

A Critique of the Notions of Law and Ethics as Regulatory Systems for Healthcare

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Abstract

Law and ethics are in their very natures, regulatory instruments and/or control mechanisms, for the proper direction of society towards the common good. While ethics as a system of moral values recommends what ought to be done or avoided, law commands the observance of those acts to be done and prohibits their contraries. Hence, ethics belongs to the internal morality of law and also operates as the justification for the precept of law. Working in a synergy, both act as social control mechanisms directive of the transactions in the social institutions and among them. The purpose of this entry is to make a general appraisal of the concepts of law and ethics especially as it relates to their correlation in the regulation of healthcare delivery system in Nigeria. In the emerging discourse, the method of hermeneutics is largely used especially in its dimensions of analysis and synthesis. It is the finding of this entry that law and ethics are two aspects of the same reality which regulates the affairs of men in society. The next discovery made by this paper is that the authentic ideas of law and ethics meet at the venue of natural law. Hence, law + ethic = Natural Law. It is strongly recommended that the natural law theory of legality and morality be upheld in all jurisdictions as the applicable directive theory and practice of law and ethics especially with regard to the healthcare delivery system.

Introduction

Man is essentially both of social and moral nature. The two natures must compenetrate in the determination of his actions and in the control of his passions. All human institutions too, ought to be established on the foundations of human 'nature' and 'end'. The social dimension of human nature implies that he/she lives and works in the community of others. But he is also of a moral (ethical) nature which essentially presupposes freedom from internal and external determinations that are contrary to his moral inclinations – to do good and reject evil. This meeting of a free nature and a moral (ethical) nature inevitably occasions tension. This is because, there is every tendency for each freedom over-stepping its boundary and invading the next subject of freedom. *Ex hypothesi*, this

conflict of freedoms led to a world described by Hobbes (1651) as “solitary, poor, nasty, brutish and short” because of war of all against all. For a remedy, reason intervened as described in the theories of social contract and other ethical systems that followed, to supervene law and ethics/morals over the unfettered freedom of man. The two devices/instruments of law and ethics thus operate as necessary limitations to autonomous freedom in order to make social life and concert possible. In this way, human behavior in social systems became subjected to the regulatory mechanism of law. As well, human acts, social actions and decisions too, were required to pass the ethical test before being accepted /acceptable in the public or private space. In other words, ethically sound rules or laws are therefore drawn up to ensure that members of the society may live and work in an orderly and peaceable manner (Padfield, 1980).

Precisely because law and ethics constitute the most primary tools (Connell, 1990) of constructing social life in all its ramifications, establishments can only thrive to the extent that there are good legal and ethical frameworks available for their regulation and control. In the absence of such frameworks, institutions of society will become rudderless, fail and fizzle out to the great detriment of the society. Consequently, the health delivery institutions of the society, to say the least, needed good laws and laudable ethical support for its survival, otherwise it collapses and with it, the development and civilization of the whole peoples.

On the Meaning and Nature of Law

Law can be prescriptive or descriptive. In the first sense, “it prescribes how things should be done or how men should behave”. In this sense, law applies to human beings alone. But when considered in that sense in which it refers to “the regularity with which certain things happen uniformly all over the world under

certain conditions” (Omogbe, 1994), it becomes descriptive. In this way, it describes certain uniformities and measures regularities in the universe (Hospers, 1976). But it is with the prescriptive sense of law that this work concerns itself. It looks not at the statistical laws of science applicable to medicine but to the human positive laws that regulate the operations and transactions in that sector.

Minded on the prescriptive sense of law, Hart observes that “few questions concerning human society have been asked with such persistence and answered by serious thinkers in many diverse, strange and even paradoxical ways as the question “what is law” (Hart, 1971). These comments by Hart are *in par-materia* with the observations made by Lloyd after considering the multiple definitions of law offered by scholars. According to him, “much juristic ink has flowed in an endeavour to provide a universally acceptable definition of law but with little sign of attaining the objective” (Lloyd, 1965). For Kant, the solution lies in an *a priori* than *a posteriori* approach to the definition of law (Entreves, 1972). And in the opinion of this paper, describing what law does than defining it is the solution to the diatribe. And this, provided that whatever description advanced, considers in its own way the basic ideas central to law namely “order” and “compulsion” (Padfield, *op.cit.*) and provided further that such attempt takes into cognizance those perennial characteristics which age long scholarship has read into the nature of law namely; that it consists of a set of rules; that it is set up by proper authority and; that it is meant for a social setting (Nwogu, 2000).

