

A Pandemic of Power Relations: Bio-Constitutional Implications of Commodification of the Right to Health, & Endemic Inequalities in a De-Globalising Malaysia

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Abstract

This chapter examines the bio-constitutional implications of commodification theory in the right to health, and endemic inequalities in Malaysia, which, I posit, contribute to Malaysia's descent into de-globalisation. These twin concerns have been exacerbated by the SARS-CoV-2 pandemic, forcing us to look behind Malaysia's glittery mask of grandeur. This revelation demonstrates widening cracks in Malaysia's fundamental regulatory systems, a failure in democratic governance by the State, and questionable access to distributive and substantive justice in the sphere of healthcare and general citizen welfare. Moving in a downwards spiral into the chronicles of populism and the emergence of an 'illiberal' democracy, and the persistent tug-of-war and leap-frogging between members of political parties since the Sheraton Move, Malaysia currently faces one of its worst constitutional crises. Whilst the political elites of the nation continue to grapple for power, her citizens reel in the wake of a country whose large populace languish in poverty, their constitutional rights 'suspended', taking her away further from the global stage that she had an opportunity to command.

Introduction

In the course of the last three decades, medical and scientific technologies have developed so tremendously that present-day possibilities of biomedical technologies have not been foreseen. Contemporaneously with this development, global bio-capitalism and the promise for the improvement of human lives have equally flourished, fuelled by wondrous imaginaries shaped through laws and social thought. As key players in global biomedicine recently made tremendous leaps and bounds in producing vaccines for the SARS-CoV-2 virus, and the world races to vaccinate as much of the population as is humanly possible, our community of global citizens continue to flock into the height of the digital age. However, continual and new concerns emerge for not only legislators, policy makers and market stakeholders, but also for individuals when faced with a novel circumstance such as the current pandemic. In these times, where heightened security and safety is of paramount concern, I posit that a fundamental alteration in Malaysia's rising position as a potential leader in Southeast Asia is marred by an increasingly worrisome narrative that hearkens its pre-developmental stage.

In Malaysia, the simultaneous chronicles of populism and the emergence of an 'illiberal' democracy (Sajó & Tuovinen, 2018), similar to countries in the Eastern Bloc in Europe, and are framed with neo-liberal (Barry et al., 1996) underpinnings, have proved thus

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far damaging to its citizens and itself. Whilst Malaysia's political situation has always attracted mixed criticism, the emergence of the Covid-19 virus, reaching the height of its virulence in early 2020, demonstrates a government lacking in both leadership and empathy for its people. Beyond the continual state of emergency that has been imposed in Malaysia for purposes of public safety, the turning point in the narrative of Malaysia's pre-Covid-19 political crisis (Kurlantzick, 2020) occurred through the birth of a modified 'democracy' coinciding with the World Health Organization's declaration of Covid-19 as a pandemic (WHO, 2020). This revised perception of a 'democratic' back-door government (Head, 2020), has largely been tolerated because of the pandemic, although it has quickly altered the manner in which fundamental rights operate in Malaysia (Shitindo, 2020). It also raises genuine questions about the sanctity and supremacy of Malaysia's Federal Constitution. If the Sheraton Move (Bowie, 2021), can be regarded as a constitutionally-legitimate *coup d'etat*, what does this say about the constitutional integrity of the country? What does this imply for the rule of law and democracy and a government (elected by its citizens) that now no longer have a place in the country's governance? This recalls to mind the notions of populism and an illiberal democracy.

The concept of an 'illiberal democracy' has a recent history, first introduced by Fareez Zakaria (Zakaria, 1997) where he states that the rise of illiberal democracies has been difficult to gauge, because the term 'democracy' is often interpreted to mean "liberal democracy, a political system marked not only by free and fair elections, but also by the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion and property." (Zakaria, 1997, p. 22). Most recently in 2018, the concept of an 'illiberal democracy' became famously associated with Hungary's Prime Minister, Viktor Orban, who "emphatically and unequivocally expressed his support for illiberal democracy." (Plattner, 2019) Plattner provides a succinct account of what this term means:

In the ensuing years, especially with the global surge of populism, the theme of illiberal democracy has received growing attention. Populism, after all, is an outlook that emphatically claims to be democratic and that relies for its legitimacy on elections as expressions of the popular will. Yet when populists come to power, they tend to infringe upon the rule of law, the independence of the courts and the media, and the rights of individuals and minorities, as has been the case in Hungary. Moreover, these illiberal aspects of populism had begun to surface not just in countries lacking a liberal tradition but even in longstanding Western democracies.

