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Limitation towards Anti-Vaccine Group: Does It Violate Fundamental Right?

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ABSTRACT

The Covid-19 vaccination program was introduced by the Malaysian government to accelerate the rate of herd immunity within a short amount of time to protect the people from the Covid-19 virus. Despite the free immunization program and the proven ability to reduce the side effects of the virus, there are still people who refused to receive the vaccination programme for non-medical reasons. The recent restrictions imposed on the people who refused to receive the COVID-19 vaccine sparked the debate of whether it deprives the people of their fundamental rights under the Federal Constitution. Therefore, a question arises of whether the decision made by the government is morally or legally right. This article will cover the complete range of debates between legal positivists, who want to maintain a conceptual divide between law and morality, and those, such as natural theorists, who reject the idea of a law/moral separation on the matter concerning vaccination refusal and the restrictions imposed on them. Our findings indicate that the restrictions on vaccination refusal do not comply with the theories propounded by naturalists. However, the restrictions are in alignment with the legal positivists as it regards law and morality as within different ambits. So, the restrictions that come with the vaccination refusal do deprive the citizens of their fundamental rights but are in accordance with the Federal Constitution.

Keywords: vaccination refusal, restriction, naturalist, positivist, rights

INTRODUCTION

The purpose of vaccination has been historically proven to minimize the fatalities resulting from transmissible diseases.[1] Through herd immunity, unvaccinated people can be protected as the virus cannot spread when the targeted pathogen is less transmissible after receiving the vaccine.[2] The vaccine for the COVID-19 virus had been introduced by the World Health Organization (WHO) in December 2020.[3]

Recently, the Malaysian defence minister, Dato' Hishammuddin announced that the limitations imposed on the people who refused to receive the COVID-19 vaccine do not infringe the rights to their freedom under the Federal Constitution. The government had denied that the limitations are a form of discrimination towards the people who refused to receive the vaccine or known as 'anti-vaccine'.

This statement came after a fellow minister, Khairy Jamaluddin, the minister of health had announced the restrictions on the anti-vaccine a few days prior.[4] Khairy Jamaluddin mentioned that the people who refused the vaccine will be prohibited from eating in restaurants or entering public places such as malls. Meanwhile, people who have been vaccinated, they are allowed to proceed with their daily activities without any restrictions.[5] Therefore, these restrictions can be seen as an unfair treatment of freedom towards the people who refused the vaccine as it restricts their movements. However, it can be contended that their decision to not receive the vaccine will endanger the lives of others who had received the vaccine to protect themselves from the COVID-19 virus.[6]

The freedom of movement had been encapsulated in Article 9 of the Federal Constitution whereby the citizens of this country can move freely within this country subject to other laws pertaining to the Federation.[7] There are various schools of thought when it comes to defining the law, morality and rights such as naturalism, positivism, sociologism and realism.

However, this article only discusses the naturalism and positivism schools of thought as the issue of restricting anti-vaccines mainly deals with the right of freedom to move of a citizen. Human rights are the primary distinctions among both schools of thought as naturalists regard human rights are solely entitled to the people meanwhile positivists classified human rights as rights that were only recognized by the authority.[8]

NATURE OF LAW

The word ‘law’ is used, viewed, and interpreted in many different senses and is not limited to only the legal term. There are the laws of science, the laws of economics, the laws of nature and many others. Nevertheless, it gives the same definition in the same senses which means any set of uniform principles. While in the context of its relationship to society, it is defined as principles that govern and regulate human behaviors.

However, the term ‘law’ itself has no universally acknowledged definition. For a long time, legal, political, and social experts have been interested by the subject of "what is the true character of law," which has led to a search for the ideal vocabulary to define law. Everyone agrees that law is a system of rules that governs a society's behavior patterns. However, there is widespread dispute about the nature, content, and function of the internet in society. A variety of causes appear to be at the root of the disagreement. To begin with, the law is only one component of the normative system that governs and influences human behavior in society. [9]Moral and social rules also play an important role in society's efforts to control behavior even if they are less clear and formal in nature and content. It is difficult to establish a line between legal standards, which are the formal manner of controlling human activity, and moral and social prescriptions, which impact and control behavior as well. It's also difficult to separate between reasons for how the law operates in society and why people obey it and reasons for how society's other regulatory norms work and why people obey them. Law has also assumed many different forms and derived from many different sources throughout history and throughout civilization.[10] When compared to the law in modern civilization with an established system of law and justice administration, law in primitive and simple societies may relate to wholly different concepts.

