NATIONAL JUDICIAL ACADEMY

NATIONAL WORKSHOP FOR HIGH COURT JUSTICES ON

DIMENSIONS OF LAW GOVERNING MEDICAL PRACTITIONERS

VIS-À-VIS MORALITY AND ETHICS

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4th and 5th February, 2021

Programme Report

The National Judicial Academy, Bhopal organized a two day online National Workshop for High Court Justices on Dimensions of Law Governing Medical Practitioners vis-à-vis Morality and Ethics on 4th and 5th December, 2021 which was attended by 20 participants. The conference involved discussion on varied areas which included Ethics, Morality and Medical Law; Medical Negligence and Malpractice; Pandemic, Public Health and Medical Industry; and Organ Transplantation.

DAY I

Session 1

Theme– Ethics, Morality and Medical Law: Interface and Interplay

Panel – Justice K. Kannan, Dr. Lalit Kapoor and Prof. Robert I. Field

It was opined that ethics and morality are in the realm of moral philosophy and that if ethics is the genus then morality is the species. Examining the historical perspective it was stated that Hippocrates laid down norms for conduct of all physicians. The Hippocrates Oath inculcates the qualities of a good surgeon. The first part of the oath incorporates the beneficence principle whereas the second part incorporates non malfeasance. The important judgment of Justice Benjamin Cardozo in Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914) was discussed and it was stated that informed consent is important. The doctor should disclose to the patient the nature of illness, the risk and benefits of the proposed procedure and its alternative. The Nazi Germany experimentation on humans and the subsequent Nuremberg Code was also discussed. It was opined that the doctor has to see all the relevant circumstances while determining the best interest. It was stated that there is an overlap between ethics and law which should be understood. It was opined that ethical standards required of doctors are more stringent than those provided in law and it was elaborated with examples of advertising, fee splitting and financial inducements. The conflict between ethics and laws was also highlighted with example of abortion and sterilization. The concept of advance directives provided in Common Cause v Union of India [(2017) 10 SCC 1] alongwith its practical implementation and functionality was also discussed.

The interplay between bioethics and law was focused upon and it was opined that bioethics involves analyzing the philosophical, social and moral implications of various healthcare decisions. It was

stated that ethical values are not always formalized as law. The competing theories which should be considered while determining the appropriate decision includes utilitarianism, rights of individuals, communitarianism, fiduciary relationship and duties. The core bioethical principles which includes beneficence, utilitarianism, distributive justice, autonomy and non-maleficence were highlighted. Thereafter, the state and federal role relating to healthcare in the United States of America were also discussed in brief. It was stated that under ethics, the physician has a duty to treat and a fiduciary obligation to put the patient interest first which is based upon relationship, obligation and beneficence. The scope and ambit of physician duty to treat and limitations were discussed by reference to the judgments in the case of Ricks v Budge [64 P. 2d 208 (1937)] and Childs v. Weiss (440 S.W.2d 104). It was highlighted that it is the duty of physicians to follow standard of care and the focus in ethics and law is on physician duty and not on the outcome. The issue relating to conflict of interest were also highlighted and it was stated that full disclosure of their interest by the doctors is an ethical consideration. The issue of referral fees was also discussed under ethical considerations and it was stated that it is of utmost concern that the doctor bases referral on medical judgment and not on financial interests. The Medicare Statute and the Stark Amendments were also discussed in reference to the issue of referral fees. Furthermore, it was highlighted that the physician has an important ethical duty to maintain confidentiality. The rights of patient were discussed which include right to receive information and right to refuse care. The celebrated decision of Canterbury v. Spence (464 F.2d 772) was also elaborated wherein it was held that the physician has a duty to disclose the risks a patient would consider important in making decision about the care which he is to receive. The contemporary issue of vaccine mandate was also deliberated upon and various ethical quandary were

