

Cases of disclosure of medical secret and its practical limits in the light of Algerian legislation

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The general rule is that the medical secret must be kept secret and not disclosed to others under any circumstances, as the doctor has the obligation to maintain the secret of his profession, which is not to disclose what is related to his patient, whether recently or discovered alone through examination and diagnosis.

However, every rule has an exception, as the medical secret can be disclosed in cases mentioned by the Algerian legislator, where disclosure is likely to achieve a public interest at the expense of a private interest, as the doctor forces his patient to reveal the secret, such as abortion, declaring infectious diseases, or testifying before the judiciary. Reporting births and deaths...Etc., provided that this is done in accordance with the general principles of law within the framework of proven and reasoned facts.

key words: Doctor, Patient, Medical Secret, Reasons for Permission, Disclosure of Medical Secret.

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Introduction:

Nowadays, medical secret has become the most basic guarantee for man to be connected to the noblest professions of humanity, as medical secret is one of the basic pillars in practicing the medical profession and one of the ethical principles that a doctor must have.

delivered at the French Academy of Ethics and Political Science on June 5, 1950 that: "There is no medicine without trust, no trust without confidentiality, and no confidentiality without a medical secret."(MaryseCAUSSIN-ZANTE., 2000, p. 57).

There is no doubt that keeping a medical secret is a moral duty before it is a legal obligation. Doctors must remain silent not only because of what they are entrusted with, which is considered a secret for patients, but also for all that they can see or hear while practicing their profession(Ashwaq, 2021, p. 105).

Thus,once this information was disclosed, we were in front of what is known as the crime of disclosing medical secret, but this rule is an exception, the doctor is obliged to report medical secrets, and here this act is not considered a crime of disclosing the profession secret punishable by both the Algerian law(Suleiman, p. 99), and the special provisions in the medical law and the Code of Medical Ethics.

Thus, in many legal texts, the Algerian legislator obliges doctors to report medical secrets related to their patients, in the public interest, whether for the good administration of justice, combating crime, or in order to preserve public health, as well as to control administrative declarations related to the civil status of individuals regarding the issue of births and deaths.

Hence, the study of the reasons for allowing medical secrecy in Algerian law is of great importance in our time

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because of its noble and lofty goal for the purpose of protecting a public interest that benefits society and individuals alike.

Given the importance of this subject, we find in front of a group of problems, the most important of which are:

If a medical secret is one of the pillars of medical work, is it permissible for a doctor to break this pillar? Is the disclosure of this secret really in Algerian legislation?

In order to answer these problems, the study of this topic was followed on the analytical approach, by dividing this article into the following:

The obligation of the doctor to keep the secrets of his profession has been known since ancient times. He began as a customary, moral and religious obligation and then settled as a legal obligation, as keeping secrets is one of the known rights of the patient.

A)The concept of medical secret.

The definition of the concept of medical secret is one of the important pillars that enable the understanding of research issues, and there is no doubt that the secret of the profession in general is a very complex topic, which raises problems that are wide-ranging in terms of legitimacy and law, so that in France a financial prize was allocated for its research in 1925.

Hence, there are many definitions of medical secret, whether linguistically or terminologically, as it is defined as: " Every incident or characteristic of which the scope of knowledge is limited to a limited number of persons if there is an interest – recognized by law - of one or more persons, rather than the knowledge of which remains limited to that scope"(Youssef, 2000, p. 199)

As defined by some criminal law commentators: " Every

incident or matter that comes to the knowledge of the doctor in any way, whether it is known by the patient himself or obtained through the performance of his duties, that is, through examination and diagnosis carried out during or on the occasion of the exercise of his profession, and the patient, his family, or others have a legitimate interest in keeping it secret."(Boulehal, 2000-2001, p. 60)

It is also defined as: "The concealment of what the doctor has seen of the conditions of his patient, and this includes the private information that the doctor obtains directly or indirectly through his work."

Through these definitions, we note that the definition of the secret to be kept has not been reached, but rather the existence of an incident that is limited to some people so that it is not correct to broadcast it to the public.

Article 37 of the same decree also added that: "Professional secrecy includes everything that a doctor or a dental surgeon sees, hears, and understands, or everything that is entrusted to him during the performance of his task."

B)Medical Secret Terms.