When understanding the relationship between law and morality, it is vital to differentiate between three types of questions. Firstly, the empirical question where the conditional relationship between law and morality will be observed. For instance, when a judge adjudicates or interprets a law, the behaviour of whether he depends on his morality or not in decision-making will be observed.[11] Next, the second inquiry is a normative question which is how an officer of the law should morally behave when making a decision and whether the moral behaviour is exhaustive of the moral value or not.[12] Lastly, the question of conceptualism where the virtue or essence of the subject of discussion will be described thoroughly. Concepts are also used to differentiate subjects that are not within the scope of the subject of discussion.[13]

Following these characteristics to determine the relationships between law and morality, the decision by the government to impose the restrictions will be discussed empirically which refers to the behaviour of the government. Conceptually, the definition of law and morality will also be discussed. Moreover, normative questions which means the decisions that should have been made by the government will also be discussed in order to clarify the relationship between law and morality concerning the restrictions that were imposed on people who refused the COVID-19 vaccine.

NATURALIST VIEW

Many philosophers believe that there are certain principles that are superior to man-made law, which is known as natural law principles. Natural law principles govern not only the workings of nature, as the laws of physics do, but also what constitutes right human behavior. Any man-made law that is in contradiction with natural law, according to natural theorists, is not a true law. In modern parlance, we might state that a law must correspond to current moral norms in order to be part of a legal system: a law must be reasonable and fair from a moral standpoint.[14]

St Thomas Aquinas, a naturalist philosopher, stated that a law that does not conform to natural or divine law is not law at all. The maxim *lex iniusta non est lex* (an unjust law is not law) is commonly used to express this. Aquinas appears to have stated that law that contradicts natural law requirements loses their morally binding effect.[15] In other words, a government that abuses its power by making unjust laws (laws that are illogical or contrary to the common good) loses its moral authority and so loses the right to be obeyed. Any such law, according to Aquinas, is a "corruption of law."[16] But, while he states that if a ruler enacts unfair laws, “their subjects are not obligated to accept them,” he also adds, “unless, maybe, in certain specific instances when it is a matter of avoiding “scandal” or civil commotion.”[17]This is in stark contrast to the radical arguments made in Aquinas' name that seeks to legitimize disobedience to the law. This interpretation of natural law however has been criticized. Firstly, the rise of legal positivism. The fundamental problem however is that various people may have different views about what is good or bad, and their intuition may reveal diverse and even contradictory things to them. This leaves reason or intuition an uncertain medium of discovering the truth. However, the main criticism is focused on the belief that human law must be in accordance with natural law, and that anything that does not correspond with natural law is not law. Many writers dismissed the natural law theory as a theory, arguing that what the law is and what it should be two separate issues.[18] Legal theory is to explain the nature of law as it exists in a legal system and provides the criteria for determining whether something is the law. It is impossible to assess whether something is law by asking whether it is morally fair and just. They do not deny that, in an ideal world, the law should be morally sound. They insist that something is the law if it has been authoritatively laid down or recognized as such by the legal system. Though it may be a lousy law, it is binding and enforceable. Even Blackstone, according to Bentham, was unable to produce an example of English law being declared invalid because it contradicted natural law.

POSITIVIST VIEW

The most influential school of thought in Jurisprudence is positivism as it is common instinct that law is enacted by human and not through divine ordain.[19] According to a renowned positivist John Austin, the law is a set of rules made by the government-backed by sanction.[20] HLA Hart divided the law into two categories which are the primary rule of law and the secondary rule of law. As for primary rule of law, it is law that is usually used by primitive society but not recognized as a proper body law as there is no official authority that recognizes the law or lacking in law-making bodies such as customary law or international law. He continued to mention that secondary rule of law aims to govern the recognition of the primary rule of law involving authorizing bodies to enact or apply the procedure of the primary law into a certain legal system.[21]

However, HLA Hart mentioned that law is not an instrument that can be used to force coercion on the citizens but it merely serves as a guide for human.[22]Social facts are still recognized by the positivist school of thought as one of the motivations behind

the legal facts of society today as it is one of the components that make up the law rather than the moral value behind the social factor itself.[23] Michel Troper also argued that human rights do not exist from positivist's point of view if it was aimed for human beings to be absolutely independent of the state authority governing them.

