastructure, including hospitals, community health facilities, trained healthcare professionals, drugs, equipment and health services must be available in all geographic areas and to all communities a non-discriminatory basis, especially for vulnerable or marginalized groups. Access to health care must be universal and guaranteed for all on an equitable basis. Healthcare must be affordable and comprehensive for everyone and physically accessible where and when needed. Health care providers must respect dignity of the patient, provide culturally appropriate care, be responsive to the needs based on gender, age, culture, language, and different ways of life and abilities. They must respect medical ethics and protect confidentiality. All health care must be medically appropriate and of good quality, provided in a timely, safe, and patient centered manner and have quality standards.⁴⁷

The scope of the right to health too is quite wide and interrelated with other rights. It is quite obvious that the rights under the International Covenant on Economic, Social and Cultural Rights are numerous and multidimensional. Thus, it is an accepted fact that the realization can only be achieved over a certain period. Since resources such as financial and others which are available to each country are different, the time required for every country to achieve the objective is also different. Although the principle of indivisibility of human rights means no human right is intrinsically inferior to any other, it does not mean that the state cannot give priority to certain

⁴⁶ Paras 33-37, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

⁴⁷ See "Report on indicators for monitoring compliance with international human rights instruments" (HRI/MC/2006/7), <http://www.ohchr.org>.

rights. The principle of ‘progressive realization’ recognizes that some rights may have to be given priority over others because in reality not all rights can be fulfilled at the same time or at the same place. Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights may be referred to in understanding the idea of ‘progressive realization’:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...

The above provision stipulates that in the fulfillment of its obligation relating to human rights the state must take appropriate measures towards the full realization of the rights to the maximum of their available resources. This is an implicit recognition that the states have resource constraints and that it necessarily takes time to implement the treaty provisions. Consequently, some components of the rights protected under the Covenant are deemed subject to progressive realization. Not all aspects of the rights under the Covenant can or may be realized immediately, but at a minimum, the states must show that they are making every possible effort, within available resources, to better protect and promote all rights under the Covenant.⁴⁸

This principle however should be treated as an exception and must only be applied with certain conditions. The states cannot use the principle as an excuse for not fulfilling core obligations or for transgressing non-derogable rights. It has been generally accepted that one of the core obligations the state must provide in relation to right to health is essential primary health care.⁴⁹ Furthermore, the principle of non-retrogression of rights also applies in such situation.⁵⁰ The foregoing discussion shows how right to health

⁴⁸ Para 31, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

⁴⁹ (GC 3, GC 14). See Rule of Law and Democracy Section, OHCHR Research and Right to Development Division Rule of Law, Equality and Non-Discrimination Branch, *Core Human Rights in the Two Covenants* (Geneva: United Nations, 2006).

⁵⁰ Para 32, Para 9, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4. See also Office of The

operates and be implemented in any country regardless of its economic background. It can be adjusted to suit the economic and social background of the country. It is not something impossible but viable, and it is a fundamental aspect of governance in any country with responsible and accountable government.

THE MALAYSIAN CONSTITUTION AND THE RIGHT TO HEALTH

There is no express provision in the Federal Constitution of Malaysia on right to health. It has been observed that the right is neither specifically codified in any of the national legislations nor proclaimed in the Federal Constitution, which means that there is no explicit constitutional or legal provision to be relied upon by the citizens to claim their right to health care entitlement. The lack of express constitutional and legal recognition will mean that the government cannot be held lawfully responsible when it fails to provide necessary health care to its citizens. Thus, having to hold on to the decision and approach of the Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*⁵¹ which held that the government cannot be imposed with obligations on rights pertaining to health without any express written law, has now become more untenable. In the midst of spiraling cost of health care, it is submitted that such an understanding is too rigid and unsympathetic to the predicament of the people. Health should not be a privilege of the wealthy. Bearing this in mind, the Federal Constitution should be understood holistically and be interpreted in accordance with accepted principles of constitutional interpretation. The Federal Constitution should be given ‘a generous interpretation’ and we need to avoid ‘the austerity of tabulated legalism’. Democracy requires the government to respect, protect, defend and fulfil the rights of the people, which means the Federal Constitution should be interpreted in a manner

United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (New York and Geneva: United Nations, 2006), 12.

⁵¹ [2021] 1 MLJ 750. The Federal Court in this case rejected the notion that the Doctrine of Basic Structure and the Doctrine of Separation of Power, which are not expressly stated in the Federal Constitution, cannot be the reason to invalidate any law and constitutional amendment.

suitable to give to individuals the full measure of the fundamental liberties referred to.⁵² It is within this spirit that Article 5 and other provisions in Part II of the Federal Constitution, should be interpreted and comprehended.

Article 5(1), which is very much relevant in these regards, deals with the right to life and personal liberty. The right to personal liberty has been confined to right of a person relating to his body. As decided by the courts, the right ‘means liberty relating to or concerning the person or body of the individual, and ‘personal liberty’ in this sense is the antithesis of physical restraint or coercion.’⁵³ This right protects every individual from any form of unlawful physical injury, and from torture and other cruel, inhuman or degrading treatment or punishment. It is also important in protecting the right to be free from non-consensual medical treatment which also forms part of right to health.⁵⁴ The other part of Article 5(1), that is the right to life, has much wider coverage and implications. Right to life in the Malaysian Constitution has been held by the Court to cover “*all those facets that are an integral part of life itself and those matters which go to form the quality of life*” which “*includes the right to live in a reasonably healthy and pollution free environment*”. Obviously, the right to life is an inclusive right and right to health is part of the right to life guaranteed in article 5(1). “*The right to live in a reasonably healthy*” environment stated by the judge refers to “*the underlying determinants of health*” expounded by the UN’s Committee on Economic, Social and Cultural Rights.⁵⁵ This line of interpretation is consonant with the Constitution of WHO of which Malaysia is a member and the various declarations signed by the Malaysian Government such as the Alma Ata Declaration and the ASEAN Declaration of Human Rights. Furthermore, this understanding of right to life is in tandem with the interpretation of right to life in the

