

**UNIVERSITI TEKNOLOGI MARA**

**ANALYSING THE LEGAL  
PERSPECTIVES ON MENTAL  
CAPACITY IN MAKING MEDICAL  
DECISIONS IN MALAYSIA**

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## ABSTRACT

In medical ethics and law, it is highly recognized that the principle of respect for autonomy plays an integral role in decision-making. The respect, however, is not absolute and the most common explanation that the respect has been held inapplicable is due to patients' lack of mental capacity to make decisions. Assessing patients' mental capacity is an important part of a doctor's profession. The assessment can be taxing as it requires an intricate balance between respect for patients' autonomy and protection to patients who lack mental capacity to make autonomous decisions. These patients are often assumed as incapable of making decisions despite not being properly assessed. However, most of these patients who are assumed to have lacked the mental capacity are actually capable of making medical decisions. This could possibly be because of the fact that there is no mental capacity law to enforce the mental capacity assessment in decision-making. Although there is a lack of reported issues or decided cases pertaining to mental capacity in making medical decisions in Malaysia, such issues have been reported in other developed countries. The UK has legalised the concept of mental capacity through the Mental Capacity Act (MCA) 2005, which could be adopted by Malaysia as well. For this reason, this study analyses the legal perspective on mental capacity in making medical decisions in Malaysia. This study highlights the inadequacies of the existing Mental Health Act (MHA) 2001 of Malaysia and other relevant laws, regulations and policies governing medical decision-making for patients who lack mental capacity. The analysis is based on four key aspects which are (1) assessment of mental capacity, (2) consent for treatment, (3) substitute decision-making, (4) advance medical decisions. As a result, the MHA appear inadequate in protecting the rights of patients who lack mental capacity to make medical decisions. Finally, this study shows that it is imperative to establish legal standards of mental capacity to guide the decision-making process and to protect the rights of patients who lack mental capacity to make medical decisions.

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# CHAPTER ONE

## INTRODUCTION

### 1.1. Introduction

Maxwell (2005) famously referred to as “life is a matter of choice” and individuals make decisions at all times. Making a decision is universally an important task and also a human right (Kong, 2017). However, the right to make decisions has not always been extended to individuals with mental impairments and disabilities, despite its alleged universal importance (Laing, 2010; Boyle, 2011). The reason is that these individuals have often been generalised as individuals who lack mental capacity to make decisions (Kong, 2017). Individuals who lack mental capacity are also seen as vulnerable and subject to discrimination, coercion, abuse and exploitation (Mackenzie & Rogers, 2013). They are considered incapable of making decisions and therefore have no right to decision-making or respect for autonomy. Only recently there has been a shift towards understanding mental capacity in medical decision-making in the context of impairment and disability (Kong, 2017). The shift is due to many of them, as a matter of fact, they were able to make decisions (Lepping, Stanly, & Turner, 2015).

From a legal point of view, whether or not an individual has the right to make a specific decision depends on whether or not he or she has achieved a designated standard with respect to a specified capacity (Donnelly, 2011). The requirements of both the standard to be achieved and the necessary capabilities depend on the view of the right for decision-making within a society. This, in turn, depends on the point of view of the individual-society relationship, and the point at which society has a duty to protect those who are considered vulnerable.

The right to make decisions as patients is often strongly linked to the principle of respect for autonomy (Beauchamp & Childress, 2009). In the medical and bioethical spheres, the principle of respect for patient autonomy defined as respect for patient autonomy as the recognition of patients’ right to hold opinions, make decisions and act on the basis of their personal values and beliefs (ibid.). Respect on this account requires both respectful action and attitude, including the development or maintenance of patient