

DOES A LEGAL FRAMEWORK FOR MENTAL HEALTH EXISTS IN MALAYSIA?

by

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INTRODUCTION

The COVID-19 pandemic in 2020 and 2021 and the lengthy lockdowns that followed brought to the forefront rising mental health disorders plaguing Malaysia. In 2015, the Ministry of Health's National Health and Morbidity Survey ('NHMS') indicated that one out of three Malaysians struggles with mental health issues.^[1] The recent 2019 NHMS indicated a growing problem with children struggling with mental health issues.^[2] In fact, worldwide, one in every eight people lives with a mental disorder that ranges from anxiety disorders, depression, bipolar disorder and schizophrenia.^[3] Having a formal legal framework allows policies and laws to be established, as well as meeting the needs and supporting the recovery of people with mental illnesses.^[4] As such, aside from the States' commitments, a formal legal framework recognising the right to mental health is crucial to addressing and reducing the growing mental health issues plaguing Malaysia.

INTERNATIONAL RECOGNITION OF THE RIGHT TO HEALTH AND THE RIGHT TO MENTAL HEALTH

The earliest affirmation of health as a right can be found in a declaration under Article 55 of the United Nations Charter 1945.^[5] The recognition of health as a human right resulted in the establishment of the World Health Organization in 1948 ('WHO'). Under the WHO Constitution, it is the fundamental right of every human being to have the highest attainable standard of health.^[6] Further, under the WHO Constitution, health includes not only physical health but also mental and social well-being.^[7] As a fundamental right, States are obligated to provide sufficient and quality access to appropriate, reasonable, and accessible healthcare and services. Since then, health has been upheld as a right that is part of an

adequate standard of living under Article 25 of the Universal Declaration of Human Rights 1948 ('UDHR')^[8] and subsequently affirmed under Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').^[9] The right to health, healthcare and mental healthcare has also been recognised in subsequent international treaties. The right to health is affirmed under Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'),^[10] Article 24 of the Convention on the Rights of the Child ('CRC')^[11] and Article 25 of the Convention on the Rights of the Persons with Disabilities ('CRPD'),^[12] all of which Malaysia has acceded.^[13] At a regional level, Malaysia has committed to providing the right to health under Articles 28, 29 and 30 of the ASEAN Human Rights Declaration.^[14] In acceding to these Conventions, States (including Malaysia) have a core obligation to provide not only for physical but mental health as well. As such, States are accountable for meeting the mental health rights obligations including providing mental health care facilities and services.^[15]

Aside from the recognition of the right to mental health, advocacy for the right to mental health has steadily gained traction with the United Nations Human Rights Council. In 2016, the United Nations Human Rights Council called for the need to integrate the human rights perspective into mental health fully.^[16] This key resolution was at the heels of 73 States of the United Nations issuing a joint statement stressing the importance of mental health to realise the right to health.^[17] In 2020, the United Nations Human Rights Council called for States to update and strengthen existing laws and policies to support a paradigm shift in mental health.^[18]

THE MALAYSIAN FEDERAL CONSTITUTION AND THE RIGHT TO MENTAL HEALTH

Health is mentioned numerous times throughout the Malaysian Federal Constitution, particularly in terms of public health and the continued appointment of members of legislature and judiciary.^[19] However, there are no specific provisions or recognition for the right to health within the fundamental liberties of the Federal Constitution. Whilst the right to health is not specifically

enumerated in the Federal Constitution, Article 5(1) of the Federal Constitution has been the continued point of reference in recognition of the right to health by the State.^[20]

Similar to the Malaysian Federal Constitution, the Constitution of India does not expressly recognise the right to health as a fundamental right. However, the Supreme Court of India has observed that the word “life” under Article 21 of the Constitution of India includes the right to health, which is an inherent and inescapable part of a dignified life.^[21] The Supreme Court of India soon followed by reaffirming that there is an obligation on the State to provide for the right to health^[22] as well as adequate medical aid to every person and strive for the welfare of the public at large pursuant to Article 21 of the Constitution of India.^[23]

