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CAN AUTONOMY BE LIMITED - AN ETHICAL AND LEGAL PERSPECTIVE IN A SOUTH AFRICAN CONTEXT?

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ABSTRACT

The principle of autonomy acknowledges the positive duty on a health care practitioner to respect the decisions of a patient. The principle of respect for autonomy is codified in the International Bill of Rights, the African Charter, The South African Constitution (108 of 1996) and the Patients' Right Charter. The common notion is to protect a person's liberty, privacy and integrity.

Health care practitioners should honour the rights of patients to self-determination or to make their own informed choices. Patients have the right to live their lives by their own beliefs, values and preferences. This implies that a healthcare practitioner should respect the wishes of a patient when a patient makes an autonomous decision.

The principle of respect for autonomy takes into consideration a patient's choice based on informed consent and the protection of confidentiality of the patient. Informed consent is a process whereby information is shared with a patient to enable an informed decision. It is therefore important for a patient to be well informed to give effect to the notion of making an informed decision. The relationship between the healthcare practitioner and the patient is based on trust and communication. Full disclosure to a patient will empower a patient to make a true informed decision.

It is of particular importance for a health care practitioner to acknowledge and respect the decisions and choice made by a patient so as not to violate a patient's autonomy.

Can autonomy be limited? It can, if legally required and duly justified. Section 36 of the South African Constitution (Act 108 of 1996) limits rights in the Bill of Rights by application of a general law.

KEYWORDS: : Ethics, patient rights, autonomy, Constitution of South Africa, Bill of Rights

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INTRODUCTION

South Africa has experienced six centuries of Roman Dutch law but has only enjoyed a quarter of a century of independence under its own constitution that enshrined a system of equality following an intense period of inequality. Those designing the constitution were able to draw on and retain much of the Roman Dutch legal system but to overlay it with the African notion of Ubuntu. Ubuntu promotes the solidarity and sharing of the community and the good of the community is recognized as paramount, yet it also supports the human rights of individuals.¹

The concept of autonomy in the practice of health care has to find a balance between the good of an individual and the good of the community. This tension presents challenges to health care practitioners in South Africa, especially those in the public sector. This paper explores autonomy in healthcare and whether autonomy is absolute or limited from an ethical and legal perspective in a South African context.

AUTONOMY AS AN ETHICAL PRINCIPLE

Autonomy is a key ethical principle in the health care profession. In essence, autonomy is a manifestation of one's legal and mental capacity to understand and make an informed decision². This principle places the duty on the health care practitioners to have respect for a patient and to value their dignity. A health care practitioner should therefore not act or conduct medical treatments or procedures in such a manner that it will violate a patient's self-worth. The important component of autonomy is to allow patients to make their own informed decisions. A health care practitioner should not interfere with a patient's decision and should avoid undue duress to participate in the medical procedures, treatments or

clinical trials. Ultimately, the health care practitioner should offer information about the proposed health intervention that is appropriate and sufficient for a patient to execute an informed decision without infringement of autonomy.²

To exercise personal autonomy one needs the capacity to understand what is available and whether it is appropriate for one's purpose. Providing information and assistance is a key ethical responsibility of a health professional. Providing the legal framework supporting autonomy is the role of legislators. These components will be the focus of this paper. Additional requirements of exercising autonomy include having the physical capacity and environment to fulfil one's choice. Age (minors and the elderly), physical ability, socio-economic status, and personality are all issues that may place limits on personal autonomy. A person may have a mental or psychological impairment that requires support from others to obtain a form of autonomy.³ The last two components, limits due to physical and mental capacity, will only be discussed as they relate to the information context of autonomy.

Savulescu⁴ argues strongly that autonomy is not absolute and therefore it is limited. Medical intervention is permitted in a situation where there is evidence of dangerous behaviour. This intervention is permissible in order to prevent any harm to others or self-harm.

AUTONOMY AND INFORMED CONSENT

Rowe and Moodley argue that autonomy is a paramount ethical and legal priority. Autonomy has a close relationship to informed consent. These two values go hand-in-hand with each other and cannot be divorced. The principle of autonomy has bearing on the doctor and patient relationship. The autonomy of a health care practitioner is a privilege not a right.