In what follows, a few samples out of the many definitions proffered for law is to be outlined. Kant for instance defined law as “the totality of the conditions under which the arbitrary will of one can co-exist with the arbitrary will of another under a general law of freedom” (Sharma, 1994). Sheila Bone tries to bring together the definitions of many jurists in this way:

A law is an obligatory rule of conduct. The commands of him or them that have coercive power (Hobbes). A law is a rule of conduct imposed and enforced by the sovereign (Austin). But law is the body of principles recognized and applied by

the state in the administration of justice
(Salmond) (Bone, 2001)

Further, Ihering views law as a means of ordering society by regulating conflicting interests. (Lloyd, 1979) Yet according to Roscoe Pound, “law is involved in the process of social control, a kind of social engineering aimed at the fair distribution of duties and benefits, thereby satisfying the maximum of wants with the minimum of friction” (Asein, 2005). Expounding his doctrine of the *Volksgeist*, Savigny observes that law is “a product of slow organic distillation of the spirit of the particular people among which it operates” (Kantorowics, 1937) What is more, Oliver Wendell Holmes, thinking of law in terms of judicial process describes it as “the prophecies of what the courts will do in fact and nothing more pretentious” (Holmes, 1897). But it was left for Karl Marx as cited in Akomolede (2008) to define law as “a superstructure upon an economic base”. A definition which is preferred by this work and adopted as a working definition is Aquinas' construction of law as “an ordinance of reason for the common good, made and promulgated by him who has care of the community” (Aquinas, 1981)

Contextualizing the Definitions into Broad Based Theories/Schools

It is noteworthy that a definition is a hypothesis as to the essential nature of the thing defined; providing as it were, a starting point for investigation, boundaries of investigation and a method of analysis (Berman & Greiner, 1972). Without doubt, the fact that law is a social institution of great complexity, with many different aspects, which varies in its nature in different societies and in different stages of historical development, places enormous difficulty on the way to its definition (Berman & Greiner, *ibid*). The various definitions offered immediately above arise from differential approaches by scholarly minds, to the subject matter of law. Each is typical of a particular school of thought. Three such general types of concepts operating as frameworks have survived scholarship and thus prevailed as descriptive definitional models of law:

One type of concept emphasizes the relationship between law and moral justice. It sees both the ultimate origin of law and the ultimate sanction of law in “right reason”. A second type of concept

emphasizes the relationship between law and the political power; it sees both the ultimate origin of law and the ultimate sanction of law in “the will of the state. A third type of concept emphasizes the relationship between law and the total historical development of the community; it sees both the ultimate origin of law, and ultimate sanction of law in “tradition”, “custom” and national “character” (Berman & Greiner, *ibid*).

The first concept above is about the *Natural Law Theory* with such exponents as, Aristotle, Aquinas, Rousseau, Montesquieu, Finnis etc. What is described in the second concept is the school of Positivism strongly represented by such jurists as John Austin, Hans Kelson, Hart and many others. And the third concept epitomizes the Historical School which has such advocates as Von. Savigny, Herder and Hegel. These three concepts and/or theories described above are by no means exhaustive of the approaches to law. Indeed, there are other fringe concepts such as the Sociological theory, the Realist and Marxists theories. But what is notable is that the status of these fringe concepts relate to affinities and/or variations of one or more of the three cardinal theories (Akomodele, *op.cit*). Each of the cardinal concepts and their fringe affinities or variations have at one time in history prevailed and dominated others.

All-in-all, this paper agrees with Berman and Greiner that “the legal aspect of the social order must be approached partly in terms of the particular moral principles which it embodies, partly in terms of the particular political authorities which shape it, and partly in terms of the particular historical experience and values which it expresses” (Berman and Greiner, *op.cit*). Indeed, these are not three things but one thing viewed from three different angles. What, of course, is required is not a choice of one over others but a critical synthesis of the best values provided in all the theories.

Re-presenting the Natural Law as the Justification of all Laws Properly so Called

Suffice it to know that it is in the natural law theory that the true meaning and justification of law is found. This is because far from deriving impetus from political authority national character, current social conditions and/or economic conditions, it finds the reason for law and the direction of same in the human nature as such, and in man's ordered inclinations. Thus, the natural law theory is properly concerned with law as it ought to be as against law as it is. It operates as a critique and criticism of laws for constant reviews.

Fundamental to the theory of natural law is; that there is a law, immanent in the nature of man and discoverable by reason which guides and controls all actions of man as a being in the universe; that the universe is ordinarily ordered to a nature; that this order of law is anterior and superior to the preferences of man and society; that this law is universal, immutable and indispensable; that positive (man-made) laws cannot afford to be inconsistent with this superior and anterior order of law; that for any human positive law to be valid, it must comply with the moral components of this order. Hence, every law which does not comply is unjust i.e. cannot effectuate justice. Little wonder Cicero observes “*Lex injusta non lex est*” meaning that an unjust law is no law at all. To be precise:

The positive law depends on the natural law and derives all its binding from it, since it directs man to the common good ... if it goes against the natural law, it becomes violence; it is no longer “law”, and has to be resisted. From the content of natural law, we can glean what is contrary to it: all that goes against the dignity of human life (De Torre, 1980)

Without equivocation, the natural law is therefore the moral justification of all laws. Put a little technically, it is the *a priori* element of laws – an ideal by which all existing positive laws can be judged (Paton, 1951). It is an immutable, autonomous, spontaneous ideal of law, the law of laws which:

... lays down conditions that all laws must fulfill in order to qualify as laws, and sets limits to the powers of legislatures, limits beyond which they cannot legitimately go in their act of legislation. If any law-maker over-steps these limits, his action becomes ultra-vires and his purported "law" null and void (Omoregbe, *op.cit*).

