



Review Article

Disclosing HIV Status: Confidentiality, Right to Privacy and Public Interest

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ABSTRACT

Generally, privacy is a universally recognised human rights. In a medical setting, all patients have a right to privacy, while doctors have a corresponding duty. Doctors are entrusted with medical records or information of patients under their care. The information could be disclosed by the patient himself, created or generated by the doctors. Although this is a common law principle, sometimes it conflicts with the public interest and duty to warn a third party. However, health-related laws in Nigeria do not have an adequate provision ensuring the safeguard and protection of this rule, nor provide reconciliation where there is such conflict, like in the case of disclosing HIV status to spouses. The objective of this paper is to examine the law and the rules of medical practice on nondisclosure of a patient's confidential record, with reference to doctors' duty to keep confidential all information about their patient and the public interest, especially their HIV status. Doctrinal research method is used to study both primary and secondary legal resources. Reference may be made to other jurisdictions. The scope of the paper is limited to the provision of the legal framework regulating doctor-patient relationship in Nigeria. More than half of the HIV patients do

not disclose their status to their spouses, and there is a conflict between patients' right to privacy and public interest not to allow the spread of the viruses/ diseases due to nondisclosure principles. Hence, a need to have a legal framework to bridge this gap.

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INTRODUCTION

There was a story where a physician who diagnosed his patient with Human Immunodeficiency Virus (HIV) positive and put the patient on drugs, found out about the wedding of the patient (he was not sure of her health status). There are many questions the physician need to consider before he attempts disclosure: Can he disclose such information to avoid the spread of the virus? Does he have a duty to disclose it? What are the consequences of disclosing such confidential information?

There was another story of a married man with three wives who was HIV positive unknown to his co-wives and their children. How can physicians caution the wives without disclosure, or will disclosure tantamount to a breach of duty on confidentiality, or can the defence of public interest save the physician from the wrath of law?

It is the aim of this paper to discuss the conflict between individual interest and public interest (Health), to sensitise policy makers about the implication of leaving these challenges unattended to. The paper examines conflicting issues of privacy, confidentiality and the doctor's duty to protect public health.

The general rule is that physician must maintain patient confidentiality, namely any information received, disclosed to them by the patient or acquired in the process of his official duty, which can only be disclosed with the written consent of the patient (Eisenhardt et al., 2006). At the same time, the doctor has a duty to protect

and safeguard society from the spread of any communicable disease (Hirisciau, et al., 2014). This is a clear case of conflict of duties on one hand and the right to privacy/confidentiality on the other. This is indeed a dilemma especially if the doctor reveals the status of his patient which can be construed as a misconduct in a professional respect contrary to medical ethics (rules 44 Code of Ethics, 2004). The doctor may also be sued for breach of doctor-patient privilege, breach of confidential doctor-patient relationship, invasion of privacy, and intentional or negligent infliction of emotional distress (Hirisciau et al., 2014). However, if a physician fails to disclose this information to a third party, he could be sued for failure to warn, intentional or negligent infliction of emotional distress in some developed countries (Edwards, 2014). It is high time a legal framework is developed to offer justification for disclosure and to define instances that may be termed as public interest.

POSITION IN SOME SELECTED JURISDICTION

In United States, for example, studies have shown that 30 out of 50 states have laws criminalising HIV exposure, despite the fact the laws have no effect in preventing spread of HIV (Sweeney Patricia, 2017), yet some states make laws allowing physicians to disclose HIV status under certain circumstances ("HIV and Confidentiality your legal right," 2014). In California, physicians have a duty to warn a third party from the clear or imminent danger of HIV

