

# Contemporary Issues in Malaysian Medical Law: Harmonising the Common Law with Local Specificities

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# Introduction

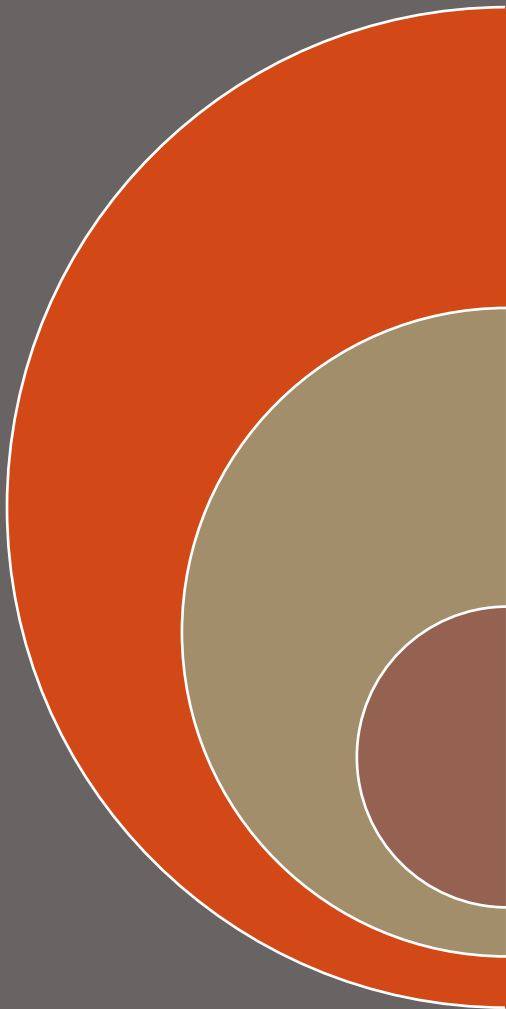
## The 3 disciplines

**MEDICINE** – the science or practice of the diagnosis, treatment, and prevention of disease - deals with precious commodities  
**Life & Health**

**ETHICS** – a system of moral principles and a branch of philosophy which defines what is good for individuals and society- **a subset of Morality** –the right and wrong in society

**LAW** – a system of rules which regulates behaviour – an instrument of **social regulation**- intervenes into all spheres of life

# THE INTEGRATION



## Medical Profession


- Expected to act on the basis of **morality and be altruistic** professionals
- Trusted to do what is best for their patients – Hippocratic Oath

## Medical Ethics

- Concerned with the application of general **ethical principles to the moral problems** of the medical profession - influenced by **religion, belief or philosophy**
- Paternalistic in nature

## Legal Intervention

- The need for intervention to protect society - rights and liabilities need to be laid out
- **every legal duty is founded on a moral obligation** - Lord Coleridge in R v Instan [1893]



MY BODY  
MY CHOICE

# Ethical Conflict in **CONFIDENTIALITY**

## Confidentiality & Patient Autonomy

- Respect for the patient's sense of individuality and privacy
- Hippocratic Oath
- Declaration of Geneva – “I will keep the secrets that have been confided in me, even after the patient has died”

## Beneficence & Non-Maleficence

- Justifications for Breaching Confidentiality as patient will be harmed
- Patient's actions may be harmful to society
- Protective Privilege Ends when Public Peril begins

# *It is an amanah....*

- When the doctor receives information from his patient, it is considered part of his **amanah (trust)** not to disclose the information to others without the patient's permission.
- Our bodies, our souls, our eyes, our ears, our intellect, our provisions, our clothing, our homes, are bounties of Allah s.w.t. and has to be either returned back to Allah s.w.t.
- **Surah al- Isra', verse 36**, Allah s.w.t. states to the effect: **"The hearing, sight and hearts will all be questioned (The Holy Qur'an, 17:36).**

# Respecting Privacy...

- The Prophet Muhammad p.b.u.h has also stated that **“The believer is not one who defames, slanders, nor is obscene”** (Sahih al-Tirmidhi, Vol. 28, Hadith No.1977).
- The **Islamic Charter of Health Ethics** provides that: **“A doctor may not disclose a personal secret that has come to his knowledge through the performance of his profession, whether the patient confides the secret to him, or the doctor comes to know it in the course of his work”** (at Article 29).

# Ethical Conflict in EUTHANASIA

## Sanctity of Life

- “utmost respect for human life” – all life is sacred on purely religious grounds, on the premise that all life comes from God.
- Life can only be taken away through due process of law

## Quality of Life

- “whether a particular patient has the capacity or potential to lead a normal life, that is, experience all the five senses and the life experiences that a normal person would.”



# Sanctity of Human Life in Islam

- Islam, like other religions, upholds the sanctity of life. It has made the preservation and welfare of a human being in second place after the preservation of religion. **It forbids killing except for a legitimate cause.**
- There are a number of verses in the Holy Qur'an which placed emphasis on the sanctity of life.
- **“And do not take any human being's life which Allah has willed to be sacred otherwise than in pursuit of justice.” (17:33)**

# To seek cure for every disease

- Hadiths:
- “Allah does not create any disease without its respective medicine”
- “For every disease there is a cure”

# Prohibition of suicide

- Clear sources from the Qur'an and hadith illustrate the sanctity of human life, prohibition of killing a human being with no justification, and prohibition of killing one's self.
- In **Surah al-Hajj**, Allah swt stated to the effect: "It is He who has given you life, then He will cause you to die, and then will bring you back to life. Man is indeed ungrateful.

# The Rule...

- Killing a person to ease his suffering even though it is at the request of the person **will be inconsistent with Islamic law**, regardless of the different names given to the procedure, such as, active voluntary euthanasia, assisted suicide or mercy killing.