Society confers professional autonomy and it is limited in comparison to the protection of a patient's autonomy and human rights. The patient is the ultimate person to cast a decision about their health and wellbeing.⁵

Some of the challenges for the health care profession in South Africa are the number of illiterate, uneducated and very poor patients. Language and culture raise barriers to informing and educating patients. This prompts the question of whether patients are truly informed and in the position to give effect to the notion of autonomy.⁵

It has become the health care practitioner's responsibility to ensure that a patient not only understands the information provided to them, but also appreciates the application of information to their condition and circumstances in order to make an informed decision.² This additional responsibility adds to the already heavy burden of health care practitioners especially in the South African context where health care practitioners have a high workload in the public health care service and do not have sufficient time to establish if a patient fully understands the information provided. In most cases the patient relies on the health care practitioner to make a decision on their behalf and to act in their best interest. Because of the high rate of illiteracy and low levels of education, many time-poor practitioners accept this situation without attempting to change it. Doubts are expressed about the capacity to change this situation in the South African context.⁵

Furthermore, although a patient may fully understand the medical treatments and consent to it, it can seldom be said the consent and autonomy are truly manifested. A patient will almost never fully grasp all the medical procedures and consequences. In this regard, Caplan⁶ argues that consent is "inherently limited". A patient is not in the position to full

predict, let alone comprehend or appreciate all the risks associated with the medical treatments and or procedures.⁶

A LEGAL PERSPECTIVE ON AUTONOMY IN A SOUTH AFRICAN CONTEXT

The Constitution of the Republic of South Africa

Chapter 2 of the Constitution of the Republic of South Africa contains The Bill of Rights. The Constitution of South Africa (Act 108 of 1996)⁷ makes provision for the right to bodily integrity in Section 12. This provision grants a person the right to freedom and security of the person. In particular, Section 12 (2) emphasises the importance of personal autonomy and the self-determination in relation to bodily integrity and states:

"Section 12

(2) Everyone has the right to bodily and psychological integrity, which includes the right

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent".⁷

Informed consent is covered in this section and is an integral part of autonomy. The Bill of Rights hosts a range of human rights such as the right to privacy, right to life, the right to freedom of religion and belief (cultural and traditional) beliefs. South Africa has an array of cultures each with its own traditions. The Bill of Rights grants everyone the right to live in accordance to their respective cultural and traditional practices and beliefs. In South African customary law, one would find that permission is required from the head

of the household or tribe for a woman to enter into, *inter alia*, legal actions or agreements. Should a woman need to secure her husband's permission to receive medical treatment, her autonomy may be violated yet her cultural laws and traditions upheld. Two of her human rights will be in conflict. An autonomous person exercises the ability to make a free informed choice in granting permission for a medical treatment or procedure. Full autonomy ceases to exist when another person takes over the decision-making role. Subsequently, autonomy is limited because of one's cultural and traditional beliefs. The argument is therefore that autonomy is not absolute and it can be limited in accordance to a person's cultural, traditional and legal systems.

The legal system of South Africa, as defined in the Constitution of Republic of South Africa, promotes the notion of Ubuntu. Ubuntu is characterized by the principle of solidarity. In comparison to the Western world where individualism has prominence, Ubuntu promotes the community whereby co-ownership and joint decision-making is fostered. This in itself limits autonomy because a decision cannot be based on one's autonomous belief, but rather on the notion of what serves the best interest and good for all members of the community and the tribe can overpower one's decision. In a South African context, culture plays a very important role in the sense of personhood, autonomy and belonging to a communal group.¹

The human rights enshrined in Chapter 2: Bill of Rights of the Constitution of the Republic of South Africa is not absolute. In fact, Section 36 in the Bill of Rights states that:⁷

“36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose”.*

Section 36 explicitly states that any right in the Bill of Right may be limited provided that the limitation meets a strict set of requirements. Subsequently, Section 12 as indicated above can be limited and informed consent (and autonomy) can be infringed upon.⁷ This pragmatic approach adopted in of Section 36, offers protection and facilitates efficiency. The example of a time-poor practitioner could be accommodated under this section. The time needed for lengthy explanations to gain full informed consent may be considered against the delayed treatment for other patients. The paternalistic approach by a health practitioner with the agreement of the patient could be acceptable. The cultural example of the husband making health decisions for his wife could also be accepted if the conditions are met and the decision is appropriate, and if the wife is not under coercion to accept and she agrees to the limit of her autonomy. Indeed, it is possible that many patients in situations similar to those outlined could be more uncomfortable making an autonomous decision.

