

BIOETHICS: A TRANS DISCIPLINARY APPROACH TO MEDICAL LAW

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INTRODUCTORY REMARKS

The pursuits in medical and life sciences have generated paradigm-shifting contributions that have led to a better standard of living. However, the cost for progressive change in health has predicaments at the interface of law, health, human rights and bioethics. As a key driver in development, bioeconomic and sociotechnical advancements have been made with no restrictions. Indeed, such unrestricted research and advancements, while done in the name of saving humanity, causes more harm than benefit. These scientific pursuits often lead to discrimination, gross human rights violation, and injustice. Ethical issues so raised encompass social, legal and environmental questions.

Bioethics is a philosophical discipline encompassing social, legal, cultural, epidemiological, and ethical conundrums arising due to the numerous advancements in healthcare and life science research. Few such issues include euthanasia, organ trafficking, cloning, research trials, uniform access to health care, gene therapy and artificial fertilization. The roles of law, human rights, and bioethics has been intertwined to create an ethico-legal normative construct. Hence, ethical dilemmas in medicine require a transdisciplinary approach- creating a unity of frameworks beyond the disciplinary perspectives of law, health and human rights and applying the same to the real-life context.

The origin of bioethics dates back to the drafting of the Nuremberg Code,¹ which was based on the Nazi trials conducted by the doctors in Nuremberg, Germany. These nefarious trials were conducted during the World War II on prisoners in military concentration camps. The American judiciaries who were to prosecute the involved doctors created the code, which constituted ten principles to guide scientific/medical research. However, this code was not applicable to modern times. Subsequently, the World Medical Association promulgated the Declaration of Helsinki in 1964.² In 1974, the National Research Act was enacted in the United States to identify the

¹ *Permissible Medical Experiments*, 2 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law 181-82 (1949).

² World Medical Association, *Declaration of Helsinki: Ethical Principles for Medical Research involving Human Subject*, JAMA 310(20), 2191-2194 (Nov. 27, 2013).

ethical principles in the conduct of biomedical and behavioral research. Two years later, a report on basic research ethics guidelines called the Belmont Report was issued.³ In the last five decades, various international, national, and regional organizations have laid down guidelines for biomedical research such as the World Health Organization, the United Nations Educational, Scientific, Cultural Organization and the Council for International Organizations of Medical Sciences.

The Code of Medical Ethics in India states that a physician should be ever ready to attend to the calls of those who are sick and practice the highest standard of care.⁴ He should never forget that the health and the lives of those entrusted to his care depend on his skill and professionalism. Ethically speaking, the physician should not commit medical negligence and must keep in mind the responsibility he has undertaken as part of the profession. Human life is invaluable and upon entrusting it with a medical professional, he has to treat them with utmost dignity.

THE BIOETHICAL DILEMMA

‘Do no harm’ is the first dictum of patient care as expounded by Florence Nightingale. Ethical conundrums are based on four principles: Beneficence, non-maleficence, parental autonomy, and justice. Patients and their wishes come first, leaving no room for discrimination or bias. Equitable distribution of resources, cost-effective therapeutic approaches and affordable healthcare are to be ensured for all members of the society without discrimination on the basis of socio-economic status, religion, creed, caste or gender. Decisions involving ethical issues should take into account the burden on the patient and family. The most common ethical dilemmas include euthanasia, abortion, organ transplant and surrogacy, to mention a few. Ideally, these decisions must be resolved on the basis of sound medical facts and by taking the patient into confidence in the decision-making process.

Medical ethics is in itself an evolving discipline. Ethicists have propounded theories such as moral relativism, moral objectivism, moral pluralism, utilitarianism, right-based theories, duty-based theories, virtue ethics and compromise positions to form a concrete basis for bioethics. The

³ The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, The Belmont Report (1979).

⁴ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Gazette of India, pt. III sec. 4 (Apr.6, 2002).

moral objectivism theory states that all moral beliefs are inherently capable of being valid in an objective sense of truth or rationality whereas moral relativism states the opposite. Pluralism believes that several values can be construed as the truth while contradicting each other. Moral consensus is what binds the society at large. Moving on to utilitarianism, this theory is based on the notion ‘greatest benefit to the greatest number’. Simply put, it takes into account the interests of all individuals equally. Right-based theory states that all moral obligations can be reduced to the moral rights imposing corresponding duties whereas duty-based theories do not allow the individual to waive the benefit of the duty imposed. With respect to virtue ethics, this theory rejects the aforementioned theories and focuses on character-based values and virtues.⁵ Lastly, the theory of compromise positions seeks a compromise between practicality and morality by combining elements from other theories. These theories assist in dealing with ethical dilemmas such as informed consent, disclosure, doctor-patient confidentiality, patient autonomy, euthanasia, abortion, surrogacy and organ transplantation.

