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The Constitutional Protection Of Citizens In The Health Sector Under The Malaysian Legal Framework: An Overview

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INTRODUCTION

Malaysia, having been under British colonial rule in the 19th and 20th centuries, inherits much of its legal system from the common law in England. Malaysia practices parliamentary democracy and is ruled as a constitutional monarchy. The Malaysian legal system encapsulates the concepts of the rule of law, fundamental liberties, a *trias politica* between the legislature, executive and judiciary and a jurisdictional division between federal and state governments. The Yang di-Pertuan Agong (YDPA) reigns as the constitutional monarch and is the Supreme Head of the Federation. The Ruler (Sultan) acts as the head of the state government, with the exception of Melaka, Penang, Sabah and Sarawak which are headed by a Governor appointed by the YDPA. The executive power is accordingly conferred on the Cabinet which is led by the Prime Minister and is responsible for implementing and administering the laws promulgated by the legislature, while the interpretation and application of the law is determined by the Malaysian courts in its judgements.

RIGHTS AND PROTECTION RELATING TO HEALTH CARE UNDER THE MALAYSIAN FEDERAL CONSTITUTION

The Malaysian Federal Constitution ("FC") was contrived when the country gained its independence from the British in 1957 and forms the bedrock of the Malaysia's modern legal system. Constitutional supremacy is expressly articulated in article 4(1)[1] and in the event of conflict between any law and the FC, the latter will prevail, and such law, to the extent of the inconsistency, will be considered unconstitutional and void. The FC is a digest of 183 articles divided into 15 parts and 13 schedules, covering imperative matters ranging from the structure and division of power between the federal and state governments, fundamental liberties, citizenship, emergency powers to the conduct and function of electoral bodies. Malaysia is a federation comprising 13 states, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu, as well three Federal Territories, which are Kuala Lumpur, Putrajaya and Labuan.[2]

[1] Article 4(1) states:
"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."
[2] Article 1 of the FC.

The fundamental liberties ensconced in Part II of the FC are consistent with the recognition and promotion of human rights laid down in the Universal Declaration of Human Rights (UDHR), and in the context of health care, such rights are an affirmation of articles 3, 7, 13 and 18. This is further discussed in the succeeding paragraphs.

Right to Personal Liberty and Self-Determination

The first fundamental liberty in the FC is set out under article 5(1), which upholds the doctrine of sanctity of life and guarantees the right of every person to personal freedom:

Liberty of the person

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

The sanctity of life is a fundamental and paramount axiom that transcends all religions, cultures and communities in the world. From time immemorial, mankind has inherently considered life to be precious and inviolable, which cannot be taken away even upon voluntary consent. The doctrine principally has its roots in the religious notion that life is a trust and gift from God, which must be respected, protected and preserved. There is no one definitive definition of "sanctity of life". Nevertheless, traditional and modern ethics concur that it embodies the idea that life is sacrosanct and must be treated with the utmost respect and dignity. An intentional act to end one's life threatens the core of this doctrine and is considered to be a grievous wrong. Kuhse states the sanctity-of-life ethics is one that "absolutely prohibits the termination of life and that sees all human life, regardless of its type or quality, as of infinite and intrinsic worth"[3]. According to Gushee, the doctrine of sanctity of life connotes that every human being at any stage of life, irrespective of background, character, capacity, mental or physical ability "are to be perceived as persons of equal and immeasurable worth and of inviolable dignity and therefore must be treated in a manner commensurate with this moral status".[4]

The right to autonomy or self-determination connotes that an individual must be capable of determining his own life in accordance with his values, goals and beliefs. In health, it means a special form of personal liberty, where individuals are free to choose and implement their own decisions, free from deceit, duress, constraint and coercion. Therefore, autonomy can only occur in the absence of external control or pressure.