Session 2

Theme- Medical Negligence and Malpractice: Contours of Liability

Panel- Justice Subramonium Prasad and Justice K. Kannan

The judgment of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 1957 was elaborated wherein the concept of "standard of medical care" was introduced. The test provided that the actions of the doctor should be comparable to standard medical practice. In Indian context,

the judgment of *Samira Kohli v. Dr. Prabha Manchanda* (2008) 2 SCC 1 was highlighted regarding informed consent and it was stated that the doctor could not conduct surgery without consent. It was stated that certain elements have to be proved for negligence i.e. duty of care, failure to perform duty, damage and capable of being compensated. Subsequently, the practice in United Kingdom and the judgment of *Canterbury v. Spence* (464 F.2d 772), *Jacob Mathew v. State of Punjab and Another* (2005) 6 SCC 1 and *Martin F. D' Souza v Mohd. Ishfaq* (2009) 3 SCC 1 were also highlighted. Thereafter, the judgment of *Montogomery v Lanarkshire Health Board* [2015] UKSC 11 of the Supreme Court of the United Kingdom was discussed in detail and the opinion of Lord Scarman was focused upon. In *Montgomery v Lanarkshire Health Board* it was laid down that it is important that the patient is made aware of the benefits and risks associated with the treatment alongwith the alternatives so that the patient is able to make an informed choice. However, the disclosure is not required whereby the disclosure of information would accelerate the end itself. Moreover, it was stated that assessment of risk should be based on significance and not percentage. It was opined that patient is not mere recipient of medical care and has a bundle of rights. It is important that information of all risks concerned with that particular ailment and the medical procedure should be explained properly and it should not be in cyclostyled format. It was stated that there has been a change from Bolan to Montgomery wherein the onus of responsibility has increased for doctors. It was opined that in U.K. there is now shift towards patient centric approach. Thereafter the judgment of *Maharaja Agrasen Hospital v Rishabh Sharma* (2020) 6 SCC 501 was also expounded upon. Lastly, various provisions under Indian Penal Code, 1860 relating to negligence were discussed.

DAY II

Session 3

Theme– Transplantation of Human Organs and Tissues Act, 1994: Issues and Challenges
Speakers – Justice Chakradhari Sharan Singh and Dr. Vasanthi Ramesh

It was explained that the legislation regarding human organ transplantation was enacted based on two Latin jurisprudential maxims viz. *'salus populi suprema lex'* and *'parens patriae'* on the

rationale to promote the good health and welfare of people. The jurisprudential foundations of the law alongwith the concept of 'body autonomy' were highlighted. The definition of 'human organ' under the Act was highlighted and it was opined that it should be more precise. The issues relating to consideration of 'human body' as property for limited legal and other purposes was also discussed. The provisions of Transplantation of Human Organs and Tissues Act, 1994 (Hereinafter- THOTA) with reference to prohibition of commercialization of human organs and the role of authorization committee for organ donation and transplantation was discussed in detail. The landmark judgment of *Moore v. Regents of the University of California* [51 Cal.3d 120 (1990)] was also discussed regarding the rights of person over body.

Thereafter, a brief overview of the history of the enactment of the THOTA was provided. It was stated that the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (1991) discusses three things i.e. organ, tissues and cells whereas THOTA is only concerned with organs and tissues. The Declaration of Istanbul (2008) was also highlighted alongwith related issues like transplant tourism and organ trafficking. It was emphasized that fundamental principle in organ donation and transplantation is that it should be completely free and without any form of consideration. Subsequently, the origin of National Organ & Tissue Transplant Organisation (NOTTO) along with functioning and role in organ transplantation in India was discussed. An overview of the framework of regional and state level organizations under NOTTO was also provided along with their roles and responsibilities. The relevance and importance of National Registry of organ donation and transplantation was highlighted with rules of preference and the role of NOTTO and its subordinate organizations. A comparison of organ donation and transplant rates worldwide was provided and it was stated that India has a very low rate of organ donation. The benefits, risks and challenges in organ donation and transplantation were also discussed in detail. The issue of commercialization was highlighted and presence of rackets in various states were discussed in brief. The issue of paying for the 'medical insurance' of donor by the donee was discussed. It was suggested that there is pressing need for bringing awareness about the legislation in the society.

