

# ETHICS AND LAW

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## INTRODUCTION

Ethics and Law are both mere variants of rules by which humans are expected to conduct themselves in Society. Rules are required to ensure repetitiveness that makes events predictable. Predictability is essential for security, survival, continuity and growth. Even therapy, which is of immediate concern to us as Psychiatrists, can work only if we have tools which have predictable effect. Therefore attention to the genesis and execution of rules is of utmost importance.

All elements in Nature are continuously bound by rules which permit the cascade of causality to flow flawlessly and without fail. This 'high-fidelity' system of Nature permits emergence of many existences including humans who are endowed with consciousness and free will. Free will provides freedom, even though limited, from the tyranny of rules and thereby the capacity to break rules. Therefore this freedom needs to be regulated in such a way that it does not lead to conditions of lawlessness and there from to chaos and self-destruction. Ethics and Law are two available mechanisms at the social level to give appropriate direction to this freedom in the best interest of all.

## THE DEFINITION AND THE DIFFERENCES

Ethics, Law and their mutual relationship have been discussed from the beginning of civilization both in India and the West. The discussions have remained amorphous and abstract. Ethics represents a system of controls that is internal whereas Law represents a mechanism of control that is external. Both internal and external controls are required for optimal control of behaviour which includes seeking and dispensing of treatment.

Ethics, often referred to as 'science of morality', represents a body of knowledge that contains principles or standards for value-based human behaviour. Law refers to a set of rules which are enforced usually through social institutions or the state. Ethical principles are generally voluntary and mostly unwritten whereas legal provisions form a written document prepared purposefully by the legislature, judiciary or the executive. The guiding principles of Ethics are all that is 'good' and/or 'right', whereas laws of the land are made more on the reality considerations of the place, the time and the people as to what is required, aspired for and is practically possible.

The guiding principles for determining what is good and what is right have varied depending on the time, the place and the context. Broadly they are determined by dictates of pragmatism, of pleasure or of power. For Jeremy Bentham the highest good is the greatest happiness of the greatest number of people. According to Immanuel Kant the morality of an act must not be judged by its consequence, but only by its motivation. Intention alone is good. According to Nietzsche, every action should be directed toward the development of the superior individual, or *Übermensch* ("superman"), who will be able to realize the noblest possibilities of life. There are many other perspectives of looking at these questions. One universal mode of deciding ethical questions has been the 'empathic mode'; it is by placing oneself in the place of the other person and then decide as to whether he would like that to be

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done to him.

We grow up with ethical principles during childhood development but learn to live with law only at a later stage. The constructs of the good and the right get internalized into our conscience through parental and social reinforcements, but the laws of the land have to be consciously assimilated in our behaviour repertoire guided by the anticipated consequences of its betrayal. The regulators for ethical imperatives are the self, the seniors, the peers, the parents, co-professionals, religious and cultural forces; whereas the regulators for maintenance of law are the police, the magistrates and the judiciary.

Ethics is the immediate determinant of our behaviour; it is private, personal and all pervasive. We may not have law for all situations of life, but no behaviour can be ethics-neutral. Ethics fills in the gaps in law, it also guides where law is silent. Law is impersonal, distant and has to be invoked to be operative. Ethics is continuously updated automatically because it is linked with life, whereas law can be updated only periodically. Law lives in the past; at times it can be more than hundred years old and completely divorced from the current realities of life. Ethics get modified by the changing consensus in society, therefore it is always current. No amount of legislation can be a substitute for ethics or vice-versa. Ethics has the immediacy and primacy of control over behaviour but law is more powerful and uniform. Ethics and Law have to mutually supplement each other; they should be congruent and mutually non-contradictory.

Ethics is more concerned about the thinking process as to what constitutes the good and the right. These are the precursors of behaviour. Law comes into action only when some act has actually been committed, either of omission or commission. Failure to comply with law leads to punishment authorized by the state; where as failure to comply with ethics can only lead to shame and guilt or remorse. There may be situations of conflict between the good and the right, the present and the future, the individual and the society or even between ethics and the law. Guidelines need to be developed for dealing with such situations. One possible way out could be to choose the least damaging option among the available alternatives.