infection (Edwards, 2014), which, in this regard will be warning the spouse or sex partner of dangers of HIV infection through the other partner. The implication of this law is that a doctor will not be in violation of medical ethics or human rights laws. In Michigan, for example, failure to disclose HIV status to a partner is a felony which carries four or more years of imprisonment and is not a defence if any contraceptives are used to avoid infection (Galletly & Dickson-Gomez, 2009). But the Supreme Court of Canada in 2012 (R v. Mabior, 2012) ruled that anybody living with HIV who fails to disclose his or her status to a partner before intercourse with some degree of certainty for infection could face criminal charges. The ruling is different from the law in Michigan where contraceptive cannot be a defence to criminal charges for having sex with a HIV positive partner. Based on this decision, use of maximum protection like condom can be a defence to such criminal liability (R. v D.C., 2012). India has since adopted the Michigan law under section 269 and 270 of the Indian Penal Code (*India Penal Code Act No 45 1860*). The law made it an offence if anybody deliberately or negligently conducts himself in a manner likely to spread the infection of a dangerous disease. According to this law, couples with HIV positive status will be forced to keep away from their partners even if they did not disclose their status. This law will assist in preventing the spread of the virus without the breach of confidentiality rules and doctors will be saved from breaching

their professional ethics and code of medical conduct.

In South Africa, protecting the confidentiality of a patient with HIV status is recognised in the constitution to show its importance (*Constitution of the Republic of South Africa*, 1996). A physician must keep confidential the HIV status of his or her patient and it shall not be disclosed without the consent of the patient. However, to circumvent the breach of confidentiality rules, the South African National Health Act provides an exception in cases where non-disclosure of a patient's personal health information would pose a serious threat to public health (S.14 National Health Act, 2003). It must be noted that most jurisdictions provide exceptions to the rule on confidentiality, but the problem is a failure to define a situation where such exceptions could apply. Therefore, there is a need for Nigeria to revisit its laws on patient confidentiality and disclosure relating to HIV positive patients and to make necessary amendments by examining the laws in different countries.

An Analysis of Relevant Laws on Right to Privacy in Doctor-Patient Relation

This section analyses relevant laws that have specific provisions regarding privacy generally and see how they can assist in protecting and safeguarding patient right to privacy and confidentiality, as well as provide the solution for failure to disclose HIV status. However, it is important to note the differences between privacy

and confidentiality. According to World Health Organisation (WHO), privacy is the power of a patient to exercise control over information received from him by doctors. In other words, it relates to a right not to be physically exposed without somebody's consent while confidentiality refers to a duty imposed on any person having information of another not to disclose without the consent of the patient. Confidentiality is a mechanism through which patient's privacy is protected (*Universal Declaration of Human right*, 1984).

International Human Rights Law on nondisclosure. Right to privacy is a basic human right that is guaranteed and protected under international human rights law. It is provided under the Universal Declaration of Human Rights UDHR (*Universal Declaration of Human right*, 1984) that no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor attacks on his honour and reputation (Bessler, 2008). This instrument is fundamentally the main source where all human rights principles derive their protection. It is followed by Article 17 (Bessler, 2008) of The International Covenant on Civil and Political Rights, which is built on the Universal Declaration of Human Rights. The Covenant is an enforceable law in Nigeria as domesticated by virtue of section 12 of the 1999 Constitution. This position is also followed by other human rights instruments including International Covenant on Economic, Social, and Cultural Rights

(CESCR 1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979), these among other instruments have recognised the right to privacy as a basic human right relating to health care. According to WHO, majority of the countries in the world have signed at least one of these instruments. However, unless these instruments are signed and adopted in the respective state, the latter is not bound by the provision of the convention. All the above international human rights instruments make provision for privacy, and we have seen how the WHO draws a line of demarcation between the two, but where absolute adherence to the provision of this instrument may put the life of the public in danger, for example, compliance with privacy and confidentiality rule and the prevention of the spread of HIV, the instruments are silent. Therefore, it is left for an individual nation to provide an exception and a regulation to make society secure.

Constitution of the Federal Republic of Nigeria. The Constitution of the Federal Republic of Nigeria as amended is the grund norm, the mother of all laws in Nigeria. Section 37 of the Constitution provides thus:

“The privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communication is hereby guaranteed and protected.”