Of the many definitions of human positive law the one that is completely compliant with the spirit of natural law is the Thomistic definition of law. It requires that law should be an ordinance of reason, made by the one who has authority over the subjects.

As ordinance of reason, a piece of legislation which arises from the spirit of the natural law, is set apart from a mere counsel or suggestion. It is rather an *order* or *command* that imposes obligation or moral necessity to be obeyed (Hardon, 1980). From the perspective of the lawgiver, it is the imposition of the superior's *will* on the will of those who belong to a society and "must be expressed in a mandatory form, no matter how courteously phrased" (Hardon, *ibid*). For instance the Criminal Code Act of Nigeria provides that:

Any person who with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever, is guilty of a felony, and is liable to imprisonment for fourteen years (Criminal Code Act, Cap. 38, Laws of the Federation of Nigeria, 2004, s. 228).

A cursory look at the provision above, discloses an order or command and not a counsel or suggestion. It is also clearly couched in a mandatory form

than optional or discretionary form. That indeed, is the nature of law properly so-called.

More still, a law informed by the natural law is an ordinance of “reason”. It qualifies as an ordinance of reason in two ways. First, though a piece of legislation is directly imposed by the *will* of the one in authority it has, prior the imposition, been formulated by the intellect as the planning faculty behind the legislator’s will. Second, since its purpose is to direct rational beings to do something, it must be reasonable (Hardon, *op.cit*). But to be reasonable the natural law criteria for reasonability of law must be met to wit:

... a law should be consistent, just, observable, enforceable and useful. It is *consistent* when it is neither self-contradictory nor in contradiction with other laws. It is *just* when it respects higher laws and distributes burdens equitably. It is *observable* when it does not demand the impossible because it is cruel or too difficult. It is enforceable when not only the law abiding but everyone can be expected to keep it because it is supported by appropriate sanctions. And it is *useful* when it serves a valid purpose without needless restriction of human liberty (Hardon, *ibid*).

What is more, the natural law requires that law(s) should be directed to the interest of the community as a whole (common good) not to a personal or private good; that they are relatively permanent, binding succeeding generations until repealed. In this way, laws differ from personal or executive orders which cease upon the death or upon the removal from office of the one who gave them (Hardon, *ibid*).

Further, if law is to be for man, the natural law urges that “it has to be made known to man in some way” (McHugh, 1976). This is the requirement of

promulgation. A law is said to have been properly promulgated “if the people can come to know about the law without much difficulty” (Hardon, *op.cit*).

It is left to point out that, law *qua* law has to be necessarily authoritative. This means that to be proper, it has to be issued by the public authority i.e. the one who has care and authority over a community of persons and should be enforced by same public authority or their legitimate successors (McHugh, *op.cit*). According to Hardon, that a law must be authoritative means that:

...it must come from a law giver or legislator who has rightful jurisdiction. The law-giver may be a physical person, which is a single individual, or a moral person, which is a body passing laws by joint action (Hardon, *op.cit*).

Note that it is such laws that pass the test of the above criteria that can usefully regulate the Healthcare delivery system of any state or country.

But is Law Necessary?: A Review of the Functions of Law in Society

Law is an important aspect of the social order and the entire system of law making, enforcing and administration is very vital to the economic, religious and other ways of acting and thinking in society (Llewellyn, 1940). From what has been reckoned above, one understands that law “is a form of social order” and that “legal order is one important way of holding society together (Berman and Greiner, *op.cit*).” Understandably, the health /medical sector or institution of society form an integral part of the social order which law operates to cement together. The point is therefore strongly urged that “people cannot live together in society without law of some kind.” “There has never been a society without some legal order, however rudimentary (Berman and Greiner, *ibid*).” Law as such has proved to be the fundamental basis of unity in society – its operations reaches into virtually every aspect of social relations. Indeed, whether “in business, in family, in recreation, in religious affairs and in many other types of activities (like health and education) legal concepts and legal rights and duties play a far more important part (Berman and Greiner, *ibid*).”

With great emphasis, a question as to what functions law fulfils in society is relevant especially in the face of centuries of critical rejection of law or recommendations for its abatement by scholars of very strong persuasions. From a certain interpretation of Plato through the Marxists to Godwin (1793) and the Russian anarchists (Bakunin and Kropotkin) (Lloyd, *op.cit*) an irresistible impression is given to the effect that law and legal order are the root of social tribulation. Yet the institution of law has found in legal/political history many supporters like the legists of China (Williams, 1976) and the Shastra writers of India (Becker and Banes, 1961). In Europe, one finds such Pro-law thinkers as Bodin, Hobbes, Hume, Augustine and Aquinas (Lloyd, *op.cit*). Torre articulated the thoughts of the pro-law thinkers and in terms of the function law fulfils in the society with these observations:

There should be stable laws, because if civil ordering were to be left to the decisions of private individuals or to the rulers themselves, it would easily be corrupted by “might is right”. Since the purpose of the laws is to direct men to the common good, they must facilitate the practice of virtue and discourage vice. This is why the juridical order, i.e., the accepted framework of clearly recognized and stipulated duties and rights, is profoundly good (De Torre, *op.cit*).