The ownership of any body of laws lies with the State which is sovereign and vested with the authority and responsibility of enforcing it. Ethics on the other hand belongs either to a community, a group or may be to whole of humanity. Freedom of individual discretion in adopting and interpreting ethical principles is always there to individual members but this freedom is not available for the application of provisions of law which are full and final in their respective current forms. There has been a recent trend among professional bodies to formulate their own written guidelines for its members. However it is generally devoid of any power to enforce it. A system of graded professional sanctions may be developed after stratifying the guidelines into three tiers of ideal, optional and obligatory types. We must ensure application of ethical self discipline from within or else law of the land shall increasingly and inevitably find reasons to intrude upon the otherwise legitimate professional autonomy.

## **THE PLACE OF THERAPIST**

A psychiatrist is unique among all therapists. He is the only medical specialist who stands in the borderland between the individual and the society. He is the only bridge between the private mental space of individuals and the social space of his milieu. He earns the authority and permission of the society to serve as healers of mind for its individual-members. Therefore he has a responsibility towards both. The often repeated 'island' of doctor-patient relationship does not operate in social-vacuum. As an agent of society, he has to function as an effective and honest therapist for those members who are mentally afflicted as well as help in maintaining social order for those who are not mentally afflicted with special reference to any possible disturbance being caused by the former. It is in this context that he is called upon to play his role as a certifier of the mental state of social offenders or other special groups. A Psychiatrist however is not exclusively a mental health professional only; he may have other identities as well as other social roles to play.

## **THE THERAPEUTIC RELATIONSHIP**

Effective treatment can happen only in a therapeutic relationship. It is a purpose-specific, temporally

circumscribed engagement of a person who is suffering with a therapist who has skills to alleviate that suffering. It has to be based on trust and hope. It is a temporary dyadic system wherein right commands are expected to produce sound results. It is different from usual business or barter of good and services. Those who demand 'delivery of perfection' from their therapist should do some introspection as to how unrealistic this expectation actually is.

The power equation in all therapeutic engagements is justifiably tilted in favour of the therapist. It is an unequal and hierarchical relationship for most of us and for most parts of the world. There are definite merits in this hierarchical relationship. Firstly it allows some power over the patients, which is required to induce positive therapeutic effects and secondly it protects against the 'pitfalls' of adversarial approach which is inherent in the equality paradigm of therapeutic relationship. But like all sources of power it also has a tendency to corrupt its users. This corruption may manifest in doctors not using their skills and knowledge to the best advantage of their patients but to serve some personal interest or the interest of some allied agencies. Therefore to protect the doctor from the potentially corrupting influence of his legitimate power and also to protect the patients from being exploited and being deprived of the best possible medical care, it is incumbent upon the society in general and professional bodies in particular to take proactive steps to bring in the ethical and legal influences on the professional conduct of its members. The principle of maintaining physical and social distance from our present and erstwhile patients is a very important protective check in this direction.

The equality paradigm has many deficiencies. Firstly, it must be acknowledged that it is doctor's job to treat his patients and he must be allowed to do so. He is any way likely to be more knowledgeable and experienced than his patients about medical matters and therefore be allowed to take his considered decision. Secondly, the equality paradigm is more likely to generate an adversarial mindset which harms the therapeutic process at multiple levels. It implicitly works against the ideal of participant collaboration between the patient and doctor, wherein patient is expected to help and guide his doctor in arriving at the most optimal decision regarding his treatment. The power of final decision regarding mode of treatment must lie with the medical personnel, in which the patient may also actively participates. However the final decision to reject or switch treatment must lie with the patient. Other disadvantages of adversarial approach to therapeutic engagement are that it makes both of them defensive and covertly distrustful of each other; mutual collaboration is undermined by interjections of undue criticism and competitiveness; the therapist may also not feel obliged to take full responsibility for patient's health needs as the other party seems to have taken the charge; and finally this paradigm can be regulated only by law as no one feels ethically committed to one's adversaries.