Applying literal rule of interpretation, one may not be wrong to argue that patient's right

to privacy is not within the contemplation of this provision, because doctors are not expected to diagnose their patient at home, or via telephone and telegraphic communication, especially in a country like Nigeria which is still under developed. But the right has been defined as the right of the people to protection against invasion of their personal life, family, directly or indirectly in any physical manner or spread of information about the personal life of such person (Nwauche, 2007). However, at the same time, looking at the general statement of the section before going into the specifics, that is the privacy of the citizens will relate to any communication between doctor and his patient or any other supporting staff who has access to patient's record in discharging his or her duties. Given the scenario above, is this right absolute? The answer is in the negative though there has to be a law made pursuant to section 45 (Mark, 2002) curtailing or limiting these rights. Section 45 of the 1999 Constitution allows certain legislations capable of derogating some fundamental human rights under chapter IV. The rights include privacy, liberty, freedom of expression, religion, and human dignity. According to this section, a law shall not be declared unconstitutional only because it derogates on the right of the individual to the aforementioned rights, the law is democratically justifiable to protect the health, security, and morality of a particular society. Therefore, nothing stops any state in Nigeria from making a law to allow disclosure of HIV status of the patient to their partners. The essence is to protect

public health. Furthermore, common law principle and the rules of medical conduct allow the physician to disclose confidential information about their patient for the public interest, the interest of the patient himself or where there is enabling statute that allows such disclosure (*National Health Act*, 2014).

National Health Act 2014. This is one of the most recent laws made to ensure good medical practice in Nigeria. It regulates the conduct of doctors, supporting staff and beneficiaries, patients or users as the law calls them. The combination of section 25 and 26 of this law relating to keeping a record of all patients and information on their health status or treatment shall be confidential subject to the provision of section 7 (*National Health Act*, 2014). Any person in whose custody the record is can disclose or give it to any other health worker in the interest of the patient, not for the purposes of revealing the secret of the patient. Information may be disclosed if the patient gives his consent, court order or any law that requires such information. If the patient is a minor, consent of his guardian must be sought, or more importantly where the nondisclosure of the information represents a serious threat to public health. Where disclosure can be made if there is a public threat is not a very good law because what will constitute a public threat has not been defined. Therefore, this will open room for violation of such rights against public interest. For example, the problem narrated in the introduction of an HIV patient getting married to a girl with a likely negative status

could be a good reason if the lady is not having a career (*National Health Act*, 2014).

Whether nondisclosure of such information to the would-be-wife of a HIV patient amounts to public health threat is an issue that remains to be resolved. Therefore, it will be interesting to find out what may be considered as a threat to public health. Are physicians under any duty to disclose to the public that a particular HIV patient is a threat to public health? Section 64 (Mehrabi, Tamam, Bolong, & Hasan, 2016) does not define what may be a public threat on account of health. But it will be assumed that allowing HIV patient to marry an innocent person will lead to spread of the virus, as there is likelihood that all offspring of such marriages may be infected. However, research has shown that fear of disclosing the status of a HIV patient account for t 70 % of the patient not going for a test to know their status (Mehrabi et al., 2016), which is more dangerous to the public then disclosing an individual status. It will be better for the law to stop disclosing anybody's status thereby, encouraging the public to go for test with the assurance that even if they are positive they will be saved from all kind of humiliation and embarrassment (UNAIDS, 2000); only that they shall be forced to take measure in ensuring the virus is not being transmitted to others. According to WHO encouraging voluntary disclosure will be more beneficial to the public and confidentiality shall be ensured (UNAIDS, 2000).