Autonomy is considered by many to be the most important bioethical principle in medical practice.[5] It is the fundamental right of the patient to conduct and manage his own affairs, including deciding what should be done with his body.[6] Therefore, under the

[3] Helga Kuhse, "Debate: Extraordinary Means and the Sanctity of Life", *Journal of Medical Ethics*, vol. 7, no. 2 (1981): 75.

[4] David Gushee, "The Sanctity of Life," Centre for Bioethics and Human Dignity, <https://cbhd.org/content/sanctity-life> (accessed 18 June, 2021).

[5] Avraham Steinberg, "Medical Ethics" in *Encyclopedia of Jewish Medical Ethics: A Compilation of Jewish Medical Law on All Topics of Medical Interest* (New York: Feldheim Publishers, 2003), I: 395.

[6] Ibid.

principle of autonomy, a patient is entitled to choose medically sound treatments and refuse undesired interventions, which doctors are duty bound to respect. As respect for autonomy or the right to self-determination becomes an important precept in ethical medical conduct, the doctor "may not restrict nor negate the free wishes of an individual with respect to his own body…[o]ne must facilitate any desired action acceptable to a person's own judgment and in accordance with his own choice."[7].

The inviolability of life and right to self-determination in Malaysia however is not absolute. Article 5(1) makes it clear that there are exceptions to the exercise of such fundamental liberties when the law states otherwise. One such example in the context of health care is illustrated in the illegality of an act amounting to active euthanasia, as well as that of attempting or abetting suicide under sections 304[8], 306[9] and 309[10] of the Malaysian Penal Code, respectively. Thus, although a person has the autonomous right to decide what to do with his or her body, this does not extend to the right to terminate his or her own life.

Right to Equality

The right to be treated as equals, regardless of age, gender and background, be it race, religion, social and economic standing or nationality is laid down in article 8(1) of the FC:

> **Equality**
> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.

This includes the protection of an individual's legal rights and guarantee of equal access to legal recourse and justice.

From the health care perspective, this clearly evinces that each individual cannot be denied access to basic health care and has the right to receive medical treatment. This is duly incorporated in the Code of Medical Ethics ("CME") issued by the Malaysian Medical Association ("MMA"), which accordingly makes reference to the World Medical Association International Code of Medical Ethics and the Declaration of Geneva. Equal treatment is enunciated in the codes of ethics, whereby doctors undertake not to permit "considerations of religion, nationality, race, party politics or social standing" to intervene between their duties and their patients. A similar statement is also included

[7] Steinberg, 395.

[8] Punishment for culpable homicide not amounting to murder is stipulated under section 304 which states that "[w]hoever commits culpable homicide not amounting to murder shall be punished (a) with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or (b) with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

[9] According to section 306, "[i]f any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine."

[10] Section 309 reads, "Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

in the Oath of a Muslim Physician attached to the CME, in which doctors endeavour in the following words: "To be the instrument of Thy Will and Mercy, and, in all humbleness, to exercise justice, love and compassion for all Thy Creation; To extend my hand of service to one and all, to the rich and to the poor, to friend and foe alike, regardless of race, religion or colour."

Right to Freedom of Movement

Article 9(2) of the FC states:

> **Prohibition of banishment and freedom of movement**
> 9. (1) No citizen shall be banished or excluded from the Federation.
> (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

This indicates that the right of a Malaysian citizen to travel freely in the country may be curtailed by laws which are intended to safeguard public health. In the current COVID-19 pandemic, the operation of such a legal exception is manifested in the enforcement of the Movement Control Orders ("MCOs") issued under the Prevention and Control of Infectious Diseases Act 1988 ("PCIDA 1988"). Since the coronavirus first encroached on Malaysian soil in March 2020, three full MCOs have been declared, the latest in May 2021. As a result, interstate and inter-district movements have been banned, and both international and state borders are now strictly monitored by immigration officers, as well as army and police personnel.