With illiberal democracies on the rise (Hungary, Russia, the United States previously under former President Donald Trump, as examples), with Singapore being regarded as one such jurisdiction under the premiership of the late Lee Kuan Yew (Mutalib, 2000), it is perhaps not surprising to see Malaysia following this route. Whilst larger economies such as the United

States and Russia may go through cycles of illiberal democracy (Plattner, 2019), and may be able to push themselves out of such a situation, Malaysia may not be able to afford such luxury.

Throughout the course of the pandemic, and considering the political sleight of hand since the Sheraton Move, widening cracks have been shown in Malaysia's fundamental regulatory systems. A failure in democratic governance (Amnesty International, 2021), and questionable access to distributive and substantive justice in the sphere of healthcare (Dzulkifly, 2021) and general citizen welfare have contributed to growing dissatisfaction by the 'rakyat'. Whilst these are issues that have quietly crept up over the last couple of years and the divisiveness of politics in Malaysia is not unsurprising, the Sheraton Move (Bowie, 2021) proved to be the nail in the coffin that cemented Malaysia's inevitable descent into de-globalisation, marking the beginning of a new governance at the height of the pandemic in February 2020.

Any possible answers that we could have hoped for *vis-à-vis* a constitutional or regulatory framework of protection is often inadequate; either lacking uniformity, consensus, detail and coherence, or, as demonstrated currently, is in abeyance through the suspension of Parliament (Al-Jazeera, 2021), impinging on a reasonable exercise and pursuit of individual human rights in accordance with the Federal Constitution (Human Rights Watch, 2021). More recently, in August 2021, Malaysia saw a new Prime Minister, Ismail Sabri Yaakob, take the helm from Muhyiddin Yassin (Deutsche Welle, 2021), the latter of whom had been declared Prime Minister following the Sheraton Move in February 2020 (Head, 2020). These events can be destabilizing for a country such as Malaysia – in addition to the pandemic that has swept through the nation like wildfire, and the political circumstances around Malaysia's governance. These destabilizing events form the backdrop of this chapter's hypothesis.

Conversely, with Malaysia experiencing one of the most significant and worst constitutional crises in its history, and during the Covid-19 pandemic, this leaves open to the clutches of destruction, one of the most fundamental liberties of her people under the Federal Constitution: the right to health. Notwithstanding the fact that the Federal Constitution does not specifically express a "right to health", Part II of the Federal Constitution has been interpreted and widely accepted to include such right. (Islam, 2013). Malaysia's accession to international instruments that relate to the right to health, as well as its numerous legislation that address a multitude aspect of health and healthcare demonstrate the strong presence of this right in the country. Whilst there may be legitimate "state[s] of exception" (Agamben, 2005) where some fundamental rights may be held in abeyance, or where the rule of law may be circumvented in the name of the public good, the right to health is all the more compelling and

important during a pandemic such as Covid-19. Ironically, as Malaysia's leadership grappled with the devastating effects of Covid-19, its fumbblings along the way have actually resulted in more hardship for the 'rakyat', thereby moving further away from the right to health.

In the following sections, this chapter is divided into two key legal areas, which, I surmise, contribute to de-globalisation concerns in Malaysia. The first key legal area addresses the transformative effect of the pandemic on constitutional law, namely, bio-constitutionalism, and its implications on human rights in the country through commodification of the right to health (and broadly, of the human self). In this section, the key highlights implicate that Malaysia's peoples struggle to exercise their right to health, as they become "bio-political bodies" that are subjected to commodification of such right, necessitated *vis-à-vis* the power relations between State and individuals and altering the state of fundamental rights in the country. The second key legal area extends from this alteration of fundamental rights into the sphere of inequalities, more specifically the economic inequalities suffered by the B40 tier, the lower key income group in Malaysia, and their subsequent access to their right to health. Whilst this second key legal area, nor this chapter per se, is intended to be an economic analysis, highlighting the disparity of inequalities between the different income groups in the country serves to draw attention to the demise of human rights in the country, particularly aggravated by the pandemic. When these key legal areas are viewed as a holistic piece of a larger puzzle, the ensuing consequences that may lead to de-globalisation become apparent; and we continue to hope that Malaysia does not reach a point from which there is no return.