Code of Medical Ethics is one of the most important documents protecting and

ensuring patient confidentiality. Any attempt to reveal to the public or any individual will amount to infamous conduct in a professional respect. Except where the law compels a physician to do so as provided under section 7 of the National Health Act, for example by an order of a competent court of law or where there is a threat to public health for failure to disclose. Every patient enjoys this confidentiality principle even after his death. The issue here is that, to what extent is the code of ethics enforceable on the physicians? Code of ethics is an enforceable law under Medical and Dental Practitioners Tribunal.

Although Cybercrime Act (Cybercrime Act, 2015) makes provisions dealing with the protection of data and right to privacy, this law does not in any way relate to health information or doctor-patient confidentiality. The Cybercrime Act relates to issue of electronically generated data, cyber crime electronic fraud and other information generated through a computer system. Specifically, section 29 (Cybercrime Act, 2015) deals with breach of confidentiality by service providers which the definition given to service providers by section 59 (Cybercrime Act, 2015) does not include physicians or other health workers.

It is submitted that all the above provisions of these laws aim at protecting confidentiality and privacy of all information obtain from a patient in the exercise of any health worker's professional conduct. The National Health Act requires all those in custody of any health information in their institution to set up control measures

to prevent unauthorised access to those records (King, 2010), but where lack of such disclosure will affect the third party, the law leaves a serious gap.

CRIMINAL ASPECT OF BREACH OF CONFIDENTIALITY

Section 29 of the National Health Act makes it an offence for anybody who is found guilty of failure to protect any health record or failure to protect and prevent unauthorised access to those records. He shall be liable for conviction and imprisonment for a period not exceeding two years or a fine of 250,000 Naira or both. This particular section of the law will go a long way in assisting the patient to feel free to reveal all confidential information because HIV patients have a higher tendency to feel stigmatised. Similar provisions are enshrined under the South African law (National Health Act, 2003). The Act also makes it an offense for any health worker who discloses any information of his patient without the patient's consent, except under provisions of section 14, 15 and 16 of the Act (Mark, 2002). Section 89 of the Act also makes it an offence liable on conviction to 5 years imprisonment with or without option or both. These two laws are aimed at protecting patient's right to privacy and confidentiality. The rationale is that unless patients feel safe they will not be confident to come to the hospital for test or treatment, especially if the disease is contagious in nature and society will be at risk. However, where it involves spouses, the only right thing to do is to disclose, so

that expected babies can be protected and to ensure safer sexual relationship, and above all to stop further spread of the virus.

THE COMMON LAW RULES ON CONFIDENTIALITY

Confidentiality law under English common law applies to certain specific professionals, namely lawyers and their clients, doctors and their patients who all enjoy confidentiality of any information derived by these professionals in the exercise of their professional duties (RPC, 1948). The common law principle was expanded to include situation beyond contractual relation with professionals (RPC, 1948). In common law, health professionals have an obligation to maintain and keep all information in the course of their professional relation with their patients (Perez-Carceles M.D et al, 2005). The duties include any information created, disclose by the patient himself or acquired directly or indirectly by the physician (Perez-Carceles et al., 2005). This duty extends to other health workers not just physicians, anybody that may likely come across any information in the process of discharging their duty of health care delivery. This includes those whose duties are confidential record keeping. Except in the process of discharging his duty, nobody shall have access to patients' confidential information, and any employee having access to the information shall be marked, recorded and he or she shall follow all necessary procedure, particularly when there is the need to transport the record from

one place to another, maximum protection shall be given to patients' confidential information (King, 2010). It is established that a case involving breach of confidentiality requires three criteria to be successful, apart from contract: (i) the information must be confidential with the necessary quality to affect the owner if there is disclosure; (ii) the information must be derived from a situation where duty or obligation of confidence is imposed and (iii) the information must be disclosed without consent or any legal justification (Koch, 2014).

It is important to keep all information confidential, especially regarding patients' health status. This has the effect of encouraging people to go for a test and to know their status, only through that, the spread of the disease can be curtailed and controlled.