Right to Freedom of Religion

Malays constitute the largest ethnic group in Malaysia, comprising 67.4% of the entire population, followed by Chinese (24.6%), Indians (7,3%) and others (0.7%).[11] Although religious faiths are not necessarily identified according to the respective ethnic groups, Malays are ordinarily identified as Muslims. Under article 160 of the FC, "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person." Islam as the principal and official religion in Malaysia[12] accounts for 61.3%, Buddhism constitutes the second largest religion with 19.8%, while Christianity and Hinduism comprise 9.2% and 6.3%, respectively (see Figure 1).[13]

[11] Department of Statistics Malaysia, "Population Distribution and Basic Demographic Characteristic Report 2010", Department of Statistics Malaysia, <http://www.statistics.gov.my/portal/index.php?option=com_content&id=1215> (accessed 27 July, 2021). The Population and Housing Census is undertaken every 10 years.

[12] Article 3 of the FC.

[13] Department of Statistics Malaysia. Confucianism, Taoism and other Chinese religions make up 1.3%; the remaining numbers represent other religions and those who do not profess any religious belief.

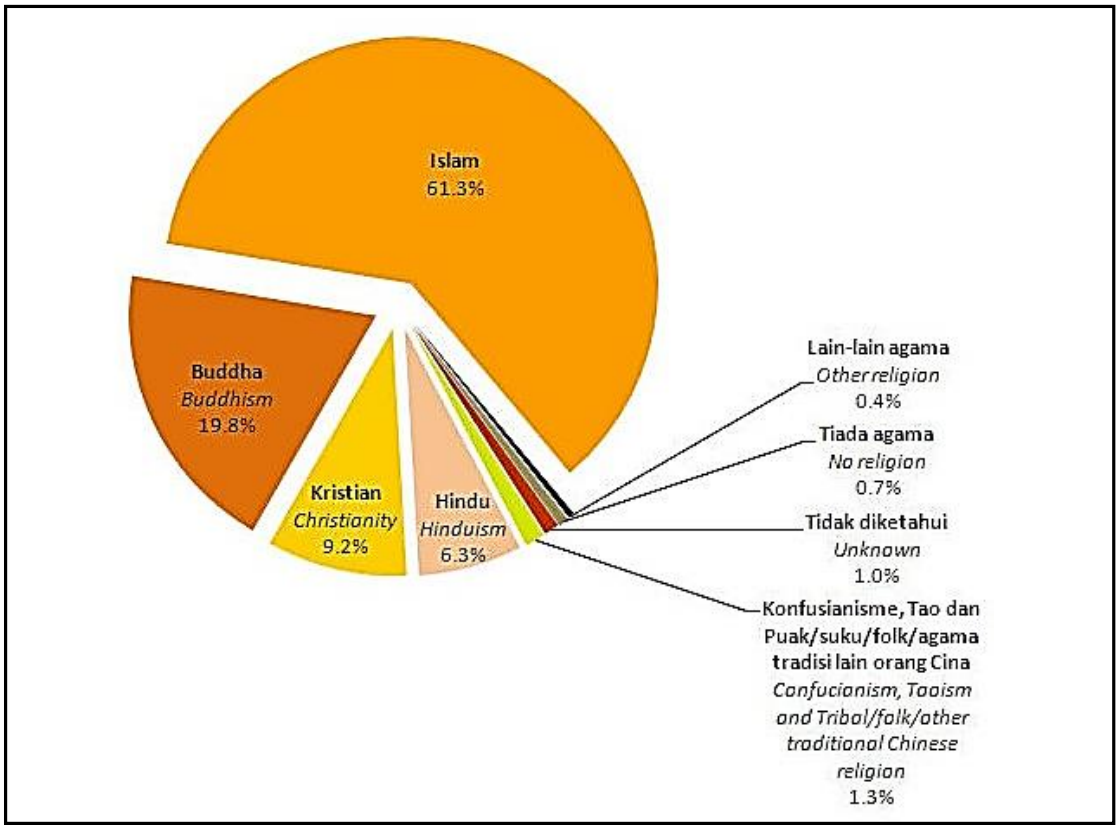

Figure 1 Percentage distribution of the Malaysian population by religion[14]