Section I: Bio-Constitutionalism and Commodification of the Right to Health in the Pandemic

This section examines the first key legal area, addressing a shift in bio-constitutionalism and how it impacts on human rights in Malaysia through commodification of the right to health. Bio-constitutionalism can be understood as a theory of constitutional law that analyses the relationship between constitutional frameworks and technologies, first coming to prominence in science and technology studies. It can be loosely summed up "to include a full range of sites and processes in which individuals work out their biopolitical relationships with the institutions that regulate them" (Jasanoff, 2011). Following Jasanoff's exposition, bio-constitutionalism "extends beyond the amendments and interpretations of legal texts to include constitutional practices and 'constitutional moments' which radically restructure state-society relations" (Krajewska, 2013, p. 3). As a constitutional theory, bio-constitutionalism is interested in the definition and classifications of rights and loci of decision making power" (Krajewska, 2013, p. 3). Whilst the pandemic may not classically fall within the categorization of 'technologies'

in the conventional sense that bio-constitutionalism envisages, the underlying relationship between life sciences, law, and government, considered in the wake of Covid-19, demonstrates the shift in the human rights constitutional framework in Malaysia.

In Malaysia, its people have experienced a successive chain of movement control orders imposed by the Federal government since March 2020, with each phase of movement control orders adjusted in accordance with the number of reported Covid-19 infections and cases in the country. Whilst these MCOs were initially welcomed as part of the government's measures to ensure public safety by curbing the increase of Covid-19 transmission in communities, the public perception and faith in the ruling government have dwindled (Kurlantzick, 2021). It cannot be denied that Malaysia had initially handled the emergence of the pandemic in an admirable manner, with early intervention measures, stringent lockdowns and a robust approach in emergency preparedness in its earlier days (Ratcliffe, 2020). However, this has been primarily credited to the Ministry of Health and Malaysia's Director-General for Health, Datuk Dr Noor Hisham Abdullah, who showed exceedingly high standards of professionalism, leadership, wisdom, courage and knowledge in leading Malaysia through the early dark days of the pandemic, and many regard him as a national hero (Arumugam, 2020). However, as political infighting continued, Malaysia, who had initially been praised for handling the Covid-19 outbreak, found itself prone to the fates that had already befallen many countries around the world.

Within the discourse of this section, the vexatious aspect concerns the right to health of Malaysia's people. The pandemic has brought to the fore crucial implications when law meets at the nexus of life and death (Hurlbut et al., 2020), prompting the need for desperate self-preservation through the commodification of self (Davis, 2003) and living. 'Commodification' in the context of this chapter refers to the "reorganization of our personal lives and relationships on the model of market relation" (Davis, 2003) with the need to now attribute a system of prioritizing the value of our bodies (Maloney, 2015) in the capitalist market. Within the context of what Marx refers to the "fetishism of commodities" (Marx, 2020), it can be posited that "when [a] product enters the market as a commodity, it is transformed into something transcendent, and its value is determined by market relations." (Chorbajian, 2020, p. 28). In these difficult times, Malaysians' access to their right to health have become a source of negotiation, with the pandemic revealing painfully deep crises of social, economic and health inequities that have been created by neoliberalism. Lisa Forman states (Forman, 2020):

The neoliberalism which was only nascent 25 years ago now dominates global decision-making, manifesting in reduced health spending for all countries (including under austerity)

and the growing deregulation, privatization, and commodification of health care like other social sectors.