Most medical professionals believe that patients are incapable of providing informed consent as they are unable to comprehend the benefits of different therapeutic approaches and procedures. Physicians have a duty to disclose all facts and information to the patient, however, they need to be extremely careful and empathetic while disclosing sensitive information. Patient autonomy is to be taken into consideration as they have the right to self-determination. In Canadian case *Reibl v. Hughes*,⁶ the patient was not informed about the 10% risk of a stroke as a consequence of an operation, which clearly violates the ethical as well as legal obligation a doctor has to inform the patient. Moreover, it is illegal to perform any medical procedures without consent.⁷ In the cases of *White House v. Jordan*⁸ and *Maynard v. West Midland RHA*,⁹ the concept of a ‘reasonable doctor’ was laid down with respect to the required level of skill and professionalism. Similar areas of conflict include refusal to treat the patient, disclosure to police and insurance companies, confidentiality with respect to children and family as well as disclosure for public interest.

⁵ HARRIS JOHN, THE VALUES OF LIFE: AN INTRODUCTION TO MEDICAL ETHICS 343 (1985).

⁶ John Reibl v Robert A. Hughes, [1980] 2 S.C.R. 880 (Can.).

⁷ Mc Carth & Donald G. Moraczewski, *Moral Responsibility in Prolonging Life Decisions*, 2 Saint Louis University Law Journal, 134 (1989).

⁸ White House v. Jordan [1981] 1 All E.R. 267.

⁹ Maynard v. West Midland RHA, [1985] 1 All E.R. 635 (HL).

All human beings are born free and equal in dignity and rights.¹⁰ Dignity implies that the patient has choice and autonomy with respect to his body. Procedures such as sex selection, female foeticide, organ selling and gene therapy violate human dignity. Abortion, surrogacy, artificial insemination, organ transplantation and euthanasia are issues that have been stuck in the grey area. The Medical Termination of Pregnancy Act allows abortion if the continuance of pregnancy would cause a risk to the life of the pregnant woman or grave injury to her mental health.¹¹ Here there is conflict of the rights of two persons: the mother and the growing foetus. With respect to artificial insemination and surrogacy, there is a battle between the desire to have children as well the commodification of the human body. The long-standing debate on euthanasia tried to balance the right to life and the desire to relieve agony and pain. In India, passive euthanasia is legal in the case of patients in a permanent vegetative state.

THE INTERPLAY BETWEEN HEALTH AND HUMAN RIGHTS IN INDIA

The State has an obligation to create and sustain conditions for good health of its citizens.¹² The Constitution ensures a life with dignity for every citizen.¹³ Any law that denies an individual's right to health is indeed invalid. Right to public health is considered at the top of the constitutional agenda and the State is duty bound to protect this right under any circumstances. In this context, right to accessible and affordable health care and medical aid is considered to be a fundamental right under Article 21, read with articles 38, 39(e) & (f), 41, 42, 43, 48-A and 51-A(g). The jurisprudence or philosophy of the right to life guaranteed under Article 21 encompasses human dignity in its full blossom. Thus, the right to life with human dignity covers within its fold, the facets of human civilization which essentially make life worthwhile.¹⁴

The judiciary in India has attempted from time to time to lay down guidelines pertaining to medico-legal problems. The Apex Court has laid emphasis on the professional ethics of the medical profession and affirmed the Constitutional obligation of the State to preserve life under

¹⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec.10, 1948).

¹¹ The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971.

¹² Vincent v. Union of India, AIR 1987 SC 990.

¹³ Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

¹⁴ State of H.P. v. Umed Ram Sharma, AIR 1986 SC 847.

Article 21. In *Parmanand Katara v. Union of India*, it was held that every injured person brought for treatment should be given aid instantaneously to preserve life.¹⁵ Landmark medical negligence cases such as *Indian Medical Association v. V.P. Shantha*,¹⁶ *Achutrao Haribhu Khodwa v. State of Maharashtra*,¹⁷ *Bolam*¹⁸ and *Laxman Balkrishna Joshi*¹⁹ have depicted medical negligence and laid down remedies and tests for the same.

Health and human rights go hand in hand to serve the interests of patients. To recognize one's right to health means to recognize one's basic human rights. However, the health and human rights paradigm can be flawed regardless of the nature of the rights especially when brought in relation to bioethics. Rights have a sense of morality attached to it which can trump other moral considerations. Health care involves an evolving challenge and requires efforts of the government, judiciary, medical professionals and the society to create an ethical sphere within which the patients can be treated with dignity.

CASE STUDIES: THE ETHICO-LEGAL CONSTRUCT IN INDIA

*Balaram Prasad v. Kunal Saha & Ors.*²⁰

This case was a legal crusade that finally brought justice to Kunal Saha, who lost his wife due to medical negligence. Anuradha Saha, a psychologist had come to her home town for vacation when she began complaining about skin rashes. Upon consulting with Dr. Sukumar Mukherjee, his wife was administered 80mg of a steroid which was a higher than recommended dose along with injections daily for three days. Mukherjee left for United States and left her under the supervision of Dr. Baidyanath Halder and Dr. Balaram Prasad. Proper care was not taken to ensure adequate nutritional support. Even after the correct diagnosis of toxic epidermal necrolysis, there was no change in the treatment. She was shifted to a hospital in Mumbai where she passed away. The 15 year long legal battle ended with a record-breaking compensation of

¹⁵ *Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

¹⁶ *Indian Medical Association v. V.P. Shantha*, (1995) 6 SCC 651.