In any therapeutic relationship the patient must feel welcome and respected. His genuine needs for privacy, confidentiality, autonomy, individuality and dignity must be honoured. His interests should not be allowed to be adversely affected because of the vested interests or behaviour of his caregivers. Ideally there should be ethical guidelines also for patients and their caregivers as to how to behave in a therapeutic relationship. This is not to restrict, restrain or control the patients; this is only to help them to get the best possible service from their doctors. Doctors after all are not mere data-driven machines with a cobweb of dropdown menu-options. Their best experiential and intuitive formulations for therapy need to be elicited by optimal patient behaviour. However they should not always expect a reasoned and contained behaviour from those who are suffering and thereby feel anxious and insecure. They should, on the other hand, be ready to give more than receive from their patients and should never engage in any kind of exploitative behaviour. The returns that they should be expecting from their patients should, in order of priority, be trustworthiness and respect rather than monetary remuneration. Therapeutic 'paternalism' should be of authoritative type and not authoritarian. A 'friendly father' model for therapist appears closest to what is practical and possibly ideal, which combines the benevolence of a friend and authority of a father. Authority is required to induce corrective and restorative changes in patient.

#### **THE 'RIGHTS' VS 'DUTY' PARADIGM**

Rights and Duties are socially derived consensual constructs to delineate the nature of expected, may be idealized at times, interpersonal transactions so that every member has a reasonable chance to life, liberty, dignity and growth. They are in a way guidelines for social behaviour. Rights define what

individual should be receiving from society, whereas Duties define what individuals should be giving to the society. Mere assertion of rights is meaningless if there is no one to provide for them, on the other hand duties are meaningless if there is no one to benefit from it. Rights vs Rights approach shall lead to artificial scarcity in the society and an adversarial mind-set, whereas Duty vs Duty approach shall lead to surplus of services and a collaborative approach.

All therapeutic relationship must ideally operate in a Duty vs Duty paradigm. Specially in our society where majority of the patients cannot assert their rights for various reasons, a good sense of duty of therapist alone can ensure optimal services to this helpless segment. Society however seems increasingly to emphasize the Rights of people, which is leading nowhere. There is separate declaration of Rights for virtually every group of people, without there being any commensurate exposition of duties. The trade between rights and duties has to be balanced. Duty is the price that we must pay for demanding our rights.

The rights vs duties trade has to be equitable when transacted between equals. When it is between unequal people, aligned in hierarchy as superior and subordinate, the transactions must be skewed in favour of those who are dependent, disadvantaged, weak and compromised. Then only they both shall move towards equality. The superior and the highly placed ones must be ready to give more than they receive and ideally at times be ready to give services without receiving anything in return at least immediately in situations of emergencies. One of the banes of modern society is the undue power that values associated with commerce and economics have acquired. Profit has become the primary motivating force in all areas of life, which translated in ordinary language means getting more despite giving less. This incidentally is the basis of all exploitations. The same spirit is also reflected when we talk only of rights and completely ignore our duties.

## **THE AUTONOMY**

Individual's autonomy is very important. It is one of the highest attainments of millions of years of evolution. It is a novel phenomenon in Nature wherein the ends can guide the means. Yet this autonomy is very limited in its scope and reach. Against the broad perspective of Nature, it is just a 'last mile' autonomy. It is hugely dependent on organic substratum, social superstratum and may be a few other determinants. Overblowing its significance and depending too much on it, is likely to be deceptive and self-damaging. Deceptive because it suggests that individual alone can act in the best interest of himself and damaging because if one takes decision in areas where he does not have the competence, then he is likely to hurt himself.

Personal autonomy of all individuals is a highly resource-efficient mental faculty which holds him good throughout his life-span. Its significance becomes apparent when someone falls sick and we need a dozen people to take care of all his autonomous functions which include personal care and social transactions. But this should not mislead us into believing that any individual is omnipotent or omniscient about himself. Autonomy does not grant any individual the capacity to know everything about him or do everything about himself. He has to trust, delegate and affiliate with others for personal needs.

