International Journal of Innovative Legal & Political Studies 10(1):50-53, Jan.-Mar., 2022

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Communitarianism and Confidentiality: Africa in Focus

Catherine Akinkuotu & Prof. Cheluchi Onyemelukwe

Babcock University, Ilishan-Remo, Ogun State, Nigeria

ABSTRACT

The concept of confidentiality or the doctrine of privileged is a fundamental aspect of medical ethics and like other ethics in medicine, it can be traced to the Hippocratic Oath. The practice of medicine would more often than not involve access to the patient's personal information and this is important because it enables medical practitioners and other relevant health care providers to properly diagnose and treat whatever ails the patient. This relationship that is therefore created between the medical practitioner and the patient now confers a duty on such a medical practitioner to keep this information in trust and not to disclose except under some crucial justifications. In as much as confidentiality is a recognized medical ethic, it remains a very complex ethic. The general understanding on confidentiality, even though so relevant has become obsolete that Hippocrates himself would be shocked at the complexities that surround this ethic today. There are various new developments which the traditional understanding on confidentiality would not be able to address without some modifications and adjustments. One of the these areas that require modification is confidentiality as it relates to the African society. The communal lifestyle of Africans makes the concept of medical confidentiality which is more of an individualistic focus strange to the African community and relationship. This article seeks to bring out his to harmonize the concept of confidentiality and communitarianism of Africans.

Keywords: Communitarianism, Medical Confidentiality, Sociological Theory, Historical School of Law.

INTRODUCTION

Every society has its own form law which often a reflection of their history, religion, values, culture or traditions. This is important because law cannot be considered universal although the morality or the understanding behind it can be similar e.g. the law criminalizing homicide. For example, Nigeria, a country in Africa was colonized by the Europeans and during this period, they imposed their own laws on them and even after the independence in 1960, some of these laws were still retained and the new laws made are still a reflection of our colonial masters, subconsciously plunging the country into neo-colonialism.

The history of sociological jurisprudence can be traced back to Humes who opined that, '…Law…in itself is a developing social institution.' There are various other theorist who have also argued for sociological jurisprudence such as Jheing (accredited as the father of sociological jurisprudence), Durkehim, and Ehrlich. Hans in his 'concept of law' although remains a positivist views law from a descriptive sociology perspective whilst interpreting rules from the eye of the society, both in action and reaction hence justifying the message of sociological jurisprudence of law being a social phenomenon. Sociological jurists do not view law in form of legal terms but are more interested in how it operates in the society as well as its impact.[1]

[1] Elise Nalbandian, 'Introductory Concepts on Sociological Jurisprudence: Jhering, Durkheim, Ehrlich' (2010) 4(2) Mizan Law Review p.348-354.

Similarly, it is the argument of the historical school of jurisprudence that law should be a reflection or a product of the customs of the people i.e. society. This theory embodies the concept of volkgeist – the spirit of the people e.g. it is the Nigerian spirit that makes a Nigerian be a Nigerian and not British. The historical school is fundamental because those who live in the society are familiar with their custom and if this custom is translated into law, understanding and subsequently adhering to the law becomes easy.[2]

COMMUNITARIANISM AND MEDICAL CONFIDENTIALITY

The foundation of African morality resides in belief that the community is more important than a person and the way to understand the man from the African perspective, the role man has to play and how they relate with others.[3] John Mbiti succinctly describes communitarianism as a situation of, '…whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual…' hence explaining the Ubuntu principle of, 'I am because you are.'[4]

From the moment an information which requires secrecy (i.e. not all information can be considered a confidential or a secret.) is conveyed by a patient to a medical-practitioner, a confidentiality obligation arises. This obligation is of importance because without this assurance, patients may not be inclined to share but it does not have an absolute position because there situations where breaking privilege serves more good than harm hence the need for justifications that undergird the general rule. This is the core of the practice of medicine in the western world, one which has an almost global acceptance, Africa inclusive.[5]

The Declaration of Geneva which is the modern day version of the Hippocratic Oath, an oath which all newly inducted medical-practitioner take as they step into the realm of licensed practice of medicine. This rule is also reflected in the Code of Medical Ethics and the National Health Act, specifically in Section 26.[6] The question that arises is that, will the ethical and legal obligation of confidentiality derived from a western perspective be effective and properly incorporated in Nigeria, an African country where there exists a communitarian lifestyle as opposed to an individualistic focus?[7]