¹⁷ *Achutrao Haribhu Khodwa v. State of Maharashtra*, (1996) 2 SCC 634.

¹⁸ *Bolam v. Friern Hospital Management Committee*, [1957] 2 All E.R. 118.

¹⁹ *Laxman Balkrishna Joshi v. Trimbak Babu Godbole*, AIR 1969 SC 128.

²⁰ *Balaram Prasad v. Kunal Saha & Ors.*, (2013) 13 SCALE 1 (India).

Rs. 5.96 crores. The quantum of compensation was set high to act as a deterrent in cases of medical negligence. This case witnessed a gross derailment from the ethical obligations of a doctor to get informed consent and respect patient's autonomy while exercising the highest standard of care.

*Kishan Rao v. Nikhil Super Specialty Hospital*²¹

Kishan Rao filed a complaint against the hospital where the patient was misdiagnosed and treated for typhoid instead of malaria and died subsequently. The District Forum found that there was negligence on the part of the hospital. However, this was overturned by the State as well as National Commission. The Supreme Court found a valid case of medical negligence and stated that the Court has to reconsider the parameters set in the *Bolam*²² case. It was laid down that no mechanical approach can be adopted to deal with such cases. Each case has to be looked at individually with respect to its facts and circumstances. Directions from the *Martin D'Souza*²³ case was not to be followed. The principle of *res ipsa loquitur* was applied and Rao was awarded a compensation of Rs. 2 lakhs.

*Aparna Dutt v. Apollo Hospital Enterprises Ltd.*²⁴

In this case, the plaintiff had undergone an operation for the removal of cysts in her uterus. The operation was said to be successful. However, she started experiencing abdominal pain which the doctor affirmed was due to fluid collection. Due to the unbearable pain and mental torture, she underwent a second surgery which revealed an abdominal pack that was left behind after the first surgery. The principle of vicarious liability was applied here and a clear-cut case of medical negligence was made out and the woman was compensated.

*Pravat Kumar Mukherjee v. Ruby General Hospital and Ors.*²⁵

²¹ Kishan Rao v. Nikhil Super Specialty Hospital, (2010) 6 SCC 635.

²² Bolam v. Friern Hospital Management Committee, [1957] 2 All E.R. 118.

²³ Martin D'Souza v. Mohammed Ishfaq, (2009) 3 SCC 1.

²⁴ Aparna Dutt v. Apollo Hospital Enterprises Ltd., (2002) ACJ 954 (Mad. HC).

This case laid down a landmark judgement for the treatment of accident victims. Sumanta Mukherjee, a 2nd year B. Tech student who studied in Netaji Subhas Chandra Bose Engineering College, was hit by a Calcutta transport bus and rushed to the hospital. The boy was conscious when he was taken to hospital and he showed his medical insurance card, which clearly stated that the boy will be given Rs.65,000 by the Insurance company in case of any accident. However, the hospital demanded a deposit of Rs. 15,000 after which they discontinued treatment due to non-payment. The boy was then rushed to a Government hospital on the way to which he died. On account of the inhumane behaviour on the part of the hospital, the parents were awarded a compensation of Rs. 10 lakhs. The unethical approach and greed for money had ended the life of this helpless boy.

CONCLUSION

India currently has the largest number of bioethics units in the world. Major medical organizations such as the Indian Medical Association, the National Board of Examinations, and the Medical Council of India have recognized its importance and formed units. Several universities have formed bioethics groups and think tanks to discuss ethical issues in medical law. The Medical Council of India has a bioethics cell that presently focuses on medical research in India. It has started organizing symposia and conferences to spread awareness and educate students and professionals. To make right to health a reality, war footing efforts are required. The state and its organs need to ensure availability and access to affordable healthcare facilities and raise the standard of care and professionalism. This can only be done through national as well as international cooperation. The judicial response in India has been quite positive in securing the right to health to the people. The judiciary has constantly reminded the medical community regarding their social, moral, legal and ethical duties to help those who are in need. The principle of strict liability coupled with exemplary punishment can act as a deterrent and prevent medical negligence and deviance from ethical and moral duties. No form of professional immunity can be exercised. Lawyers, doctors, and scientists must work with philosophers on practical ethical issues. Crossing disciplinary boundaries are necessary to better understand the intricacies of one's own discipline and battling the inevitable ethical war.

²⁵ Pravat Kumar Mukherjee v. Ruby General Hospital and Ors., (2005) CPJ 35 (NC).