The commodification of healthcare is certainly not a new phenomenon; it has existed in Malaysia for at least the last two decades and the Malaysian healthcare system, existing through both public and private schemes (Barraclough, 2000) deepens the rifts of commodifying healthcare. However, I suggest that the pandemic appears to have brought to light a new recognition that the *right* to health has also been commodified. As an example: when Malaysia announced that citizens in Selangor and Kuala Lumpur could opt-in and register for the AstraZeneca Covid-19 vaccine (Gangadaran, 2021), (as a pre-cursor to Malaysia's national vaccination plan), this was quickly proceeded by a desperate rush to register for the voluntary opt-in. Malaysia's registration application platform, MySejahtera, experienced grave technical difficulties; and frustration and complaints were abound on various platforms of social media, with people dismayed, angry, frustrated that registration could not take place (Povera & Arumugam, 2021). Whilst the opt-in vaccination appeared to be a reasonable plan in theory – in practice, this was limited to people in Selangor and Kuala Lumpur, effectively excluding the other states in Malaysia. This means that only persons in Selangor and Kuala Lumpur would be able to exercise their right to health, by registering their opt-in for the vaccination on an online platform and application. Analysing the layer of disparity one step further, we must also question if all persons in Selangor and Kuala Lumpur would have even had the opportunity to register on the MySejahtera platform, because it required one to either own a smartphone, or computer/laptop, and have internet access, ie the *opportunity* to exercise their right to health. Another example demonstrating blatant misconduct and a prevention of a person's exercise of their right to health is the fact some Malaysians have been 'vaccinated' with empty syringes (Zolkepli, 2021). Amidst allegations of these incidents being linked to the subsequent sale of these vaccines in the black market, and despite the insistence of the then Health Minister that this was not the case (The Star, 2021), it is unsettling to imagine that one's right to receive the vaccination, one's *right to health*, has been unduly compromised and commodified at the risk of their own life.

I posit that the commodification of the right to health now requires Malaysia's people to renegotiate their political and economic freedoms, to determine their individual 'value' in the market, to enable prioritization and declaration that one's right to health trumps over another, to enable them entitlement to early vaccinations, to medical treatment in hospitals (Chan & Perimbanayagam, 2021), to entry into supermarkets or food shops, or being able to be afforded the 'luxury' of working from home and not losing their employment. The

commodification of self and living, penetrating the core of legal, regulatory, administrative and general state governance as a new kind of social order, forces individuals to work out their ‘new’ bio-political relationships with the state during the pandemic: individuals, who embody and embed the commodification of life and death, whether through the supplication of vaccinations, or through economic displacement, or being able to reunite with family and loved ones across district borders.

If we employ a radical interpretation: such wilful commoditization within the control and governance of political systems, inter-locked with the exercise of fundamental rights of its people, are serious enough that they may have persistent effects straddling the border of Achille Mbembe’s concept of necropolitics (Mbembe, 2019), a more radicalized version of Michel Foucault’s bio-politics (Foucault & Gordon, 1980); referring to a conception of the “political making of spaces and subjectivities in an in-between of life and death” (Mbembe, 2019, p. 37). And in this space of life and death that is Covid-19 – and if a person dies “because of a set of other people’s decisions – decisions about the pricing of drugs, patent laws, economic policy, national priorities, and international sanctions. These had structured [their] environment in a way that made it impossible for them to survive.” (Wolff, 2012, p. 11) Paul Farmer, in his seminal work, *Pathologies of Power: Health, Human Rights and the War on the Poor*, refers to this phenomenon as “structural violence”. (Farmer, 2003).

Whilst it may be overly-critical to attribute structural violence to Malaysia for the deaths of its people in the fight against Covid-19, Malaysia’s ‘new’ democracy coupled with a stifling of legitimate rights, has the effect of drawing her further away from international norms of recognized human rights and closer to the de-globalisation process.