In very clear and concise outlines, the three general social functions of any system of law are as follows: (1) The function of restoring equilibrium to the social order (or to some part thereof like the healthcare sector) when that equilibrium has been seriously disrupted. (2) The function of enabling members of the society to calculate the consequences of their conduct (even in the healthcare sector) thereby securing and facilitating voluntary transactions and arrangements. (3) The function of teaching people right belief, right feeling, and right action - that is, to mold the moral and legal conceptions and attitudes of a society and in this case with reference to healthcare delivery system and procedures (Berman and Greiner, *op.cit*). This educational function of law as marked out in number (3) above is very important in the healthcare delivery/reception system of our society. In this way, experts are taught what is proper to do while patients and their relatives are taught their rights, duties and obligations in the delivery and reception of healthcare. This tutelary function of law should start from

calling attention to the nature of man as a moral subject with a purpose beyond the universe.

Situating the Functions of Law in the Context of Healthcare and Medicine

If as discussed above, it belongs to the province of law to enable persons calculate the consequences of their actions and to teach them right actions/beliefs, then, there is no sector more fundamental for the exercise of law's jurisdiction than the healthcare delivery system and medicine. Adjusting to that venue, law exercises control over actions of practitioners, society and patients to ensure adequate result in conformity to the *nature* and *end* of man in view of social progress and development. In doing this, law orders accepted and expected objective norms of action, enforces justice in respect of human rights/dignity, ensures planning and development in the healthcare industry and sanctions infractions.

Also recognizing that many ethical dilemmas need to be objectively resolved in the course of giving and receiving medical treatments, law intervenes with dependable guidelines (Olapade, 2008). Among the many ethical dilemmas in question are: Is it justifiable to practice euthanasia? Is it permissible to use extraordinary means to prolong death? What should a doctor do in the event that a patient refuses to give or withdraw his/her consent to a particular treatment and/or procedure? What is the extent and/or limits of patients' rights? What is the measure of government's and public's obligation in ensuring adequate healthcare? These issues raised and many more like them are taken up by healthcare law for the purposes of proper and abiding legislations. Olopade (2008) has therefore tried to define medical/health law as follows:

Medical law which can also be called “medical jurisprudence” is the symbiosis or nexus between law and medicine. It is that branch of the law that has bearing with medical practice or medical profession. It is an aspect of the law that deals with ethical or moral issues and the relationship that exists between medical practitioners and their clients or patients. Medical law borders on issues that will lead to maintenance of excellence in medical practice.

In law's capacity as a regulatory and control mechanism, and under the nomenclature of health/medical law, it organizes and controls all the incidents of healthcare delivery system with a view to securing the dignity of the human person. This function touches a number of sensitive issues one of which is the confidentiality that should exist between the healthcare provider and his/her patients (Yakubu, 2002).

The sources of health/medical law in Nigeria include but are not limited to Nigerian legislations, International instruments, Case laws and expert medical and legal opinions. As regards Nigerian legislations, the primary source of health law is, The Constitution of the Federal Republic of Nigeria 1999 as amended in 2011 (See sec.17(2)(b);(3)(a)-(d);and secs. 33&34). For the avoidance of doubt, section 17(2) (b) provides that “the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced” while subsection (3) (c) provides that there shall be “adequate medical and health facilities for all persons.” A community reading of these two provisions covers the responsibilities of the government, healthcare providers and patients at once. What is more, the provisions for right to life and to the human dignity made in sections 33 and 34 of the Constitution respectively relate, by due extension, directly to healthcare obligations.

After the Constitution some of the local statutes providing for healthcare include but are not limited to (1) Medical and Dental Practitioners Act (LFN 2004, Cap. 221) (2) Medical and Dental Practitioners (Disciplinary Tribunal and Assessors) Rules (LFN 2004, Cap. 221) (3) Nursing and Midwifery (Registration etc) Act (LFN 2004, Cap. 332) (4) Pharmacy Act (LFN 2004, Cap. 357) (5) Rules of Professionals Conduct for Medical and Dental Practitioners in Nigeria (6) University Teaching Hospitals (Reconstruction of Boards etc) Act (LFN, 2004, *op.cit.*, Cap.463).

Among the relevant International Instruments/treaties are (1) Universal Declaration of Human Rights (General Assembly Resolution 217 A(III), December, 1948) (2) African Charter on Human and People's Rights (Nairobi, 26th June, 1981; Entered in force: October, 1986) (3) The Geneva Declaration (4) The International Code of Medical Ethics (Olopode, *op.cit.*).

From Nature of Law to Nature of Ethics in the Regulation of Healthcare

The transition from law to ethics is not irregular because the nature of law is incomplete without some kind of internal morality. What may be the proper question is not whether there is any ethical content to law but which ethical system is involved? Hence to think of law is coterminous with some thought about ethics. Yet social systems apart from law's control are further subjected to certain ethical monitors especially as regards social policies and practices.