The Patients' Rights Charter

The Constitution was enacted following a period in South Africa when human right's

violations occurred. Many people in the Republic of South were not used to having access to rights in health care services.¹ The Patients' Rights Charter⁸ outlines and educates people in their health care related rights. Every citizen has the right to participate in the decision making on matters impacting on his or her health. Furthermore, it states that a patient can refuse treatment subject to the refusal not endangering public health. The Patients' Right Charter makes provision for disclosure of personal information. Confidentiality and privacy is acknowledged. Personal information is protected and may not be disclosed unless informed consent is given. Some laws and court orders can require disclosure of personal information.⁸

The Patients' Right Charter promotes autonomy and informed consent. As with the Bill of Rights, there are checks and balances in applying the law. Autonomy may be infringed to promote public health. A South African law or court may limit autonomy in the best interest of the

National Guidelines and Organisations

South African Medical Research Council (MRC)

The Medical Research Council (MRC)⁹ lists autonomy as the first of the four ethical principles (autonomy, beneficence, non-maleficence and justice). It is stated in the MRC Guidelines that autonomy encompasses respect for the person and necessary for human dignity. An emphasis is placed on the importance of consent and the freedom of patients when making decisions about their health and wellbeing especially in research.⁹

An important principle of solidarity is highlighted in the MRC Guidelines. These Guidelines promote solidarity within communities, in particular within a South African context. In this regard, the MRC acknowledges the individual choices and

the increasing conflict between personal autonomy and public safety.⁹

Health Professions Council of South Africa (HPCSA)

“The Health Professions Council of South Africa is a statutory body, established in terms of the Health Professions Act and is committed to protecting the public and guiding the professions.”¹⁰ Twelve professional boards operate under HPCSA including two in dentistry- the Medical and Dental Board and a board that registers dental therapists, oral hygienists and dental assistants.¹⁰

The HPCSA (Booklet 1)¹⁰ makes reference to core ethical values and standards from the Health Professions Council of South Africa (HPCSA). The HPCSA imposes ethical duties on healthcare practitioners while performing their professional role or duty in the society. These ethical values include the following: respect for persons, best interest or well-being of the patient (non-maleficence or beneficence), human rights, autonomy, integrity, truthfulness, confidentiality, compassion, tolerance, justice, professional competence and self-improvement and community.

The Health Professions Council of South Africa (HPCSA) produces a booklet titled “General Ethical Guidelines for the Health Care Professions” (Booklet 1) which captures the ethical values and standards for health care professionals.¹⁰

The HPCSA has the power to receive complaints about health practitioners and to impose penalties if guilty. This statutory body announces judgements on the public website. In 2014 the concept of autonomy was investigated when several health practitioners had complaints upheld about breaches in obtaining consent or in maintaining confidentiality. These were dealt with under by the HPCSA and the names published of those found guilty.¹⁰

CONCLUSION

Autonomy is one of the most important ethical values in the health care practice and is the core to informed consent. When the Constitution of the Republic of South Africa was drafted, checks and balances were created between individual autonomy and the culture of Ubuntu or community solidarity and decision-making.

The Bill of Rights provides protection for individual rights including that of autonomy, but all the rights and liberties listed can be limited if the reason is legally justified. This was necessary in the emerging nation which had a large number of illiterate and poorly educated people who had little experience of freedom or access to human rights in their lifetime. Under these checks and balances, it would

seem that a public health practitioner may truncate the process of gaining informed consent under the pressure of patient loads or accept cultural traditions that suppress autonomy. However, if the patient is dissatisfied they are able to complain to the HPCSA which has the power to fine or discipline health professionals found guilty of abusing the limits, or seek redress through the courts. One may therefore conclude that autonomy, whilst strongly protected, can be limited in a South African context under strict rules to enable justice for society and without terminating the rights of the individual patients. As the education and understanding of patient rights flows through society, these limits on autonomy may change but this may be well in the future.

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