The Federal Court in *Dato’ Menteri Othman Baginda & Anor v. Dato’ Ombi Syed Alwi Syed Idrus*^[24] has previously explained that the Federal Constitution is a living legislation and must be construed broadly and not in a pedantic way. The recent Federal Court decision in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor*^[25] has cast doubt on whether Article 5(1) of the Federal Constitution could be read broadly. However, the approach taken by the Federal Court rested solely on the interpretation of the word “personal liberty” and not on the concept of “life” under Article 5(1) Federal Constitution. As such, taking guidance from the Indian Supreme Court decision as well as the prismatic interpretation of “life” under Article 5(1) of the Federal Constitution by the Federal Court in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor*,^[26] the “right to life” under Article 5(1) of the Federal Constitution could and should be read generously to include the right to health (not only of physical health but also mental health), implicitly imposing an obligation on the State to provide adequate mental healthcare.

LEGAL FRAMEWORK FOR THE RIGHT TO MENTAL HEALTH

Legislation, specifically for mental health, is important to protect the rights of people with mental health issues. A clear legal framework for mental health addresses critical issues involving community integration, providing and

improving access to high-quality care and protecting and providing rights to housing, education, and employment.^[27]

Malaysia's first legal framework for mental healthcare was the Lunatic Ordinance (Sabah) 1951.^[28] This was followed by the Mental Disorders Ordinance 1952^[29] in Peninsular Malaysia and the Mental Health Ordinance (Sarawak) 1961.^[30] Since then, the current legal framework surrounding mental health in Malaysia encompasses a set of policies and legislations. The primary legislation is the Mental Health Act 2001 ('MHA') and Mental Health Regulation 2010 ('MHR') which replaced the Mental Health Ordinances. The MHA only came into operation in 2010 when the MHR was adopted. The legislation consists of an amalgamation of laws relating to mental disorders, provisions of care (admission, detention, care, treatment, rehabilitation) and the protection of persons with mental disorders.^[31] The introduction of the MHA and MHR was considered a turning point for the mental healthcare system in Malaysia in providing detailed policy guidelines on mental healthcare services in Malaysia and meeting WHO recommendations. The MHA provides guidelines for delivering mental healthcare in Malaysia and establishing private and government psychiatric hospitals, psychiatric care homes and community mental health centres. As the MHA includes establishing private healthcare facilities, the Act is to be interpreted together with the Private Healthcare Facilities and Service Act 1998.

The MHA covers patients with mental health disabilities and defines mental disorders as "mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired".^[32] Critical aspects of the MHA include the admission of voluntary patients and involuntary detention of patients with mental health issues. Patients with mental disorders can be admitted to a psychiatric hospital as voluntary patients upon their request.^[33] Patients suspected of having a mental disorder pursuant to the recommendation of registered medical professionals can be admitted involuntarily into psychiatric hospitals, particularly in the interest of their own health or safety, as well as for the protection of the general public.^[34]

The MHA provides for the appointment of public and gazetted private psychiatric hospitals and psychiatric nursing homes in Malaysia to ensure that patients with mental disorders have access to healthcare facilities and services.^[35] The MHA requires the quality of psychiatric healthcare facilities and services to be continuously upheld and monitored.^[36] Another key aspect of the MHA is the development of community mental health centres as part of the move to community-based care. This move is part of the State's mental health policy to support Malaysia's deinstitutionalisation of mental healthcare.^[37] Community mental healthcare services include community-based rehabilitation services, hospital diversion programmes, mobile crisis teams, therapeutic and residential supervised services, and home help and support services in the community.^[38]

The MHR, on the other hand, sets down the expected standard and care required for patients with mental disorders in both public and private healthcare psychiatric facilities, including minor and geriatric patients.^[39] In addition, the MHR provides patients with clear rights and duties to protect these rights, especially regarding treatment, information, confidentiality, personal identity, and privacy.^[40] There are also clear guidelines under the MHR regarding controversial treatment plans, including electroconvulsive therapy and using restraints and seclusions.^[41]