In the light of these conversations, any piece of legislation that must claim the title *Medical Law* must be susceptible to those ethical norms which are compliant to the nature of man as a free moral agent with transcendent/other worldly perspectives. This brings to force once again the classical controversy relating to the relationship between law and morality and to the issue of whether morality should be enforced/legislated. These issues have been handled under what has been popularly called Hart-Fuller and Hart-Delvin's debates (Njoku, 2007) respectively. What is more, the medical and/or healthcare professions as a whole need to be properly guided by such professional ethics of the kind and stuff that is suitable to the nature of man as "person." In what follows, an attempt is made to examine the nature of ethics/morality, evaluate the varieties and competing systems of ethics, identify the ethical system most in conformity with the nature of man, and interrogate the functions of ethics especially as it relates to healthcare delivery system of the society. Also, the need for a sound ethical influence on legislations relating to medicine will be engaged.

Ethics as a Control System

Ethics directly relates to the philosophical study of morality. Often, it is interchangeably used with "morality" when reference is to the subject matter of ethics. Sometimes it is narrowly used to depict the moral principles of a particular tradition, group or individual; for example, Christian Ethics (Audi, 1999). Simply put, it concerns the investigation and explanation of the so-called moral facts like moral evaluations, commandments, norms, virtuous acts, and perhaps the manifestations of conscience (Brugger, 1972).

Ethics properly seeks to give reasons for lived values and attitudes as it

asks the questions: What ought I do? What is the right action to perform or right choice to make? Notwithstanding that it is divisible into broad areas of study and emphasis, the general study of goodness and the general study of right action, constitute the main business of ethics. In this regard, its principal substantive questions are:

What ends we ought, as fully rational human beings, to choose and pursue and what moral principles should govern our choices and pursuits. How these questions are related is the disciplines principal structural question and structural differences among systems of ethics reflect different answers to this question (Audi, *op.cit*).

To the question, what ends are good to be pursued? Philosophers answer variously with the result being a profusion of theoretical frameworks. For Epicureans and J. S. Mill, it is 'feeling good or pleasure'-*hedonism*. For the stoics and perhaps Plato and Aristotle, the good to be pursued is 'doing well'/ 'excelling' at things worth doing-*perfectionism*. Note too that the idea that the end to be pursued must be that which is good in itself-*intrinsic value theory*, has also been held out and radically defended. A list of what philosophers have considered good in themselves include but are not limited to life (health), happiness, pleasure, knowledge, value, friendship, beauty and harmony (Audi, *ibid.*).

Turning to the question; what moral principles should govern our choices and pursuits? Or what is the right action for man? A plethora of issues emerge. These include (1) self evident moral principles (2) such principles that are expressions of a legislating *will*, for example, divine command principles (3) terms/principles of social cooperation-*contractariaism* (4) principles justified and suggested by right ends-*teleologism*; here, if the end is one's own happiness, it is ethical egoism but if it is happiness of humanity based on the ideal of rational benevolence, it is utilitarianism (5) principles based on the notion of duty, or what is right or rights-deontology (Blackburn, 1996).

In a resume, to the question what is the right action to do or the right action to perform? Hedonism, Utilitarianism, Altruism, Egoism and Theistic ethics avail the answer(s) (Onigbinde, 1999).

Other answers readily come from; universal benevolence theory, ethics of cultural progress, aesthetic morality, perfectionism, ethical rationalism and ethical formalism (Mautner, 2000). In this gallery of confused and confusing ethical theories, one finds such common denominators as: ethical relativism, ethical subjectivism and situation ethics. There appears to be in all these, a conspiracy against objective morality and absolute/universal values in favor of privative norms. But in such a conflictual hall of ethical-state-of-nature, health and wholeness, indeed human existence cannot be supported. Life will be nasty, brutish and short.

On the Failure of these Conventional Ethical Standards

Generally, all ethical systems that emphasize temporal happiness and welfare as ultimate values are said to be *eudaemonist*. Here, what is ethically right is equal to what is useful and profitable for achieving the good of temporal well-being and success. In this way, eudemonism is always utilitarian (Peschke, 1999). This ethical norm is defective in that:

The temporal happiness of an individual and even the welfare of a group is obviously a limited value, which cannot prove its right to preference in principle over the wellbeing of others. In more general terms, preferences of limited values over more comprehensive values are always a distortion with disharmony and injustice in its train. Utilitarianism with its unconditional preferences of temporal happiness and welfare over the higher eternal values inverts the order, disrupts and overthrows it (Peschke, *op.cit*).