Session 4

Theme– Pandemic, Public Health and Medical Industry: Balancing the Scales

Speakers –Justice Vipin Sanghi and Dr. Anant Bhan

The session was initiated by stating that the situation was very serious during the second wave of COVID-19 in India and the judiciary was flooded with PILs. Thereafter, Article 3 and 25 of the Universal Declaration of Human Rights (UDHR) were discussed in brief alongwith the International Health Regulations of 2005. It was highlighted that the Right to Health has been considered as a facet of Article 21 of the Constitution in Rakesh Chandra vs State of Bihar (1989) Supp (1) SCC 644 and Shantisar Builders vs Narayanan Khimalal Totame (1990) 1 SCC 520. The responsibility of the state under Article 47 was expounded and the judgment of Vincent Panikurlangara vs Union of India (AIR 1987 SC 990) was discussed. The allocation of responsibility for health and allied fields in the State List and the Concurrent list under Schedule VII were also discussed in the session. The role and powers of municipal corporations, municipalities and local self-governance bodies to prevent the spread of infectious disease were also delineated. Furthermore, The Epidemic Diseases Act, 1897 and Disaster Management Act, 2005 with its relevant provisions were discussed in brief. Thereafter, the legal obligations of the medical industry and practitioners was highlighted with reliance on judgment of Parmanand Katara vs Union of India (1989) 4 SCC 286 and Paschim Banga Khet Mazdoor Samity vs State of West Bengal (1996) 4 SCC 37 .The role of courts during the pandemic was also enunciated with reference to various judgments and orders passed by Supreme Court in Shashank Deo Sudhi vs Union of India (2020) 5 SCC 132, Jerryl Banait v Union of India (2020) 15 SCC 686 , In Re: The Proper Treatment Of Covid 19 Patients and Dignified Handling Of Dead Bodies In The Hospitals Etc.,[Suo Motu Writ Petition (Civil) No(s). 7/2020] and In Re:Distribution of Essential Supplies and Services during Pandemic, [Suo Motu Writ Petition (Civil) No(s). 3/2021].The court through its interventions issued various directions relating to oxygen allocation, treatment, vaccine capacity and dispersal, differential pricing of vaccines, supply of essential drugs etc. The orders of Delhi High Court in Rakesh Malhotra v. Government of NCT of Delhi (W.P (C.) 3031/2020) which dealt with various issues regarding supply of medical oxygen, availability of medicines, price control etc were also discussed.

It was also highlighted that the pandemic has revealed the issue of deficient health facilities, leaky infrastructure and the gaps in regulatory systems. The wider impact of COVID-19 on public health was also highlighted including its effects on routine immunization, nutrition, maternal health and tackling tuberculosis, malaria, HIV. It was stressed that COVID also resulted in rise in mental health related disorders including grief, depression and has increased inequalities in society and poverty. The clinical trials of medicines and vaccines with reference to coronavirus was also discussed alongwith potential problems with 'fast tracking and transparency issues'. The issues relating to clinical autopsies of COVID-19 patients was also discussed in brief. The importance of valid and correct data sharing behind the clinical research was also emphasized. The key clinical ethics issues were also elaborated upon including treatment with unproven therapies; duty to care versus right to protection; rationing of scarce resources and resource allocation; dignity in death and care for non COVID-19 patients. The judicial response and the judicial interventions in matters of testing, oxygen supply, availability of beds and medicines to the patients, vaccination strategy, and compensation to victims of COVID-19 was highlighted as crucial in containing the pandemic and bringing accountability in the executive branch of the government. The issue of vaccine hesitancy and vaccine equity were also deliberated upon. The breach of medical ethics during pandemic like over-charging patients, not undertaking adequate care of patients, transparency etc. was also reflected upon. It was opined that there is need of compensation policy for vaccination programme in the light of experience from polio vaccination drive wherein victims are yet to receive compensation for failed trials. Lastly, it was opined that the 'Right to Health' guaranteed under Article 21 of Indian Constitution mandates providing accessible health infrastructure to everybody.