

BOOK REVIEW

MEDICAL ETHICS AND MEDICAL LAW: A SYMBIOTIC RELATIONSHIP

By José Miola,

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In an era where the “discourse” of medical ethics seems to be ever-present, one of the most obvious questions that comes to mind is the following: how, and with what results, do medical ethics combine with medical law, given that they can both be understood as regulatory devices? This is exactly the pivotal question that this well-researched publication aims at answering, especially in the light of their well documented co-existence in case law, governmental reports, academic courses and so on. Starting from a historical analysis of the development of medical ethics and going through a detailed presentation of judicial decisions in areas demonstrating an intense ethical content, the author presents his case with eloquence and clarity and reaches quite a crystal-clear conclusion: this co-existence is detrimental both for medical law and medical ethics, since it is the main reason why many issues remain ultimately unregulated.

This rather pessimistic view runs through the whole argument and becomes apparent even from the introductory pages of the book, where the outcome of the Bristol Inquiry Report is discussed, in an attempt to anticipate many of the issues that will be explored further. The Inquiry, although having dealt with technical matters, concluded that the regulatory regime of the Bristol Royal Infirmary (and by expansion of any medical establishment in Britain), namely a combination of medical law and medical ethics, is totally unhelpful in providing clear guidance to medical practitioners, for a variety of reasons that include cultural flaws within the medical professional, excessive professional autonomy and a significant fragmentation of the sources of regulation that either generate confusion or cancel each other out. For all these reasons, the practice of medicine remains essentially unregulated and a paradox comes to the surface: that the proliferation of regulation, in the form of both medical ethics and medical law, has not resulted in clear and practical solutions, but rather in the opposite outcome.

Taking these premises seriously, the author examines in detail four real-life scenarios where medical ethics and medical law co-exist, in the sense that they both provide regulation or guidance for problems that a medical practitioner may possibly

encounter. In consequent chapters, the author discusses risk disclosure (or, as it is more commonly known in the relevant legal lingo, “informed consent”), the problem of consent emanating from minors, sterilisation of the mentally handicapped and, finally, decision-making at the end of life. In all these areas, he analyses in depth the most significant cases and the relevant judicial dicta and attempts to decipher the interplay between medical ethics and medical law. The analyses he undertakes are, of course, informed by his initial viewpoint, and his main focus of interest is whether the courts have accepted the responsibility to make the relevant decisions themselves, or whether they opted, instead, to pass this responsibility back to the medical profession. This latter option, which is often depicted under the term “medicalisation”, essentially means that a court of law will accept the legality of a medical decision, treatment, assessment etc., as long as this can be sustained in accordance with criteria originating from the medical profession itself. By applying this viewpoint, the author identifies with great precision when the former or the latter option are adopted and although attempting to find an element of coherence in the wider picture, the data that he unearths force him to conclude that the field is dominated by significant randomness and that shifts between the two options can be traced only to the subjective opinions of the judges involved. The only trend that the author identifies is a noticeable tendency of the courts to keep for themselves the power to decide, when they identify a “significant” moral issue that seems to be of interest for the wider society. In these situations, the author argues, a paradox comes into existence: that medical law acquires priority over medical ethics, exactly when moral issues are adjudicated. Conversely, whenever a “trivial” issue is at stake medical law remains silent and it is the domain of medical ethics that is expected to provide a solution.

Leaving this paradox aside (which can actually be explained as the logical consequence of the way that the very description of the situation is framed), the main thrust of the whole argument is quite compatible with the findings of the Bristol Inquiry Report. In effect, the author plausibly claims that the randomness and the complexity of the interconnection of medical law and medical ethics, in real-life terms, and, crucially, the unfolding of this complexity within the judicial terrain, tends to contradict what regulation is, or should be about: namely the provision of clear, well organised and usually generalisable solutions to complex issues that potentially affect a significant number of individuals who, living in a democratic society, are entitled to know the applicable rules in advance, with at least a more than moderate degree of certainty.

In parallel with the presentation of the main argument, a number of peripheral, but significant themes are also pursued that further enhance the value of the book. To begin with, a very interesting distinction is made between formal, semi-formal and informal sources of the ethical discourse, a distinction very helpful in clarifying what the usually obscure term “medical ethics” may mean and in showing how deep the level of complexity is. Also, the choice of presenting the relevant case-law in strict chronological order is totally justified, since it helps the reader enormously to follow how the legal reasoning of the courts evolves and to notice the significant shifts that occur in this process. Finally, the dedication of a whole chapter to the “presence” of medical ethics in Government-Commissioned Reports is in itself a total novelty since

it touches upon an area not usually discussed in the literature of medical law and medical ethics.

Yet, and despite its significant merit, the book misses an opportunity to cross this invisible line that would render it a truly groundbreaking piece of work. It seems to this reviewer that the insistence of the author in showing how things work in practice, and why his initial assertions about a detrimental fragmentation are correct, brings to the whole project an overwhelming touch of descriptiveness, that is of course great for identifying the problems but not helpful to provide solutions or even to offer explanations for particular noticeable instances, like the occasional shifts in the legal reasoning of the courts. It is obvious from the analysis that a confusing over-fragmentation exists in the field, yet the reader begs for a way forward that is not essentially provided in the book. In order for such solutions or at least proposals to be offered, a different type of enquiry is necessary, namely one that explores in depth the relationship between the distinct normative domains of ethics and law. More importantly, only if one is ready to frame this interconnection as a theoretical question, in other words as something which must be problematised in itself, will it be possible to move forward and open up the discussion of a number of issues that should not go unnoticed, since the solution to what the author identifies as problematic can be found exactly there. For instance, it would be necessary to explore both the similarities and the dissimilarities of the ethical and the legal discourse; to investigate the regulatory effectiveness and the limits of both; to tackle questions of authority and legitimacy, since it is important to justify who has ultimately the power to decide; and so on. In any case, it appears that only from such a theoretical perspective can their “symbiotic relationship” become a term with substantial value, and not simply a flamboyant linguistic innovation. Furthermore, it is probably this theoretical deficit that explains why, as a final comment, the author acknowledges that ultimately what will happen remains within the consciousness of the individual medical practitioner. It goes without saying that the issue at stake is *how* to regulate, sometimes *against* the consciousness of the individual medical practitioner or even of the individual judge...

It is for these reasons that this reader is forced to conclude that, without a serious theoretical discussion of what medical ethics, as a discourse, entail and what the limits of its interconnection with the legal discourse are, the problems that the author of this book has so plausibly identified will persist.

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