It does appear, but nay, that the modern form of utilitarianism in making a case for the greatest happiness of the greatest number survives the inconveniences of the traditional eudaemonism which emphasizes personal happiness. Nevertheless, it makes a bad case for the reasons that it fails to identify who establishes what worthwhile happiness is and has to be for everybody (Peschke, *ibid*). More still, on the grounds of justice and fairness, utilitarianism does not pass the test of credibility. It can, for instance, justify an unjust death penalty just for the greatest happiness of the greatest number (Lyons, 1970). To be sure, utilitarianism is nothing short of an ethics of enlightened self-interest. It is such an ethical theory too external to create obligation for man. In its essence, it is a system of

“amorality which denies the real existence of ethical values and elevates profit of the individual to the supreme norm of morality (Brugger, *op.cit.*)” Without more, hedonistic ethics which consider a shrewdly calculated pleasure and satisfaction as the basis of all ethical evaluation collapses on the same veneer with utilitarianism (Brugger, *ibid*). The universal benevolence theory (altruism) though tried to rise above the defects of utilitarianism and hedonism was caught up by its neglect of the obligation of a man to himself. It presupposes the moral nature of the society but failed to provide a rational basis for its assumption. This same criticism applies with equal consequence to the ethics of cultural progress which subordinates the person as a means to achieving an impersonal progress (Brugger, *op. ibid*). Also aesthetic ethics which advocates a certain kind of unique consistency (harmony), as the ethical norm, fails to come to grips with the seriousness of moral demands and with the sacrifices which these frequently require (Brugger, *ibid*).

Perfectionism of Wolff is too indefinite for a norm of morality. This is because not just any realization of human inclinations lead to the morally good (Brugger, *ibid*). In fact, Peschke laments the prevalence of man-centeredness in those ethical systems which make self-perfection (in its naturalistic or religious forms) and temporal progress the ultimate end of moral effort (Peschke, *op.cit.*). The Fathers of the Second Vatican Council in dismissing such ethical systems as flawed, observes that individualism does not sufficiently account for social necessities which are “among man's chief duties today” (G. S, 30, 32). As it were, the “decisive” deficiency of the morality of self-perfection lies in this that it centers on values of limited nature, leaving aside superior values which alone would merit to be the ultimate center of attention and love (Peschke, *op.cit.*).

Those other ethical systems which preach morality for its own sake are also flawed; in this category one finds the Kantian ethics of *Categorical Imperative*, and the ethics of value-*Axiological Ethics*.

Kant's ethical norm is based on *universalizability* namely “so act that the maxim of your will could always hold at the same time as a principle establishing universal law.” Thus ethical obligation must be fulfilled for its own sake, not for the hope of utility (happiness or pleasure) or for any end-like God. The greatest violence of the Kantian ethics is its lapse into subjectivism. Hence:

By excluding finally an ultimate end of morality in God and by basing morality on individual judgment of what he thinks could become a universal law, Kant's ethics ultimately leads to subjectivism. It is left to the individual's discretion to decide what actions would be acceptable as general law. But there is no assurance that the choices will be morally reasonable and just. (Peschke, *op.cit*).

On the pretext/criteria of this imperative, one can justify any manner of action/choice or set of actions and choices. For instance, in 1961, Adolf Eichmann, who organized the extermination of Jews in Nazi Germany insisted at his trial in Jerusalem “that he had acted according to Kant's imperative” (Peschke, *ibid*).

Ethics of value, finds the norm of action or choice in the realization of some moral values-justice, courage, brotherly love, truthfulness etc. To be certain, these values are not the conclusions from any ultimate end of human life but are merely perceived by a kind of intuition of a certain feeling for value. Unfortunately, this ethical norm is flawed in that it ascribes the perception of moral values to an irrational feeling and leaves to the individual discretion the decision as to which moral values are worthy to be accepted and realized (Peschke, *ibid*). Evidently, in this normative suggestion, there is no criterion superior to the person's subjective feelings. Mere feelings are however fallible. This lack of a superior, objective criterion for the ethical conduct “creates a void which will easily be filled with the criteria of eudaemonism and utilitarianism” (Peschke, *ibid*). What is more “lacking a criterion that determines the nature of the Good, value ethics will continue to fall back upon the satisfaction to be derived, as the best norm for action” (Pannenberg, 1969). Note that where satisfactory consequence is used as a norm, healthcare and services will compromise those abiding verities that define man as a person and moral subject.

Whichever way the analysis goes, conventional ethical normative standards which philosophers of various persuasion have defended all resolve either to one form of ethical relativism or ethical subjectivism. On the one hand, ethical relativism is found objectionable in defending a ridiculous position that truth can be double or multiple-truth relativism

(Mautner, *op.cit*). Yet the point has been made out by experts that “variation in moral commitments does not prove that moral truth is relative any more than variation in scientific beliefs prove that scientific truth is relative (Olen and Barry, 1992). What is actually needed is a normative standard capable of sustaining objective principles for actions and choices of man as man. In what follows, attempt is made to consider a valid metaphysics of morals based on the 'nature' and 'end' of man.