⁵² *Dewan Undangan Negeri Kelantan & Anor v Nordin Bin Salleh & Anor* [1992] 1 MLJ 697. See also Privy Council’s decision of *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

⁵³ *Government of Malaysia & Ors V Loh Wai Kong* [1979] 2 MLJ 33. The interpretation was followed and approved by the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

⁵⁴ See Private Health Care Facilities and Services Act 1998 and World Medical Association International Code of Medical Ethics.

⁵⁵ Para 4, General Comment 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4.

Constitution of the United States of America and India. The Malaysian court in *Tan Teck Seng*⁵⁶ referred to the judgment of Field J in *Munn v. Illinois*⁵⁷ in which the judge explained the term ‘life’ appearing in the due process clause in the Fourteenth Amendment to the Constitution of the United States of America:

No State ‘shall deprive any person of life, liberty or property without due process of law,’ says the 14th Amendment to the Constitution. By the term ‘life,’ as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.

The interpretation of the expression “*life*” appearing in Article 21 of the Indian Constitution in *Bandhua Mukti Morcha v. Union of India & Ors.*⁵⁸ also been referred to in *Tan Tek Seng*.⁵⁹ The statement by Bhagwati J. in the case is worthy to be quoted verbatim:

It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Frances Mullin’s case (AIR 1980 SC 849) to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Articles 39, 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State - neither the Central Government nor any State Government - has the right to take any action which will deprive a person of the enjoyment of these basic essentials.⁶⁰

⁵⁶ *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 1 MLJ 261, 288.

⁵⁷ [1877] 94 US 113, 142 (24 L Ed 77, 90).

⁵⁸ AIR [1984] SC 802.

⁵⁹ *Tan Tek Seng*, *ibid.*

⁶⁰ AIR [1984] SC 802, 811-2.

The difference between the Federal Constitution of Malaysia and the Indian Constitution, according to the judge in *Tan Tek Seng*, should not bar the Malaysian Courts from adopting a similar view with the Indian courts as regards to the expansion of provision relating to human rights.

Courts should keep in tandem with the national ethos when interpreting the provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of Constitutional interpretation.⁶¹

Accordingly, it was held in *Tan Teck Seng* that the expression “*life*” appearing in Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.⁶²

As regards to principles to be followed in interpreting our Constitution, in *Dato Menteri Othman Bin Baginda* the judge explained that that the constitution “*being a living piece of legislation*” must be construed broadly and not in a pedantic way, “*with less rigidity and more generosity than other Acts*”. In the course of his judgment reference is made to Lord Wilberforce’s statement in *Minister of Home Affairs v Fisher [1979] 3 All ER 21*:

A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.

⁶¹ *Tan Tek Seng* ibid at p. 289.

⁶² Ibid.

The judge then concluded "*it is in the light of this kind of ambulatory approach that we must construe our Constitution.*"⁶³ On the same note the Supreme Court stated that provisions of the Federal Constitution which concerned fundamental rights and freedoms of the individual must be given 'a generous interpretation avoiding what has been called "*the austerity of tabulated legalism*", suitable to give to individuals the full measure of the [fundamental liberties] referred to.⁶⁴ Based on the court decisions and interpretation by the Malaysian courts above, and in line with declarations signed by the Malaysian government as well as international human rights conventions and treatises acknowledged worldwide, it should be understood that Article 5(1) confers right to health to all persons.

CONCLUSION

Health is a key issue in governmental affairs and fundamental aspect of quality of life. One of the Sustainable Development Goals (SDG) also known as the Global Goals, which have been adopted by all United Nations Member States in 2015, is 'Good Health and Well-Being'. One of the targets under the goal is that all countries would achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all. Malaysian laws and the Constitution should be understood and interpreted along this target and aspirations. In the absence of express constitutional provisions that declares the right to health in our constitution, the judiciary should supplement the legal deficiency by using its creativity and ingenuity in interpreting the constitutional provisions with generosity and compassion to give full measure of the liberties and rights of the people in relation to health. Eventually, it is hoped that the constitution could incorporate clear and comprehensive

⁶³ *Dato Menteri Othman Bin Baginda & Anor V Dato Ombi Syed Alwi Bin Syed Idrus* [1981] 1 MLJ 29, 33.

⁶⁴ *Dewan Undangan Negeri Kelantan & Anor v Nordin Bin Salleh & Anor* [1992] 1 MLJ 697, 712. See also Privy Council's decision of *Ong Ah Chuan v PP* [1981] 1 MLJ 64, 71.

provisions that encompasses the right to health as already been done by some other countries.⁶⁵

⁶⁵ For example, article 28H of the Constitution of the Republic of Indonesia provides that;

‘(1) Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care.

(2) Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.

(3) Every person shall have the right to social security in order to develop oneself fully as a dignified human being.’

Art 39 of the Constitution of India provides certain principles of policy to be followed by the State. It is states that .the State shall, in particular, direct its policy towards securing ‘that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength’ and ‘children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.’ Article 47 of the constitution imposes constitutional ‘duty of the State to raise the level of nutrition and the standard of living and to improve public health.’ The provision also requires that ‘the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.’