There existing differences between the moralities and culture in Africa and the west often leads to conflicting positions which as a result of the rift between individualism and communitarianism. The west is an individualistic society in which individuals each pursue their own interests and do not identify as part of the larger society which is why privacy and the protection of rights which reflects the separation of individual from society as a value that society respects. On the other hand, Africa is a communitarian environment in which one of the basic units of the society is the community itself and gives priority to the needs of the community. This is not to say there is no respect for individual interest but where is there is a clash between the interests of individual and of the society, society takes primacy.[8]

The dichotomy in the individualistic focus of the west and the communal practice of Africans is not a comparison to support or chastise a particular system but to point out that this distinction exists and failure to pay attention can lead to disastrous consequences.[9] Medical practitioner ordinarily feel inclined

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[2] Inioluwa Olaposi, "Historical Theory of Law: Meaning, Explanation, Arguments For and Against" (LAWhub, 4 July 2021) https://www.lawhub.com.ng/historical-theory-of-law-meaning-explanation-argument-for-and-against/ accessed 16 November 2021.

[3] Obiajulu Nnamuchi, 'Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question' (2014) 14(43) Chicago-Kent Journal of International and Comparative Law.

[4] John S. Mbiti, 'African Religions and Philosophy (London: Heinemann, 1969).

[5] Obiajulu Nnamuchi, 'Confidentiality in Medicine – A Really Decrepit Concept in Africa' (2017) 36(1) Medicine and Law p. 103.

[6] National Health Act 2016, Section 26.

[7] Obiajulu Nnamuchi, 'Confidentiality in Medicine – A Really Decrepit Concept in Africa' (2017) 36(1) Medicine and Law p. 103.

[8] Ibid.

[9] Obiajulu Nnamuchi, 'Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question' (2014) 14(43) Chicago-Kent Journal of International and Comparative Law.

to share the health state of a patient with family members even though such disclosure does not fall under any justified exception although it is generally unethical to share such information. [10]

For example, an African child of maybe the age of 18 is rushed to the hospital from school, the parents on getting to the hospital finds the child unconscious, the next step is to go and inquire from the doctor about what happened to their child. If on getting to the doctor, the doctor tells them that he cannot do so as he was not authorized by their child to disclose her health information, the African parents are more likely to think that the doctor has lost his/her mind but in the west, the doctor's position is more likely to be accepted.

The British Medical Association and the NHS Code of Practice lay down standards for medical confidentiality in the United Kingdom.[11] The United States of America have the AMA's principles of medical ethics and the HIPPAA upholding confidentiality and defining the circumstances in which they might be disclosed. [12] The National Health Act 2014 which is an important medico-legal framework provides in Section 26 that, 'all information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential.'

All these provisions flow from the Hippocratic Oath and the Declaration of Geneva which emphasizes the respect that should be afforded the personal information of patients. These are different countries in different continents with different values, cultures, morals and history which begs the question of whether we live in a homogenous world where laws can be the same.

It is important to be cautious when it comes to the transfer of ideas and concepts from one social structure to another because even in countries or societies with similarities, there are still some idiosyncratic characteristics that makes it difficult for some ideas to operate within such a system.[13] This is why the African parents would have expressed shock at the doctor's position in the example given above, not because there is something wrong with that position but because the societal values that are familiar with is inconsistent with the westernized perspective of confidentiality.

The beauty of the African culture or lifestyle is the unity and the existence of community. Within this atmosphere, people are of the knowledge that they are not alone and there are others who have their interest at heart. There is nothing wrong with indoctrinating western ideas but this must be done in the appropriate manner in which it goes the proper channels of national scrutiny, compatibility test, and value test just like when Nigeria was asked to make homosexuality legal but because homosexuality is contrary to our religious and cultural beliefs of the society, it was rejected. This should be applied to various legal and ethical regimes proposed to Africa, the concept of confidentiality inclusive.[14]

It is not in question of whether there are laws that guide the relationship between medical practitioners and patients, it is a question of if this law really works in African society. There are various laws, codes, rules that provide for the duty of confidentiality and the exceptions to this duty but the issue with these frameworks is that it is not from point of view of an African man. Pope Francis once said, '…every country or region…can seek solutions better suited to its culture and sensitive to its tradition and local needs.' [15] This means every country has the right and expected to structure its legal and ethical framework in a way that best reflects the society they are in.[16]

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[10] "Confidentiality" (Confidentiality | UW Department of Bioethics & Humanities) https://depts.washington.edu/bhdept/ethics-medicine/bioethics-topics/details/58 accessed August 8, 2021.