Moreover, positivists regard morality and law as separate systems and therefore independent of each other.[24]Moral values and moral rules are different according to John Austin. The act of donating and being kind to other people are examples of moral values. However, moral rules are extracted from moral values such as the prohibition of murder and rape. These rules are the ones that are called 'positive law'.[25]

However, Hans Kelsen argued in his Pure Theory of Law that legal rules and moral rules are different yet they usually coexist together.[26] HLA Hart also opined that law is made of 'minimum content of natural law'. He opined that law was made based on the norms that all members of society will agree upon that is, survival instincts. He listed down the human conditions that made up this survival instinct to protect themselves and their properties which are 'vulnerability', selfishness, equality, 'limited resources' and 'limited understanding of the strength of will'.[27]Even though societal norm (in this case, it is the human survival instinct) is a huge part of naturalism school of thought, it did not automatically show that Hart conformed to the naturalist school of thought, he merely hinted that moral and law often coincide even though they are completely within different scopes from one another.[28]

Besides, Scott Sharpio has mentioned in Legality that the essence of legal positivism is that something that is allowed by law does not necessarily align with the conduct of human morality.[29] Hence, these opinions theory indicates that in positivism school of thought, law is separate from morality yet they often coincide.

ROLES OF LAW IN MALAYSIA'S HEALTHCARE

Malaysia has a slew of legislation aimed at safeguarding public health particularly COVID-19 related laws. The Prevention and Control of Infectious Disease Act 1988 for example bestows significant powers on government officials in the prevention and control of contagious illnesses. The appropriate officials have the authority to inspect any location, person, or thing and take preventive or remedial action. In addition, the law mandates that infectious diseases be reported and monitored on a regular basis. However, though there is no specific provision or law mandating citizens to take vaccines, legal action regarding vaccine rejection can be taken against individuals who are identified as issuing defamatory or seditious statements or even false news about vaccinations. The legal provisions which are seen to be applicable to such actions are the Defamation Act 1957, the Sedition Act 1948 as well as the Communications and Multimedia Act 1998 or any other appropriate act.

In Malaysia, the laws pertaining to restrictions on the people who refused the COVID-19 vaccine do not only apply to the naturalist theory of law (in which emphasizes on morality) as it deprives the people of one of the main theories that usually coincide with morality that is, human rights. In fact, the laws were influenced by positivist theory of law which focuses on the compliance with the law enacted even if there are elements of injustice to some parties. As discussed above, the theory of naturalism defines law as a set of rules made up from the divine ordain and societal norms which were regarded as good and morale.[30]Aristotle also argued that a law that violates moral principles is not a valid law. The legitimacy of a law does not lie with from the authority but is based on moral values. On the other hand, John Austin, the founder of the positivist school of thought, defined a law

as an order issued by a party with authority and it becomes an obligation to implement it. Penalties or sanctions will be imposed for failure to comply with the law. In other words, the legitimate law comes from the government itself.

It can be seen that the law related to the issue of anti-vaccines is applying more to the principle of positivism which prioritizes compliance with the order given by the authority. In this situation, the restrictions are the sanctions meanwhile the COVID-19 vaccination is the set of rules made by the government on its citizens. So, according to the positivist school of thought, the restriction by the government is a legally right thing to do because human rights are immaterial in the eyes of pure legal positivism and the governmental power is the focus of this school of thought. Since the government also does not impose the obligation to vaccinate all Malaysian citizens, these restrictions can serve as a guidance to encourage people to get vaccinated which is also in line with HLA Hart's view on the function of sanction.

However, despite being the founding fathers of the modern positivism school of thought, Kelsen and Hart also opined that law is not a mere will of sovereign.[31] As mentioned in the earlier section, positivist also regards law as an extraction from moral rules.[32] Hans Kelsen theorized that law and morality often coincide. In cases like this, where there is a moral obligation to protect other people from being harmed by the COVID-19 virus, the restrictions imposed on the people are reasonable according to these 'modern' take on the positivist school of thought. It is no longer based solely on the reason of the law being enacted by the government; it is also because there are moral rules that must be followed in order to survive as a society. This contention is also aligned with the theory of 'minimum content of natural law' by HLA Hart whereby human made laws based on the norm of survival instincts.[33]

Hence, even though the restrictions and limitations imposed may have violated their freedom, it does not mean that the value of morality is not taken into account. This is because, the restrictions imposed are harmful but preventative in measure.

RIGHTS

The concept of a 'right' is one of the most important and contested concepts that perplexes legal and moral philosophers. However, discussing rights immediately draws a contrast between what a right is on the one hand and what rights people have or should have on the other. The so-called will (or choice) theory and the interest theory are the two main theories of rights. Professor Hart, believes that while I have a right to do something, what is ultimately protected is my choice whether or not to do it.[34] It emphasizes the importance of individual liberty and self-actualization, which are viewed as fundamental principles that the law should protect. The 'interest' theory, on the other hand (espoused most forcefully by MacCormick[35]), contends that the objective of rights is to safeguard the right interests, and holders rather than human choices. It's worth noting that proponents of both theories (though not MacCormick) usually acknowledge the correlative nature of rights and obligations; in fact, as we'll see, it's often at the heart of their arguments.