Section II: Extended Disparities in Economic Inequalities

Based on an assumption from the previous section, that commodification of the right to health and a shift in bio-political relationships between individuals and the state would affect all of Malaysia’s people in a similar way – this may attract the notion that all such suffering is equal. This is not the case. Commodification of the right to health, in fact, poses a much more serious problem when considered in light of the endemic inequalities in Malaysia (Lee et al., 2020). By this invocation, I posit that the consequences of such commodification *extend* the societal and economic disparities of individuals. Thomas Piketty questions how human societies can justify their inequities, with his key thesis honing into political and property regimes, a lack of will to challenge this “quasi-sacralization” of rights (Piketty, 2015), and the eventual “unjust disparities in income, wealth and political power” (Kaiser-Schatzlein, 2020). In a previous

monograph, I briefly traced Malaysia's relativist approach to both domestic and international human rights (Lau, 2019, pp. 263–266), but the vestiges of inequalities in Malaysia are much more complex than it reveals. Whilst much of inequality scholarship in Malaysia has been attributed to ethnic inequalities and divisiveness (Ravallion, 2020), the intention in this section is to focus on the economic (income) inequalities that have been magnified because of the pandemic (and, by extension, because of these inequalities, affecting the aims of social and distributive justice connecting to the right to health).

For the purpose of drawing attention to the discourse in this section, we refer to three key income groups in Malaysia, known as the T20, M40 and B40 tiers (S. A. Shah, 2021), measured in accordance with the Gini coefficient index (International Labour Office, 2016). Despite the Malaysian government's efforts to minimize the financial and economic impact of Covid-19, ranging from setting up a special Covid-19 fund for patients affected by quarantine procedures (A. U. M. Shah et al., 2020, p. 111), to the provision of funding to the Ministry of Health and an economic stimulus package (PRIHATIN package) for individuals and businesses (A. U. M. Shah et al., 2020, p. 112), these unfortunately have been a stop-gap measure. Studies conducted have shown that the pandemic has exerted difficulties and contributed to increased poverty on B40s, and small and local businesses (Rahman, 2020). I posit that these also extend to the B40s' access (or lack thereof) to effective communication, connectivity, and infrastructural availability to healthcare during the pandemic. Whilst there was evidence of (mostly) urban citizens' desperation to obtain access to the government's official vaccination website to opt-in for the AstraZeneca/Oxford Covid-19 vaccine (Dzulkifly, 2021), there is little indication whether the B40s are similarly able to access these initiatives at all, whether due to their economic conditions, literacy, lack of adequate network connectivity and smart devices, or location in rural areas, amongst others.

A report from the International Labour Organization provides detailed figures and analysis of the socio-economic impact of Covid-19 in Malaysia (Lim, 2020), showing that the plight of the B40s continue to be aggravated. Even with an economic stimulus provided by the government, it is still insufficient, as unemployment and poverty continue to plague Malaysia's ills to the point that many B40 families can no longer support themselves. Another report commissioned by UNICEF and UNFPA (UNICEF, 2021) revealed that many urban low-income households living in Kuala Lumpur could not even afford proper food for sustenance, having the need to resort to cheap vegetables and instant noodles, and that "loss of or reduced income requires behavioural modification including in food access and prudent spending on food" (UNICEF, 2021, p. 11). In these difficult times, the #benderaputih, or white flag

campaign was established at the community level, where lower income families that experienced distress during the lockdowns could fly a white flag as a plea for help (BBC News, 2021). Neighbours, volunteers, and other Good Samaritans came to the aid of these families, and while this sense of community and goodness is heart-warming, it is simultaneously a bleak sign of the times to come, indicative that the government cannot help its own people. Through these hard-hitting times, it is the spirit of volunteerism in Malaysia that displays the mettle of its people, whether these are volunteers in vaccination centres (Ladisma & Said, 2021), or in the early stages of the pandemic, volunteering to produce personal protective equipment (PPE) for hospital staff and front line workers (Tariq, 2020) or even reaching out to outposts in rural areas (Grunebaum, 2020).

The question that begs answering is this: if the plight of the B40s is such that a majority have been pushed headlong into extreme poverty, or if they cannot afford basic essentials such as food – how may they be expected to exercise their right to health, to access vaccinations and to protect themselves from the further severity of Covid-19 infections and effects? This recalls to mind the conception of Paul Farmer’s “structural violence” – particularly, Amartya Sen’s foreword that hearken to the asymmetry of power, and how that asymmetry can generate “a kind of quiet brutality” (Farmer, 2003). Although Malaysia is currently progressing more positively in its national vaccination program, its national recovery plan in progress (Tan, 2021), and with promises by its new Prime Minister for a robust recovery (Yusof, 2021), businesses and traders that have suffered severe economic losses during the pandemic and the numerous lockdowns, for instance, are unconvinced that the government’s National Recovery Plan will be successful (Zahid, 2021).