Accordingly, religious stances have always been an important and influential factor in the advancement of policy and regulatory frameworks in Malaysia.[15] It has been suggested that although the provisions of the FC do not explicitly require that legislation must be in conformity with any particular set of religious principles, the constitutional guarantee and protection accorded to religious practices and the influence of religious ideals in the law-making process in Malaysia are evidences of the impact that religion has on the country's legal development.[16] Islamic influence, in particular, has played a significant role in the construction of the social and political affairs of the country.[17]

Consequently, the FC confers upon each individual religious freedom i.e. the liberty to profess, practice and propagate his/her religion under article 11:

> **Freedom of religion**
> 11. (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

[14] Ibid.

[15] See Khairulnizam Mat Karim, Suzy Aziziyana Saili, and Muhd Anuar Awang Idris, "The Role of Interfaith Dialogue in Societal Development : Malaysian Experience", *British Journal of Arts and Social Sciences*, vol. 8, no. I (2012): 112.

[16] Shamrahayu Abdul Aziz, "Some Thoughts on the Relationship between Law and Religion in Malaysia", *Current Law Journal*, vol. 1 (2009): xxv.

[17] See Wu Min Aun, *The Malaysian Legal System* (Petaling Jaya: Pearson Malaysia, 2005), 187; Shamrahayu, xxi.

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

(5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.

However, similar to the restrictions imposed on the freedom of movement as discussed above, article 11(5) subject this fundamental liberty to legal sanctions, which among others, are intended to protect public health and interest at large. Section 11(2) of the PCIDA 1988 confers power on the Minister of Health "to prescribe measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area." This includes the issuance of Standard Operating Procedures ("SOP") for different sectors including health care, sports, service providers, as well as business and religious activities. An example of the SOP for religious activities is illustrated in Figure 2 below:

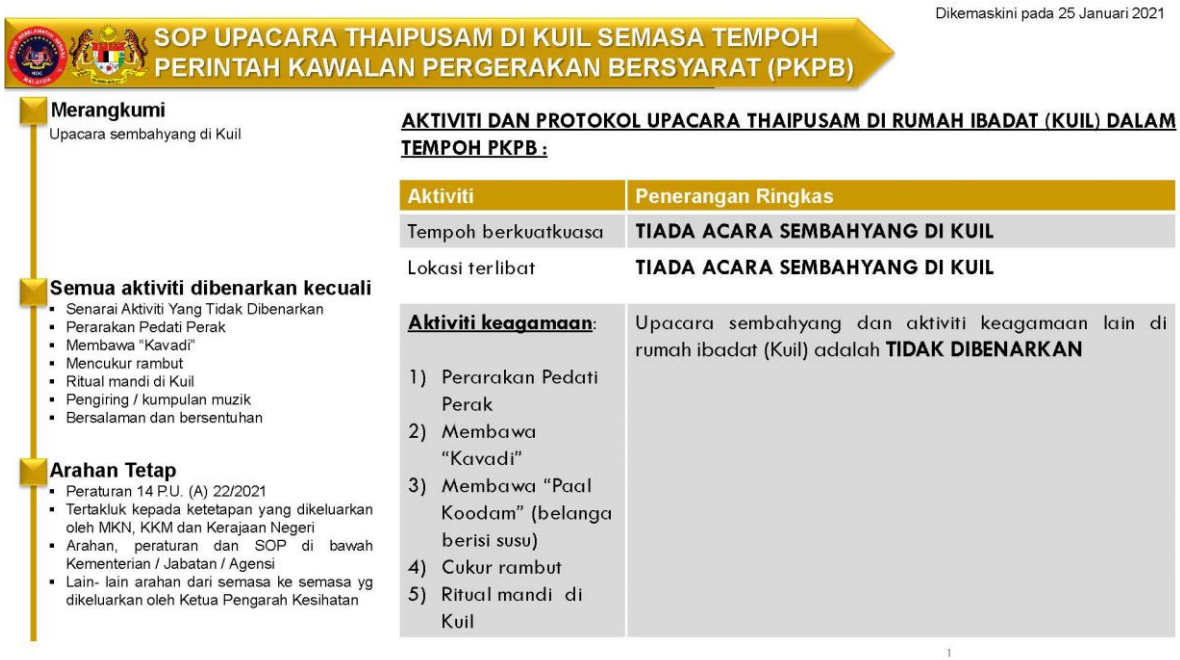

Figure 2 SOP for Thaipusam celebration[18]

JURISDICTION OF LEGISLATIVE BODIES AND REGULATORY INSTITUTIONS RELATING TO HEALTH CARE

The Ninth Schedule of the FC lists down the jurisdiction of the federal and State legislatures to promulgate laws relating to different subject matters, which are divided into the Federal List, State List and Concurrent List. Health care is one of the sectors enumerated under the Federal List and Concurrent List, hence the laws in this respect

[18] Majlis Keselamatan Negara, "SOP Jan 2021", Majlis Keselamatan Negara, <https://www.mkn.gov.my/web/ms/sop-jan-2021/>.

are primarily legislated by Parliament and also to a certain extent, by the State Legislative Assemblies as highlighted in the table below:

NINTH SCHEDULE [Articles 74, 77] **Legislative Lists** **List I—Federal List**	**List III – Concurrent List**
14. Medicine and health including sanitation in the federal capital, and including— (a) Hospitals, clinics and dispensaries; medical profession; maternity and child welfare; lepers and leper institutions; (b) Lunacy and mental deficiency, including places for reception and treatment; (c) Poisons and dangerous drugs; and (d) Intoxicating drugs and liquors; manufacture and sale of drugs.	7. Public health, sanitation (excluding sanitation in the federal capital) and the prevention of diseases.

Table 1 Legislative power of federal and state governments relating to health care

The above division demonstrates that laws on medicine and health are under the jurisdiction of the federal government, which include regulating the establishment, governance and operation of health care institutions and the manufacture and use of drugs. Public health and prevention of diseases are responsibilities that are shared between both federal and state governments. Legislation on sanitation in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan are under the purview of Parliament, whereas elsewhere, this aspect is placed under the power of the respective state legislatures.

Funds	Professionals	Facilities & services	Products	Population health
Fees Act 1951	Nurse Act 1950 (amended 1969)	Lunatics Ordinance (Sabah) 1951	Sales of Drugs Act 1952 (amended 1989)	Poisons Act 1952 (amended 1989)
Fees Act 1951 - Fees (Medical) Order 1982 [PU(A)359/1982]	Registration of Pharmacists Act 1951 (amended 1989)	Mental Disorders Ordinance 1952	Dangerous Drugs Act 1952 (amended 1980)	Hydrogen Cyanide (Fumigation) Act 1953 (amended 1981)
Fees Act 1951 - Fees (Medical) (Extension to Federal Territory of Labuan Sabah And Sarawak) Order 1985 [PU(A)67/1985]	Estate Hospitals Assistants (Registration) Act 1965 (amended 1990)	Mental Health Ordinance (Sarawak) 1961	Medicines (Advertisement and Sales) Act 1956 (amended 1983)	Destruction of Disease-Bearing Insects Act 1975
Fees Act 1951 - Fees (Medical) (Amendment) (No. 2) Order 1994 [PU(A)468/1994]	Midwives Act 1966 (amended 1990)	Private Hospitals Act 1971	Human Tissues Act 1974	Prevention and Control of Infectious Diseases Act 1988
Fees Act 1951 - Fees (Medical) (Amendment) Order 1994 [PU(A)5/1994]	Medical Act 1971	Atomic Energy Licensing Act 1984	Food Act 1983	Malaysian Health Promotion Board Act 2006