In Search for a Valid Ethical Norm of Conduct: A Case for Christian Ethics

To arrive at an objective standard of human conduct, regard must be had to 'nature' and 'end' of man. Hence, ethics studies human actions both in their inner order and in their order to the end of man or in other words how man should live in order to attain his end (De Torre, *op.cit*). The 'end' of man in question is his possession of God and to this, human acts must conform, for that is the objective element of ethics/morality. Human nature too is fixed but actions proper to that nature are free acts. Man thus consciously, willingly and deliberately directs himself to this “end”. Note that if the “nature” and “end” of man are fixed, actions that will be proper to such nature as ordained to such end cannot be arbitrary. While contexts may affect the disposition of instant actions, their metaphysical content will be in such a way that ethical subjectivism and relativism will be completely excluded.

Note further that the ethical norm which accords with the end of man has its root in the natural law. Its objective and obligatory nature derives from the objective nature of God. Hence:

The essence of morality is not the dignity of the human person, or his discovery of value and duties, but his ordination to God. The binding character of the natural law is not the result of an “imperative of practical reason”, or of the “sense of duty” or of “social imposition”: it is God Himself, creator and provident, who ordains all things to his glory and gives men a rational command “written in their hearts” (De Torre, *ibid*)

Accordingly, the proper way to arrive at man's ethical obligations is not by

analyzing social facts or by following human urges and drives and tendencies. These facts are not always right and they are subject to alteration by circumstances of place, time and exigencies of the moments. The path to the ethical obligation properly so-called is the metaphysical route via the knowledge of being and fullness of being-God. Hence “ethics can only be rooted in metaphysics (De Torre, *ibid*). It borrows three main premises from natural philosophy: the existence of a personal God, freedom of human will and the immortality of the soul (Hardon, *op.cit*). Implicit in the above premises is the idea that “a good moral action is done freely by humans in conformity with the mind and will of God” (Hardon, *ibid*). It is considered good precisely because it leads a human person to the good or destiny set by God himself in a future immortality (Hardon, *op.cit*).

Christian ethics therefore, presupposes the affirmation of an unconditioned condition and from that vantage point it advances an objective ethics capable of securing moral/ethical absolutes as guide to human actions and choices. According to Korff (1979) every ethics which affirms the existence of an unconditional “ought”, and only that is an ethics worthy of the name, requires for justification of this “ought” a purpose which is unconditioned itself.”

It is defensible that no space-time value (utility, self, society, happiness, etc.) can sustain and secure an unconditional ultimate claim as guide for conduct. As a matter of fact:

Such a claim can only emanate from an absolute, supreme value and purpose, i.e. from a purpose rooted in the divine being and will. Christian ethics therefore searches for the ultimate purpose and meaning of human life and history in God's will and decrees. Nothing determines its particular character more comprehensively than the biblically founded Christian understanding of the ultimate end (Brugger, *op.cit*).

This kind of ethics which is prescriptive of an objective moral order is *teleological and* can be called Ethical Personalism (Brugger, *ibid*). The ethical perspective in reference is unique and is different from other

theoretical frameworks by kind not by mere degree. In essence:

... it does not lead to a godless autonomy which denies religious duties and values (Kant); it does not lead to a purely immanent subjective ethics lacking all influence of objective values based on the real world; it does not lead to an extreme moralism which attempts to make morality or will the absolute foundation of metaphysics (Kant); it avoids the extreme of narcissism, pride and self-love of the stoics (Brugger, *ibid*).

This ethical order recognizes that there is a universal moral order which binds all men in basic life issues, actions and decisions. And in different circumstances of place, time and society this objective ethical order is specified. Hence, there cannot be double morality each for a different situation, person, society, time or place.

From Christian Ethics to an Ethics of Healthcare

The circumstances of the modern world have brought ethical dilemmas to almost all areas of life, health, sickness and death. Most common issues where these dilemmas exist include abortion, euthanasia, birth control, medicine etc (Goring, 1992). Unfortunately, the various conventional ethical systems have not been able to resolve the ethical problems satisfactorily. But once the Christian ethics is adopted for a paradigm, the tumultuous hall of ethical theories are quietened and clear-cut principles of obligation arise for application in life and health issues with a view to resolving the dilemmas arising therefrom. If ethics is applied to resolving the dilemmas complicating broad life issues, it is called *bioethics*, if to the restricted area of medicine it is *medical ethics* but if to healthcare specifically it is *healthcare ethics* and when applied to care of patients, it is about *clinical ethics*. (Sharon and Kockler, 2009). In this work however, the terms are technically used interchangeably notwithstanding the title *Law and Ethics of Healthcare ...* But given that healthcare ethics is only an aspect of bioethics, any proper discourse of healthcare ethics must start from a clear understanding of bioethics. Hence, accordingly to Childress, bioethics relates to “the application of ethics to biological sciences,

medicine, healthcare and related areas as well as the public policies directed towards them (Messer, 2002).