In terms of income and economic disparity, other pertinent studies remind us of a trend during the pandemic, where “the highest income group took the opportunity to invest in the financial market to gain additional cash, compared to the affected group who used the money to pay the necessary bills” (S. A. Shah, 2021). If the pandemic has made clear one thing – it is also the fact of economic reality and divisions between class and race in society – a kind of position within “newly regularized social relations” (Bratton, 2021, p. 133) where some have the comfort to “tap the glowing screen and food appears on your doorstep.” For the economy to reach a point of stabilization, this depends on a whole-of-the-team approach, for governments to support and trust the actions of public health authorities to keep the virus within control. This also means taking care of the B40s, who are subject to a literal matter of life and death through negotiating their own “biopolitics” with the state (Bratton, 2021, p. 11).

Conclusion

It is irrefutable that the pandemic has caused a deglobalisation process in general (Irwin, 2020) – countries did (and some still do) enforce locked international borders, interrupting the pre-pandemic flow of business, goods, capital and workers; production of goods and key industries were halted for extended periods of time, with even the G7 countries experiencing massive economic burdens (Barua, 2020). In the case of Malaysia, therefore, it is necessary to acutely reflect on its post-pandemic politics “both in terms of how the state interacts with society as well as in terms of how a human society that is utterly planetary in scope knows itself, models itself, and attempts to compose, organize and care for itself through various mechanisms” (Bratton, 2021, p. 12). De-globalisation can additionally be debilitating, especially when we consider Malaysia’s polarizing stance on the international stage, by its non-signing and non-ratification of a key international instrument, the International Covenant for Economic, Social and Cultural Rights (ICESCR) (Bon Tai Soon, 2015), particularly more jarring when its neighbours such as Indonesia, Thailand, and the Philippines have done so. The key provisions in the ICESCR (*International Covenant on Economic, Social and Cultural Rights*, 1966) that are particularly pertinent to the pandemic include, amongst others, ensuring that individuals have an adequate standard of living, with sufficient food, clothing and housing (Article 11), and health to the highest attainable standard of physical and mental health (Article 12). Bratton’s statement sums this position up as follows (Bratton, 2021, p. 13):

The anarchic state of international politics in which nations close from one another and compete for resources such as data or vaccines – when it needn’t be a zero-sum game – is both unnecessary and dangerously uncoordinated.

An accession to human rights on an international level may be the critical nudge needed for Malaysia’s recovery and may be a turning point that pivots from the holds of further deglobalisation. It is, however, only one aspect in a series of necessary events leading to a reformed model of political and socio-economic governance. Malaysia needs to critically and indubitably reflect and implement serious action on the state of its post-pandemic politics: it must be inclusive, unified, restorative and rationalist. Whilst it is also easy to presume that biopolitical power relationships do not exist between individuals and the state, because “they are difficult and disturbing...[it is] ultimately another way of allowing biopower to be exercised without accountability” (Bratton, 2021, p. 17). It is worth recalling, at this juncture, the United Nations’ Development Programme call for nations to “dramatically overhaul policies and invest in public health, economic stimulus, and social safety nets, to help countries recover faster from the Covid-19 pandemic” (UNDP-RDAP, 2020). Indeed, an opportunity for

“redressing inequality between groups, including ethnicity and gender, will require continual, and more systematic, policy responses” (Lee et al., 2020).

At the heart of it, Malaysia has looked away long enough from the causes and effects of its own “structural violence”. With the installation of its new Prime Minister and a new government, yet again, a government which has circumvented the constitutional election processes – Malaysia must make a firm commitment to human rights and avoid the extremist descent into full de-globalisation, to critically and unabashedly review its power and connections to truly understand and prevent suffering of its people, and disentangle the squalor of political greed that has intertwined the social and economic rights of its people.

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