Part of the mental healthcare legal framework also includes the National Mental Health Policy ('NMHP') that was introduced in 1998 and subsequently revised in 2012. There are five key components to the NMHP; advocacy, promotion, prevention, treatment, and rehabilitation, with the aim to provide comprehensive strategies and guidelines to address mental health issues. In addition, in 2002, the Malaysian Mental Health Framework was introduced as a scheme for planning and implementing mental health services in Malaysia to provide a comprehensive range of mental health services for all age groups in Malaysia.^[42] Soon after the MHA came into force, the Ministry of Health introduced the Psychiatric and Mental Health Services Operational Policy in 2011 to provide integrated psychiatric services between institutionalised and community mental healthcare providers.^[43]

Patients with mental disorders are also considered persons with disabilities and directly protected under the Person with Disabilities Act 2008^[44] ('PDA'). The PDA followed the State's ratification of the Convention on the Rights of Persons with Disabilities ('CRPD') in 2010. The CRPD was a landmark convention to guarantee equal opportunities for persons with disabilities, particularly in terms of health, education and employment. In line with the provisions under CRPD,^[45] the PDA defines persons with disabilities to include those who have long-term physical, mental, intellectual, or sensory impairments affecting their full and effective participation in society.^[46] Under the PDA, the State seeks to provide equal social protection in areas of health, rehabilitation, education and employment.^[47] One key concern for patients with mental disorders is the right to continued and secured employment. Under PDA, employment is a right and employers are required to provide safe and healthy working conditions.^[48] In addition, employers have a social responsibility to provide stable employment, favourable workplace conditions, and reasonable accommodations for patients with disorders and mental health conditions.^[49] To be afforded protection and rights under the PDA, persons with mental disorders must register with the Registrar General for Persons with Disabilities.^[50]

CONCLUSION

As highlighted, implementing a mental health framework in Malaysia is crucial to address the growing mental health issues plaguing Malaysia. Malaysia has a long history of providing and protecting the right to mental health.^[51] Whilst the right to mental health is not clearly enunciated within the Malaysian Federal Constitution, a broad reading of Article 5(1) indicates that there is recognition for the right to health and, by extension, the right to mental health. The current legal right to mental health framework not only encompasses specific legislation on mental health through the MHA and MHR but also extends to the PDA. An analysis of the current mental health framework indicates that critical issues involving community integration, providing and improving access to high-quality care, and protecting and providing a right to mental health are addressed. However, the way forward, as mooted by the United Nations Human Rights

Council, is for the current mental health framework to be updated and strengthened to support the paradigm shift in mental health.^[52]

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Endnotes:

[1] Jayan Gnanapandythan, Juanita Halili and Zalilah Abdullah (eds), *National Health and Morbidity Survey 2015: Volume III* (Institute of Public Health, Ministry of Health, 2015) 1–403 <<https://www.moh.gov.my/moh/resources/NHMS2015-VolumeIII.pdf>>.

[2] Chan Ying Ying et al (eds), *National Health and Morbidity Survey 2019: Non-Communicable Diseases, Healthcare Demand and Health Literacy* (National Institutes of Health, Ministry of Health Malaysia, 2019) 001–386 <https://iku.moh.gov.my/images/IKU/Document/REPORT/NHMS2019/Report_NHMS2019-NCD_v2.pdf>.

[3] 'Mental Disorders: Key Facts', *World Health Organization* (Web Page, 8 June 2022) <<https://www.who.int/news-room/fact-sheets/detail/mental-disorders>>.

[4] 'Promoting rights-based policy & law for mental health', *World Health Organization* (Web Page) <<https://www.who.int/activities/promoting-rights-based-policy-and-law-for-mental-health>>.

[5] *Charter of the United Nations*.

[6] *Entry into force of the Constitution of the World Health Organization*, UN Doc A/RES/131 (17 November 1947).

[7] *Ibid.*

[8] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art. 25.

[9] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art. 12.