In the area of medicine particularly, rapid advances in hi-tech, create novel ethical problems relating to matters of life and death. Thus researches into biomedical ethics have become a *desideratum*, generating as it were, “substantial interest among practitioners and scholars alike (Audi, *op.cit*).” Narrowing to medical ethics, one finds it to be “primarily a field of applied ethics, the study of moral values and judgments as they apply to medicine. As a scholarly discipline, medical ethics encompasses its practical application in clinical settings as well as work on its history, philosophy, theology and society” (Medical Ethics, 2016). As a matter of custom, there are about six values commonly emphasized in medical ethics. They include: (a) Autonomy - patient has the right to refuse or choose their treatment forms and/or procedures (b) Beneficence - a practitioner should act in the best interest of the patient (c) Non-maleficence - “first do no harm” (d) Justice - concerns the distribution of scarce health resources and the decision of who gets what treatment (e) Dignity - the patient and the person treating the patient has the right to dignity (f) Truthfulness and Honesty - this directly relates to the concept of informed consent (Medical Ethics, 2016). Having regard to the above ethical principles, one need not essay long to demonstrate that “ethics is the very essence of sound medical treatment (Sheen, 1954).”

The instant work prefers the title Ethics of Healthcare to either Medical Ethics or Bioethics because:

... the former is too narrow to cover all the topics that concerns healthcare today and the latter too broad. Those concerned with helping people care for their health must think about social issues that exceed the limits of professional competence of physicians and nurses, but they need not deal with all the bioethical questions involved, for example, the industrial uses of genetic engineering on human treatment of animal (Ashley and O'Rourke,).

Fundamental questions confronting healthcare ethics include but are not limited to (1) what is health and who is responsible for it? (2) what are the

ethical principles of healthcare? And (3) how should these principles be applied to ethical issues? (Ashley and O'Rourke, *ibid*).

One ethical truth which urges itself to modernity and flies on the face of conventional healthcare providers is that any healthcare that worth the title must by the application of its principles, provide for the four-fold basic needs of man as outlined by Aquinas to wit: (1) *The need to preserve life*: the principles of totality and growth through suffering; (2) *the need to procreate*: the principles of personalized sexuality and moral discrimination, (3) *the need to know the truth*: the principles of well-formed conscience along with the rules for resolving conflict cases (principles of double-effect and legitimate co-operation) and finally the principles of informed consent and professional communication which provide conditions for a prudent conscience; (4) the need to live in society: the principles of human dignity and of the common good and subsidiarity along with the principles of stewardship, which relate human society to the environment and to the use of all gifts for the common good (Ashley and O'Rourke, 1984). Such healthcare facility which embodies the above principles and serves the proper human needs must be ethically sensitive to the rights of the patient to wit: (1) the right to the whole truth; (2) the right to privacy and dignity; (3) the right to refuse any test procedure or treatment; and (4) the right to read and copy medical records (Ashley and O'Rourke, *ibid*). In this light the fact re-emerges still again that ethics is the mainstay of sound medical treatment (Sheen, *op.cit*). It is also important to underscore the point that ethics applied to healthcare governs the entire transaction in that area as to make them reasonable and sufficiently rooted in and directed to the nature and end of man. Beyond that, it informs the spirit of the laws regulating the healthcare delivery system and finally supplies the conduct guide for healthcare providers in what is properly called Professional Ethics. Example of such ethical guides applicable in Nigeria includes: (1) General principles of the Ethics of Medical and Dental Practice in Nigeria; (2) the International Code of Medical Ethics; and (3) Amnesty Conference on Abolition of Death Penalty (Olopade, 2008).

Conclusion

Man is an atypical being in the landscape with a 'nature' and 'end' specific to his existence. Law and ethics operate together in the regulation of his actions, behaviors and social transactions. To be valid, such laws and

ethics must have orientation to his proper *nature* and *end*. Precisely as a free moral subject with a destiny beyond space-time continuum, law and ethics must correspond with the consequence of this unique existence. Only such laws and ethics sustained by the normative standards of the natural law are able to inform the healthcare system. From that jurisprudential venue, objective and absolute normative principles/values arise for the guidance of human conduct and choices, especially as they relate to man's life, health, sickness, and death. Thus, a synergy of sound law and ethics of healthcare is a must if the system will justify its purpose. What is needed is a functional compenetration of law and ethics in a symmetrical fashion for the achievement of integral health of man and society. While the laws dictate ethical standards which are in conformity with the human *nature* and *end*, ethics infuse the laws with at least the minimum acceptable standard of morality for legality. Indeed, the legality of a piece of legislation is directly proportional to the extent of its compliance with minimum ethical standards. Thus Fuller avers that "every departure from the principles of laws inner morality is an affront to man's dignity as a responsible agent (Fuller, 1969)." This strengthens all the more the case that law and morality must negotiate in the venues of human conduct and choices, not excluding healthcare related conducts and options. Commenting on this orchestrated meeting of law and ethics and their necessary inter-subjectivity, Lord Simonds in *DPP v Shaw* observes thus:

... I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that is their duty, to guard it against attacks which may be the more insidious because they are novel and unprepared for (1962 A.C. 220 act 267).

Meanwhile, it cannot be forgotten that legal obligations are created in the human consciousness by laws only because the law operates within the purview of some basic moral norms acceptable in the society (Akomolede, *op.cit*). Anyway, the idea of law and ethics are fundamental considerations in the Nigerian healthcare delivery system and must be treated as such, with emphasis on that law and ethics which correspond to the demands of human *nature* and *end*.

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