The following table lists down the laws and regulations governing the health care sector, which are categorised into five areas:

Fees Act 1951 - Fees (Medical) (Amendment) Order 2003 [PU(A)6/2003]	Dental Act 1971	Private Health care Facilities & Services Act 1998	Food Act 1983 (Control of Tobacco Product (Amendment) Regulations 2008]	Persons with Disability Act 2008
	Medical Assistants (Registration) Act 1977h	Mental Health Act 2001	Food Act 1983 - Control of Tobacco Products (Amendment) (No. 2) Regulations 2009	
	Optical Act 1991		Telemedicine Act 1997	

Table 2 Laws and regulations on health care[19]

[19] Asia Pacific Observatory on Health Systems and Policies, "Malaysia Health System Review", *Health Systems in Transition*, vol. 3, no. 1 (2013): 24-25.

In terms of the health care institutional framework in Malaysia, the core regulatory body is the Ministry of Health ("MOH"). Important functions of the health care system, such as policy making, issuance of clinical practice guidelines and planning are centralised at MOH, which is also the primary provider of government health services in Malaysia. Public sector health services in Malaysia are centrally administered by MOH through its central, state and district offices.[20] The private sector (clinics, hospitals and other services provided by non-governmental organisations) also contribute significantly towards the provision of health care services and is regulated under the Private Healthcare Facilities and Services Act 1998. In addition, health care services are also provided by other ministries and governmental departments to specific groups of the community. For example, the Ministry of Higher Education runs the university teaching hospitals, the Ministry of Defence has several military hospitals and medical centres and the Department of Aboriginal (Orang Asli) Affairs provides health services to the indigenous population in collaboration with MOH. The Department of Social Welfare provides nursing homes for the elderly, and the Ministry of Home Affairs manages the drug rehabilitation centres.[21]

By virtue of sections 3(1) and 4 of the Medical Act 1971, the Malaysian Medical Council ("MMC") is vested with the power to regulate and monitor medical practice. The law requires medical practitioners to register with respective professional statutory bodies and hold a current practice certificate. The boards are authorised to register and disqualify professionals, issue practice certificates, approve training degrees, approve premises for training, issue guidelines and standards, conduct examinations and conduct inquiries into malpractice complaints.[22] The local medical scene is also replete with a number of professional non-governmental societies, one of the most reputable being the MMA. As the main body representing the voice of the medical fraternity, one of the prime objectives of the MMA is to promote the integrity and interests of medical practitioners in all branches of medicine, and to maintain the professional standards of medical ethics.[23] In furtherance of the purpose of such establishments, policies and codes have consequently been issued to direct and assist doctors to discharge their duties and obligations in line with ethical principles.

The CME was adopted in 2001 at the 41st Annual General Meeting of the MMA. The CME lays down guidelines for the proper conduct of doctors practising in Malaysia, and is divided into eight sections ranging from ethical rules relating to doctor-patient relationship, setting up practice and the role of the Association's Ethics Committee in promoting ethical conduct and resolving disputes. Under section I, "Good Medical Practice", the CME recognises the belief in God as the foremost tenet in Malaysia's guiding principles and acknowledges the diversity of the nation's population in terms of race, religion and culture. Section I also outlines some of the core ethical values of the communities in Malaysia:

[20] Asia Pacific Observatory on Health Systems and Policies, 18.
[21] Ibid.
[22] Asia Pacific Observatory on Health Systems and Policies, 26-27.
[23] Malaysian Medical Association, "MMA: Malaysian Medical Association," Malaysian Medical Association, <http://www.mma.org.my/> (accessed 10 February, 2021).

- The Physician must maintain the utmost respect for human life and the human person.
- The Physician should not recommend nor administer any harmful material and should render help regardless of the financial ability, ethnic origin or religious belief of the patient.

The first point is in consonance with article 5(1) of the FC in terms of preserving the sanctity of life, which forms the most fundamental ethical dogma in theological and modern bioethics.