AN ANALYSIS OF THE CODE OF MEDICAL ETHICS ABOUT CONFIDENTIALITY RULE

The origin of medical ethics and good clinical practice is Hippocratic Oath, which existed for over 500 years (Koch, 2014). It has become the rules that regulate medical practices. All codes of medical practice have their origin in it in terms of confidentiality (Britannica., 2016):

“What I may see or hear in the course of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.”

Although there is no exception to the rule of confidentiality according to Hippocratic oath, it is now ethical to disclose according to most of the medical code of ethics if there is justification; for example, the World Medical Association (WMA's) International Code of Medical Ethics allows disclosure of confidential information with written consent of the patient, express permission by law or if there is imminent danger that may harm the patient or others for failure to disclose (Rules 8, 2005). This position is in *pari material* (synonymous) with the Nigerian medical code. However, the phrase used is the public interest which may lead to disclosure, but no meaning is given or what constitutes public interest is. Therefore there is a serious gap in the law, and this important phrase should not be left to chance without proper interpretation.

In Nigeria, the principal law is the Medical and Dental Practitioners Acts (Laws of Nigeria, 2004). The law makes provision for the regulation of medical practice in Nigeria. It has established Medical Council of Nigeria and Disciplinary Tribunal and saddled it with the responsibility of investigating erring medical practitioners. The Council has power pursuant to section 1 (2) (C) of the Act to prepare and review from time to time statement related to Code of conduct which the council considers desirable for the purposes of medical practice in Nigeria.

Rule 44 is the rules dealing with the regulation of keeping the secret of any information received by doctors in the

exercise of their professional duties. Space will not be enough to reproduce the rule. However, the relevant portion shall be provided below:

“The medical records are strictly for the ease and sequence of continuing care of the patient and are not for the consumption of any person who is not a member of the profession. Practitioners are advised to maintain adequate records on their patients so as to be able, if such a need should arise, to prove the adequacy and propriety of the methods, which they had adopted in the management of the cases. Disclosure of information on the patient by the doctor can only be made following an informed consent of the patient, preferably in writing...”

This rule is not for the consumption of any person who is not a member of the profession. Members of this profession according to this rule and the law generally is any person who is a medical practitioner registered to practice in accordance with the rules (*Nursing and Midwifery Council Act*, 2004). However, it must be noted that most of the cases of confidential information are disclosed not by the physicians themselves, but by other supporting staff who are assisting the physicians in discharging their responsibilities. If this rule or code, therefore, applies only to registered medical doctors, other supporting staff must have their separate rules regulating their conduct related to confidential information of every patient. Although the scope of this paper

is doctor-patient relationship, nurses are an important supporting staff to medical doctors, and regulations have also been made pursuant to Nursing and midwifery council Act, (Onyemelukwe, 2016) known as professional Code of Conduct to ensure sanity in their practice, especially on the issues of confidentiality (Wellman, 2005). The current author opines that there is a need for harmonisation of rules because of the serious implication of harmonised regulatory law over similar subject matter in a similar environment. It leads to difficulties in the enforcement and implementation of certain rules and regulations (“HIV and Confidentiality your legal right,” 2014). Otherwise, it will be difficult to regulate supporting staff from violating the confidentiality rules and rights of patients. What mechanism is there in place to detect information leaks, especially since too many staff have access and control to the information? Even the provision of the HIV and AIDS Antidiscrimination Act come to play after the information is disclosed because the law is meant to provide protection against discrimination (Mark, 2002).

The common law rule has expanded the principle of confidentiality to the third party who may not have obligation derived from the contract when they knowingly receive any material information and even if they did not have any relation with the owner of such information, they are forbidden to disclose. Therefore, it means, the law could be extended to people outside the physician-patient relationship. Nurses, midwifery and

other supporting staff, especially those in the laboratory, may have the opportunity of receiving confidential information of a patient in the exercise of their professional duty. They may be individually liable for breach of such duty or vicariously liable to their employers (Mark, 2002).