[10] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') art. 12.

[11] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC') art. 24.

[12] *Convention on the Rights of Persons with Disabilities*, UN Doc A/RES/61/106 (24 January 2007) ('CRPD') art. 25.

[13] Malaysia ratified the CEDAW on 5 July 1995, CRC on 17 February 1995 and CRPD on 19 July 2010.

[14] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration* (18 November 2012) arts. 28–30.

[15] *Human Rights Council, Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/34/32 (31 January 2017) 4.

[16] *Human Rights Council, Resolution adopted by General Assembly on 1 July 2016*, UN Doc A/HRC/RES/32/18 (18 July 2016).

[17] United Nations Human Rights Office of the High Commissioner, 'The Right to Mental Health' (Web Page) <<https://www.ohchr.org/en/special-procedures/sr-health/right-mental-health>>.

[18] *Human Rights Council: Resolution adopted by General Assembly 19 June 2020*, UN Doc A/HRC/RES/43/13 (1 July 2020).

[19] Federal Constitution arts. 9, 11, 48, 119 and 125.

[20] Article 5(1) of the Federal Constitution states: "No person shall be deprived of his life or personal liberty save in accordance with law".

[21] *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* AIR 1981 746.

[22] *Bandhua Mukti Morcha v. Union of India & Ors* AIR 1984 SC 802.

[23] *Paschim Banga Khet Mazoor Samity v. State of West Bengal* [1996] 4 SCC 37.

[24] *Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ Rep 98; [1984] 1 CLJ 28; [1981] 1 MLJ 29.

[25] *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750.

[26] *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 at page 800; [1996] 1 MLJ 261 at page 288.

[27] World Health Organization, *Comprehensive Mental Health Action Plan 2013–2020* (Geneva, 2021) 7–15.

[28] Lunatics Ordinance (Sabah) 1951 (Cap. 74).

[29] Mental Disorders Ordinance 1952 (Ord. 31 of 1952).

[30] Mental Health Ordinance (Sarawak) 1961 (Sarawak Ord. 16 of 1961).

[31] Marhani Midin et al, ‘Mental Health Services’ (2018) 32(4) *Taiwanese Journal of Psychiatry* 281–293, 283.

[32] Mental Health Act 2001 [Act 615] s. 2(1).

[33] *Ibid* s. 9.

[34] *Ibid* s. 10.

[35] *Ibid* ss. 3, 4, 26–31.

[36] *Ibid* s. 49.

[37] Sheua Tsuey Chong, MS Mohamad and Ah Choy Er, ‘The Mental Health Development in Malaysia: History, Current Issue and Future Development’ (2013) 9(6) *Asian Social Science* 1–8, 5.

[38] *Ibid*.

[39] Mental Health Regulations 2010 [*PU(A) 206/2010*] ss. 4–19, 31–42.

[40] *Ibid* s. 43.

[41] *Ibid* ss. 20–30.

[42] Midin et al (n 31).

[43] *Psychiatric and Mental Health Services Operational Policy* (Medical Development Division, Ministry of Health Malaysia, November 2011) <https://www.moh.gov.my/moh/images/gallery/Polisi/PSYCHIATRY_OPERATIONAL_POLICY.pdf>.

[44] Nurhidayah binti Abdullah, Hanira binti Hanafi and Nur Izzati binti Mohd Hamdi, ‘The Right of Persons with Disabilities in Malaysia: The Underlying Reasons for Ineffectiveness of Persons with Disabilities Act 2008’ (2017) 1 *International Journal for Studies on Children, Women, Elderly and Disabled* 127–134, 129.

[45] CRPD art. 1.

[46] Persons with Disabilities Act 2008 [*Act 685*] s. 2.

[47] *Ibid* ss. 26–37.

[48] *Ibid* ss. 29(1) and (2).

[49] *Ibid* s. 29(3).

[50] *Ibid* s. 20.

[51] *Entry into force of the Constitution of the World Health Organization* (n 6).

[52] *Human Rights Council* (n 18).

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