[11]See Department of Health and Social Care, "Confidentiality: NHS Code of Practice" (GOV.UK November 7, 2003) https://www.gov.uk/governemnt/publications/confidentiality-nhs-code-of-practice accessed 3 June, 2021.

[12] See "Health Information Privacy" (HHS.gov April 6, 2021) https://www.hhs.gov/hipaa/index.html accessed 6 June, 2021.

[13] Obiajulu Nnamuchi, 'The Nigerian Social Health Insurance System and the Challenges of Access to Health Care: An Antidote or a White Elephant?' (2009) 28(129) Medicine and Law.

[14] Obiajulu Nnamuchi, 'Confidentiality in Medicine – A Really Decrepit Concept in Africa' (2017) 36(1) Medicine and Law p. 108.

[15] Pope Francis, *Amoris Laaetitia: The Joy of Love* (2016).

[16] Obiajulu Nnamuchi, 'Confidentiality in Medicine – A Really Decrepit Concept in Africa' (2017) 36(1) Medicine and Law p. 110.

This calls for a reevaluation of both the legal and ethical framework on confidentiality in Africa and it has be one that shows the 'spirit of the people' and a reflection of our society. This means that access to the patient information will involve a broader scope of relatives making the general understanding of confidentiality fragile in the Africa. This is not to say it is an irrelevant concept but the scope of it has to expand to accommodate the bioethics of Africans.

For this re-evaluation to be done, there has to be a legislative and ethical framework which takes into cognizance the cultures, morals and values of the African society without totally eliminating the essence of the duty of confidentiality. It is possible that in the process of accommodating communitarianism, the rights of the patients is overlooked which may lead to more harm than good. There must be balance between the patients' rights and communal rights e.g. parental rights.

For example, in Tega Esabunor & Anor v. Dr. Tunde Faweya & ors[17], the 1st appellant was born on April 19, 1997 and fell ill within a month after his birth i.e. as at the time of the case, the 1st appellant was a month old baby. The 1st respondent who was the physician providing care to the appellant suggested a blood transfusion but the 2nd respondent (the patient's mother) refused for medical and religious reasons (the religious reason being that they belong to the Jehovah Witness sect and they do not believe in blood transfusion). The next day, an originating motion exparte was moved by the learned counsel of the commissioner of police by virtue of Section 27(1) and 30 of the Children and Young Person's Law of Lagos State[18].

The magistrate court granting the prayer sought ordered that all health practitioners involved in the care of the 1st appellant must do everything necessary to protect the child. The 1st appellant got well and was discharged, thereafter, the mother filed an application to the high court seeking the order made by the magistrate court be dismissed but this appeal was dismissed by the high court and later the Supreme Court.

The rationale for the decision of the courts lies on the fact that everyone has the right to life[19] and although there is the freedom to choose[20], the case was different because it involved a child who at the moment did not have the capacity to choose and the law has the duty to protect this child from the actions and decisions which may harm him because in the end, he may grow up and choose not to follow the path of his parents. Therefore, the welfare of the child takes priority and outweighs any belief.[21]

CONCLUSION

In properly managing the communitarian aspect of confidentiality, there needs to be limitations to how involved the community e.g. the family in the health of the patient. The ultimate goal is the protect the patient and restore such person to full health and those who are involved in providing medical care to the patient as a result of their expertise and knowledge are in the best position to make good and informed medical decisions. The family can be carried along in the process of the decision making but the power lies in the hands of the patient to accept or reject whatever treatment is being offered and when the patient lacks capacity, the medical practitioner is to do what is considered best for the patient as required by law even if it means going against the wishes of friends and family as long as the patient's wellbeing takes priority..

[17] [2019] S.C. 97/2009.

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[19] Constitution of the Federal Republic of Nigeria, Section 33.

[20] Ibid, section 45.

[21] See M.D.P.D.T v Okonkwo (2001) 7 NWLR 711(206).