According to rule 44 of the code, information about any patient can only be disclosed by a doctor with the consent of the patient, preferably in writing, even where the information amounts to commission of an offence, such as attempted suicide (S. 231 Penal Code, 2004), abortion and drug dependence, except if the disclosure is necessary to protect the interest of the patient or the community (Plomer, 2005). This particular rule is in conflict with public policy, it should be the responsibility of every citizen to report any offence, because community policing requires that the public shall inform the police about any act that amounts to a violation of law or commission of an offence. Failure to disclose here will be against public interest, although it may be argued that disclosing confidential information of a patient may not also be in the interest of the public, because you want to encourage people to come forward and see doctors since there are diseases that need to be discovered quickly before they spread.

The reason other than therapeutic may be given for disclosing patient information, such as research (Plomer, 2005), public health surveillance, and clinical audit (Parrott et al., 1989). The rules provide for the principles required for that purpose: patient's consent must be obtained before

the disclosure even if his identity may not be known (Rules 44, 2004) and the disclosure must be anonymous where unidentified data can serve the purpose and it must be kept to the minimum necessary level. The practice has always been for the protection of patient's medical record and the disclosure can only be made where disease notification is required by statute.

Many developed and developing countries have adopted patient electronic record keeping system, popularly known as *health*, and have been integrated into their legal framework for data protection and privacy issues. A system is a special form of electronic information record keeping system; it is used to keep patient medical record electronically. In Nigeria, there is a legal frame work for data protection and other electronic devices protection (Cybercrime Act, 2015). The Cyber Crime Act aims at promoting online resources and the protection of computer systems and networks, electronic communications, electronic recorded information data and computer programs, intellectual property and privacy rights. Therefore, all that is required is a mechanism in place since there is already a legal framework to protect the information.

REMEDIES FOR BREACH OF CONFIDENTIALITY RULE

Physicians or other supporting staff will not go unpunished for violating the confidentiality rule for disclosing any information received or acquired in the discharge of their professional duties.

Disciplinary action may be taken against any erring physicians (S. 16 Medical and Dental Practitioners Act, 2004) or any other supporting medical staff, especially those working in the record keeping department. The disciplinary action here is of different nature. Professional bodies may also take a disciplinary action against erring physician because disclosing confidential information is an infamous conduct in a professional respect (Odia, 2014). An individual action may be taken by the patient himself to claim damages for breach of duty to keep confidential information either against the physicians or the institutions and physicians vicariously. Fine may also be imposed on the physicians if there is a breach of statutory duty (Dato, Aziz, Hussain, & Rasidi, 1995). Being a common law duty as well, its violation may lead to damages against the liable party.

CONCLUSION

From the foregoing, it can be concluded that confidentiality rule has to be done away to prevent the spread of HIV. Where the violation of the rules will prevent patients from going for a test in some countries, laws have been made to criminalise any conduct capable of putting people at risk of infection. For example, the Indian Penal Code and Michigan state in US have criminalised non-disclosure to a partner of his or her HIV status or negligently putting them at the risk of being infected with any killer disease.

The general rule is that under no circumstance shall doctors disclose any

information derived from his patient without his consent. However, the issue of public interest precludes this. This article found failure to define or what constitutes public interest has made it a dilemma for the medical practitioner to disclose as the laws examined do not make it categorically clear. Therefore, it is our suggestion there should be a clear cut criteria of what constitutes public interest for the purpose of disclosure, especially where spouses are involved with regard to sexually transmitted diseases like HIV. For example, the laws shall be amended to include that any person who is infected or has reason to believe that he is infected by any infectious disease shall not do any act capable of infecting anyone and doing so shall be a punishable offence as provided in section 26 and 270 of the Indian Penal Code provided. The law shall also provide protection to medical practitioners if after counselling a patient refuses to stop any act capable of infecting anyone, to inform the person likely to be infected to take precautionary measures. This article recommends that are allowed to disclose HIV seropositive status of couples to each other to reduce transmission of the virus.

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