Further, Appendix I to the CME, "Perspectives in Medical Ethics", reproduces the classical and modern oaths taken by doctors that have consistently over time emphasised the duty of doctors to treat life as sacred.[24] Appendix I sets out the oath to be taken by Muslim doctors, under which they must avow to "hold human life as precious and sacred, and to protect and honour it at all times and under all circumstances" in accordance with Islamic law.

The CME also contains provisions that accord due respect to patient autonomy, which is a constitutional right under article 5(1) of the FC. For instance, in section I, under the subheading "Summary of Duties of Doctors to the Patients, Profession and Oneself", it is stated that in order to justify the trust given by patients to doctors, doctors have a duty to maintain a good standard of practice, care and behaviour, which amongst other things includes providing information to patients in a manner they can easily comprehend, and respecting the rights of patients to be fully involved in decisions about their care.

The Code of Professional Conduct ("CPCM") is set out in Appendix II to the CME. It is a quasi-regulatory document that outlines the minimum standard of professional conduct expected of a registered medical practitioner in Malaysia. Breaches of the limits of conduct prescribed in the CPCM will render the practitioner liable for serious professional misconduct and subject to disciplinary proceedings. The CPCM sets out the powers of the MMC[25] to deal with complaints or information on the misconduct of any practitioner, including the procedure for inquiries and the sanctions that can be imposed. Under section 3.1 of the CPCM, "[t]he utmost respect for human life should be maintained even under threat, and no use should be made of any medical knowledge contrary to the laws of humanity". Violations of the sanctity of human life, such as torture or other forms of cruel, inhuman or degrading procedures, are considered to be a form of conduct that detracts from the reputation of the profession.

Another health care guideline that is worth mentioning is the Patient's Charter, which takes the form of a memorandum of understanding between the Federation of Malaysian Consumers Associations, the MMA, the Malaysian Dental Association and the

[24] Under the Hippocratic Oath, a doctor must make the following statement: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion"; and in the International Code of Medical Ethics, which is based on the modern restatement of the Hippocratic Oath known as the Declaration of Geneva, the first duty of the doctor in treating patients is that he or she "must always bear in mind the obligations of preserving human life".

[25] The disciplinary jurisdiction and power of the Council to impose punishment is mandated in sections 29 and 30 of the Medical Act 1971.

Malaysian Pharmaceutical Society, evincing their commitment towards promoting and enhancing the high standard of professional and ethical conduct in the respective areas of health care, as well as to protect and educate patients of their rights. The Patient's Charter is to be treated as an educational document that embodies the CME, and correspondingly integrates the autonomous rights of patients in medical care. This is evident from several provisions under one of the two main sections of the Patient's Charter, which are known as Patient's Right.[26] The Right to Choice of Care[27], Right to Adequate Information and Consent[28] and Right to Participation and Representation[29], for instance states that the patient is entitled to adequate information and consultation relating to his medical treatment, and thereupon the right to consent or refuse prior to any procedure being carried out. This includes the patient's right to partake in medical decision making.

CLOSING

The right to enjoy good health and unhindered access to health care services are guaranteed constitutional rights in Malaysia. Both the regulatory and institutional frameworks in the health care system are designed to ensure that such rights are protected at every level, from the laws promulgated by law-making bodies to the policies, ethical codes and guidelines issued by the MOH, MMC, MMA and other medical societies. The preservation of the fundamental liberties conferred by the FC however, are not entirely unqualified and are subject to certain legal limitations, which are intended to safeguard against infractions to the social fabric and protect the greater good of societal interests. The importance of this balance has never been more apparent than in current times i.e. in terms of managing the COVID-19 pandemic, where such individual rights to a certain extent must submit and acquiesce to the necessity of protecting public interest.

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[27] Clause II of Patient's Right.
[28] Clause IV of Patient's Right.
[29] Clause VI of Patient's Right.

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