One of many branches of rights that are commonly discussed is human rights. It is regarded as the modern tool of revolution that goes hand in hand with the current development of law, morality and politics.[36] Human rights can be said to derive from natural law theories. John Locke mentioned in The Second Treatise of Government that those individuals are not restricted to the will of authority instead they have their own abilities and the freedom to make their own decisions. Hugo Grotius, a renowned naturalist argued that a human right is just as long as the individual enjoys his action in practicing his right and any opposite behavior is wrong.[37]

However, the positivist school of thought has a different opinion on human rights. Human rights can only be enacted by the government, and it is up to the government to protect and apply human rights in the legal system.[38] Yet, there are a few developments over the recent years regarding the positivist school of thought that go beyond authoritative measures. A doctrine called 'rule of law' has been introduced which was derived from the positivist school of thought itself. Essentially, this doctrine split the principles of law into two categories which are formal and substantive. The formal principle involves the law as a tool for government action.[39] On the other hand, the substantive principle guarantees individual rights and social welfare. In order to achieve the goal of substantive principle there needs to be a few criteria that need to be fulfilled according to Austin and Hart such as consistent rules, the rule of law is transactional; which means that it is not influenced by factors of age, class, religion or gender differences, the rule of law can be implemented in general, a strict hierarchy of justice and bureaucratic.[40]

Therefore, according to the positivism school of thought, human rights are bestowed upon the individuals in a state and the obligations under human rights are conferred upon the government to protect its citizens from any breach.[41] However, the naturalists stressed that even though the responsibility to protect the individuals is bestowed upon the government, the wish of the individuals regarding human rights must also be considered.

CONSTITUTIONAL RIGHTS IN MALAYSIA

Federal Constitution states that there shall be no discrimination against any party. Art 8 (2) of the Constitution provides that:

There shall be no discrimination against any citizens on the ground only of religion, race, descent, place of birth or gender in any law …

Though the provisions did not specifically mention discrimination or mistreatment on the grounds or factors of vaccination, these provisions can be understood that everyone is entitled to equal protection of the law. The principle of legal equality and the prevention of discriminatory practices is part of the principle of human rights. Article 7 of the Universal Declaration of Human Rights also states:

All persons are equal before the law and are entitled without any discrimination to equal protection of the law.

Hence, there should not be a restriction or limitations imposed on the group of people who rejected the COVID-19 vaccination.

However, it is to be noted that Art 8 (2) of the Constitution does not stand alone. In the event of a public health-related pandemic, Article 9 (2) of the Federal Constitution can be used to restrict such freedom in order to protect the rights of others from being infected where it provides that:

… Any law relating to the security of the Federation or any part thereof, public order, public health ...

Indeed, the Federal Constitution gives individual freedom to every resident in the country, but if the matter poses a threat, especially involving aspects of public health and safety, such rights can be limited by the government. In other words, in the context of the Federal Constitution, individual human rights are not absolute and can be limited through the existing provisions. This includes the law that does not allow individuals without two completed doses of vaccines to dine in. However, it is to be noted that the government did not deny them the right to

eat, instead, they were only not allowed to eat physically at the restaurants as the risk of other people being infected is likely.

CONCLUSION

To conclude, it was no doubt that everyone has the right to decide on their own. The same goes for the right of an individual to choose to be vaccinated or not. However, as a citizen, we are bound by the laws of the country, and it becomes an obligation to obey them. Perhaps, it is seen as an oppression or an injustice when the permission and leniency granted by the government do not apply to individuals who refuse to be vaccinated. However, if viewed from the perspective of individuals who have completed two doses of vaccine, it is also not fair for them if they were to be infected with the virus through unvaccinated individuals. For those affected by the restrictions, it will be seen as a violation of fundamental human rights and unfair. Indeed, vaccine intake does not guarantee COVID-19 independence. However, scientific studies and data have shown that it can reduce the risk of death and are effective in fighting the virus as compared to individuals who do not have any vaccine protection. Therefore, if any individual chooses not to take the COVID-19 vaccine, do respect those who took the vaccine by not spreading false information about the COVID-19 vaccine and comply with the restrictions imposed to avoid the risk of infection beings.

NOTES

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[30] See supra note 14.
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[32] See supra note 26.
[33] See supra note 28.

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