Overemphasis on individual autonomy seems to originate out of mutual distrust and fear of exploitation even in conditions of slightest subjugation to other's autonomy. If our culture and professional ethics can ensure that there shall be no exploitation or harm of any kind in situations of sickness induced subjugation to therapist, the degree of mutual distrust and sense of insecurity shall decrease and in due course a healthier therapeutic paradigm shall become the norm. However this can happen only if there is social premium on duty-based delivery of medical care. Resorting to the socially approved shield of 'informed consent' may be a good defense for the threatened autonomy of therapist but it cannot be a substitute for his honest efforts of trying to do the best for his patient. He alone is a true and final judge of his intentions.

In situations where individual autonomy is already compromised, the person should not be further burdened with the task of taking vital decisions about his treatment. The nearest people in the filial neighbourhood of social network should and do often take over either to supplement or supplant the weakened autonomy of the individual. Autonomy should not be considered sacrosanct and

inviolable. It should be monitored, net-worked and prevented from becoming isolated and autocratic. In situations where there is no one to take over or supplement the compromised autonomy of a patient, we have the phenomena of wandering lunatics on the roads. Here society should step in and take temporary control of their autonomous functions till their autonomy is restored.

A beautiful incident has been narrated by Prof. A. K. Agarwal in his Presidential address on 'Ethics in Psychiatry' in 1994 about late Dr. Inglefinger, the Editor of the New England Journal of Medicine. "He was diagnosed to have a terminal illness and he received multiple and contradictory advice from his physician friends. He describes his agony in the following words. 'I received from physician friends throughout the country a barrage of well intentioned and contradictory advice.....as a result not only I, but my wife, my son and daughter-in-law (all doctors), and other family members became increasingly confused and emotionally distraught. Finally when the pangs of indecision had become really intolerable, one wise physician friend said, 'What you need is a doctor.' He was telling me to forget information I already had ..... and to seek instead a person who would tell me what to do, who would in a paternalistic manner assume responsibility for my care. When this excellent advice was followed, my family and I sensed immediate and immense relief."

### **THE PRIVACY**

Privacy must have purpose because it has been granted by nature to every individual. It provides a sense of identity and sovereignty which is essential for functioning as independent and autonomous unit. Psychiatric treatment often entails privileged entry into patients' privacy with due permission as well as participation of the patient. Every bit of this private world belongs to the patient alone and should not be allowed to be transgressed at any cost either by any inadvertent or willful behaviour of the therapist. This is in the interest of mental health of the patient. The only exception would be when it is a threat to the safety and security of society or other individuals.

Protecting confidentiality and ensuring that patient's privacy remains a closed system has some therapeutic advantage also. A smaller and closed system would allow more efficient manipulation of internal levers for therapeutic advantage. If the system is allowed to enlarge by breaching the barriers of confidentiality, the number of variables that might influence therapeutic interventions would also increase and thereby reduce the chances of success.

### **SEPARATE LAW FOR MENTAL PATIENTS**

Often it is debated as to whether we should have separate law for Mental patients. Does it serve any purpose or it simply perpetuates the stigma further. In reality we do need a different set of laws for mental patients because they are different from other medical patients in many fundamental ways, even though they are also similar in equally fundamental ways. A mental patient who refuses treatment may cause irreparable damage to society with or without personal harm but a medical patient who refuses treatment will primarily cause personal harm only with some limited social effects. Therefore society feels compelled to intervene in cases of mental patients but not so in cases of medical patients because the behaviour and judgments of the former have consequences beyond the confines of their personal existences. A mental illness may alter one's insight and reality testing and thereby adversely affect his capacity to meet the obligations of social role and responsibilities, rights and duties. Physical incapacities do not affect these areas of life. Mental illnesses are amongst the most stigmatized and misunderstood of all medical conditions, therefore also we need a separate law.

Psychiatrists seem to exercise much greater power over their patients than other physicians because of their ability to influence the thoughts and behaviour of their clients, which are the most vital component of his personality. More power necessitates more stringent and specific controls. All these reasons justify a separate set of laws. Since laws are meant to regulate behaviour and mental illnesses manifest chiefly through changes in behaviour, therefore there is every justification for having a separate set of laws for mental patients.