# To persevere patiently...

- A person in such situation persevere patiently with the available medical treatment as the reward for such patience in the Hereafter is tremendous as promised in **Surah al-Zumar**, in which Allah swt stated to the effect: “And those who patiently persevere will truly receive a reward without measure.”

# However, it is...

- Not obligatory to administer medical treatment, which is ruled to be definitely useless or futile, particularly if the patient is brain-stem dead and there is no hope of recovery at all – Yusuf Qardawi.
- Even though, such medical treatment is withheld, the basic human rights of the patient, which include being provided with food, drink, nursing, and relief from pain must still be provided.

# Changing Trends

## Rapid Growth of Technology

- Advent of Internet and Social Networks
- Patients become more **literate and knowledgeable**
- Very questioning

## Commercialisation & Privatisation

- Increase in private healthcare institutions – growth of healthcare insurance
- Payment for healthcare services now a norm
- Development of **Consumerist Attitudes**

# IMPLICATIONS

## Higher Expectations

- Patients tend to be '**Over Optimistic**' and at times '**Perfectionist**'
- Healthcare Services are expected to be Excellent
- No longer Tolerant to Substandard Services

## Litigation Prone Society

- Demanding for Higher Accountability
- Demanding Justice through the Court Law
- '**The Name, Blame and Shame**' Culture



# THE DECLINE OF MEDICAL PATERNALISM

## Medical Paternalism

- ❑ Interference by the doctor with the patient's freedom of action, justified on the grounds of the patient's best interest.
- ❑ Patients cannot make balanced judgment.

## Patient Autonomy

- ❑ Each patient is ideally entitled to determine his or her own health destiny.
- ❑ The capacity to think, decide and act on the basis of such thought and decision freely and independently.



## Nation [Home > News > Nation](#)

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# Group calls for guidelines on issuance of directive

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KUALA LUMPUR: Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism called for clear guidelines on the issuance of Medical Directive (AMD).

Its president Jagir Singh said the next-of-kin of patients must also be clear on the implications of the directive for better management of their cases.

"The decision of next-of-kin must also have legal protections to avoid any complications later," said Jagir.

He said the AMD would be useful for patients who had pledged to donate organs.

Malaysians Against Death Penalty & Torture (Madpet) coordinator Charles

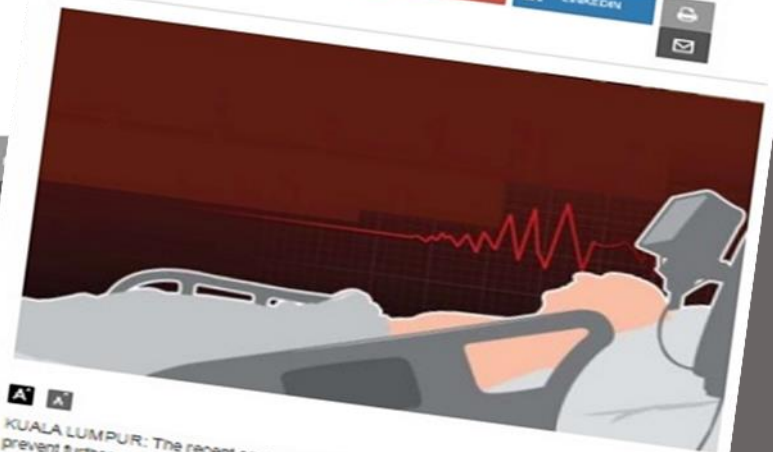
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# 'Living will' for the terminally ill

BY M. MAGESWAR

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KUALA LUMPUR: The recent case of a terminally ill American woman who ended her life to prevent further suffering sparked global debate on the subject, including Malaysia. Brittany Maynard, 29, who had end stage brain cancer, died on Nov 1 by taking a fatal dose of barbiturates prescribed to her legally by a doctor, under the state of Oregon's Death with Dignity Act.

Although euthanasia or assisted suicide is illegal in most countries of the world, there are also legal avenues for the terminally ill in Malaysia to issue an advance medical directive (AMD) to determine the treatment they want or do not want.

The AMD, or "living will", gives such patients a greater say in how they want to die before they lose their decision-making capacities and provide doctors guidelines to implement their wishes.

Recent calls by medical and religious communities for increased awareness and proper guidelines to be issued on advance directives

# Leading to Legal Intervention



- The patient expects the law to give him dignity, respect, independence, autonomy, information and self-determination.

# Malaysian Federal Court in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007]

- ... In my view however, a **COURT HAS A RIGHT TO STRIKE DOWN SUBSTANDARD APPROVED PRACTICES** when common sense dictates such a result. (1982) **“No profession is above the law and the courts on behalf of the public have a critical role to play in monitoring and precipitating changes where required in professional standards.”**

# THE LEGAL SOLUTIONS

- ❖ **Legal solutions play a pivotal and consequential role in addressing such issues. ethical, philosophical and religious dilemmas**
- ❖ **Law functions as a means of controlling the ethical conduct of the medical profession in safeguarding societal demands and interests.**

# Amongst the main SOURCES OF MALAYSIAN MEDICAL LAW

1. **Legislations**
2. **English Common Law – Sec 3 of the CLA 1956**  
*- apply the common law of England and the rules of equity as administered in England on the 7 April 1956*
3. **Judicial Cases – influence of Commonwealth countries' court decisions – eg Australia, Canada**

# Solving Contemporary Issues...

- **Require reflections on rigidity of the English Common Law in several areas in Medical Law**
- **Require understanding the local circumstances – what is suitable for the Malaysian society**
- **Require the considerations of cultural and religious beliefs**
- **Ultimately ... Require HARMONISATION with LOCAL SPECIFICITIES ... the quality of being particular and pertaining to a specific case - "the particularity of human situations"**