### **THE RESIDUAL ISSUES**

There are a large number of related issues which have remained untouched here and deserve

constant professional attention from ethical perspective. Newer technologies are expanding human power and creating completely novel situations which could never have been imagined before. They always keep throwing newer challenges to be addressed by concerned professionals. Issues related to genetic and reproductive engineering, cloning, gene therapy, potential fallouts of Human Genome Project, genetic counseling and organ transplantation are areas which test the limits of human wisdom. Euthanasia, assisted suicide and withdrawal of life-support system are other areas of intense emotional significance for which we do not have straight answers. The ethical issues relating to the reality of dual control in dealing with patients of paediatric age group are also very important. Another situation of grave import is when patients want professional help for attaining blatantly unethical goals. We also need to develop sound ethical principles for teaching and training of psychiatry at all relevant levels. Psychiatric research is another area which demands ethical attention of highest order because we put our patients in situations about which we ourselves do not know.

## **CONCLUSIONS**

Both Ethics and Law are required to optimally regulate the behaviour of both the therapist and the patient to achieve the therapeutic goal of maximum reduction of suffering. The therapeutic relationship should be based on trust and mutual respect. It should be a duty based collaborative engagement wherein patient participates to help his therapist arrive at the best possible solution to his problem. The patient and the therapist should treat each other as natural allies and not adversaries. Patient's privacy, dignity and autonomy should be respected but they should not be overprescribed. They should be employed in the best interest of the patient and also the society. Psychiatrists should fulfill their dual responsibilities honestly and fairly. Law must be ethical and be continuously updated; Ethics on the other hand must respect the legal boundaries.

### **\*HIGHLIGHTS\***

- Ethics and Law are both variants of social rules which ensure predictability in society. Predictability is essential for security, survival, continuity and growth. Therapy also can be effective only if we have predictable tools of intervention.
- Ethics represents a system of internal controls whereas Law represents a mechanism for external controls. Both is required for optimal control of all behaviour which includes treatment seeking and dispensing.
- Ethics is generally unwritten and voluntary whereas Law is purposefully written and enforced by the state.
- Ethics is guided by moral principles whereas Law is guided by reality principles.
- No behaviour can be Ethics neutral whereas we may not have Law for all situations of life. Ethics fills in the gaps in Law. They supplement and complement each other.
- Ethics is always current and operative; Law has to be invoked to be active and needs to be updated periodically to keep it relevant.
- A psychiatrist as therapist is a bridge between the individual and the society. He is ordained, both by ethics and law, to fulfill his dual responsibility.
- There is always a justifiable hierarchy in therapeutic relationship, between patient and therapist, which has certain advantages over equality based paradigms of therapeutic relationship.
- A 'friendly father' model for therapist appears closest to what is practical and possibly ideal, which combines the benevolence of a friend and authority of a father. Authority is required to induce corrective and restorative changes in patient.
- A patient must feel welcome in doctor's premises. His privacy, autonomy, individuality and dignity must be respected.
- Ideally there should be ethical guidelines for patient behavior also. This is to optimize the chances of eliciting the best healing responses from the therapist.

- Rights and duties are socially derived consensual constructs to guide individual's behaviour in society. Duty is the price that we must pay for demanding our rights.
- All therapeutic relationship must operate in a duty vs duty paradigm, wherein both therapist and patient are guided by their duty towards the other. It is likely to generate trust and optimal collaboration between patient and doctor for best therapeutic outcome. Harping on rights alone has many disadvantages.
- Individual's autonomy is a divine blessing of crucial importance but still is very limited in scope and reach. It should not be overblown or oversubscribed.
- Resorting to the socially approved shield of 'informed consent' may be a good defense for the therapist but it cannot be a substitute for his honest efforts of trying to do the best for his patient.
- Privacy is essential for sound mental health and also for sovereign identity. It must be respected unless it becomes a threat to self and others.
- Having separate law for mental patients fulfills only their reality needs originating out of fundamentally different nature of mental patients who at times may have compromised ability to meet the demands of their social roles and responsibilities. It does not contribute to reinforcement of their social stigma.
- There are a large number of other areas, mostly thrown up by newer technological advances and changing social dynamics, which continuously test the limits of human wisdom as far as ethical and legal considerations are concerned.

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