Jurisprudence stipulates three conditions that must be met in the medical secret in order to meet this characteristic, as these conditions are as follows:

- **The doctor must have stood on the incident or information because of his profession:**

The doctor's obligation to keep the medical secret is not limited to what the patient revealed to him, but includes everything he obtained during the course of his profession or because of it, that is, the nature of the doctor's profession would be reviewed, and this is explicitly confirmed in Article 24, paragraph 2 of the aforementioned Health Law.

- **The patient has an interest in keeping the matter**

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secret:

It is required in the secret to be kept that the patient has an interest in making it a secret, regardless of the nature of this interest, whether material or moral. If the patient has an interest, even a moral one, in concealing the information or the incident, the secret status preserves it from disclosure.

- The information or facts are relevant to him as a doctor:

What can be concluded is that the principle in disclosing the medical secret is criminalization, but this matter is not at all, but there are exceptions to this principle, based on other justifications that make the disclosure of the medical secret more important than concealing it, so the interest in this is greater and more beneficial.

2-The obligatory and permissible reasons for disclosing the medical secret.

Disclosure of medical secrecy may sometimes be an inevitable and necessary matter that achieves a higher interest and preserves the cohesion of society, either to prevent real harm or to ensure the proper functioning of justice. There is a jurisprudential and judicial consensus embodied in legislative texts as well as judicial jurisprudence, that there are cases that do not oblige the doctor to keep professional secrecy, but must disclose it without any criminal or disciplinary accountability, and this is an exception to the principle of the obligation of medical secrecy.

In line with the above, it is possible to summarize the cases that fall within the obligatory and permissible reasons for disclosing the medical secret in two cases, the first of which

relates to the permissibility of disclosure to prevent the occurrence of the crime(a) and the second relates to the permissibility of disclosure to ensure the proper functioning of justice(b).

(a) Permitting disclosure in order to prevent the occurrence of the crime.

The purpose of granting the doctor the absolute right to disclose the medical secret of his patients, is primarily due to the protection of the public interest and society, through disclosure to prevent the occurrence of crimes, without being subject to follow-up and accountability, whether criminal or civil, as well as disciplinary.

The wisdom of permissibility is that the doctor, on the occasion of performing his work, may come to his knowledge of the occurrence of crimes against patients who provide him with treatment, and in a similar situation, the doctor is obligated to report these crimes, as the human body enjoys complete inviolability, and from this, the obligation to keep the medical secret is withheld, and disclosure is likely to achieve a public interest at the expense of a private interest, so that those who violate the inviolability of that patient's body do not escape punishment and retribution(Kamel, 2005, p. 185).

Accordingly, we conclude that the duty to report crimes, even if it is originally a public duty, excludes doctors and other confidants of the medical secret, and this exception is only based on a legal provision, and relates only to the following crimes:

1- I need to report a crime.

The Algerian legislator criminalized the act of abortion, and stipulated that the medical secret may be disclosed on the occasion of the occurrence of this crime, that is, this crime requires reporting by the doctor or the like, as it includes a

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crime, and the doctor reporting it is a duty imposed on him by the force of law, and in return the doctor is exempted from punishment for disclosing the medical secret, contrary to the French law that allowed abortion under the law of voluntary detention of pregnancy issued in 1975, and most Arab laws do not punish the crime of abortion.

Hence, the position of the Algerian legislator in this regard is clear and in line with the aforementioned proposal, and this is evident from the second paragraph of the text of Article 301 of the Penal Code (Order No. 66-156 of June 8, 1966).

The notification must be made to the competent judicial authorities, otherwise it shall be considered a disclosure of the medical secret, and the doctor who asks him to help with abortion, shall persuade him in such a hypothesis to refrain from doing so, otherwise it shall be reported to the public prosecutor or the judicial police.

2- Reporting crimes against minors and prisoners:

The Algerian legislator, like the French and Belgian legislators, aims to urge doctors to report cases of ill-treatment of minors and prisoners to protect them from violence and torture because they are in a state of weakness.

If the law obliges doctors to report crimes, non-compliance or breach of it entails criminal liability.

Therefore, the legislator decided to have criminal protection (Nasreddine, 2003, p. 16).

(b) Permitting disclosure in order to ensure the proper administration of justice.

One of the most important and demanding social interests is to ensure the proper functioning of justice. For the sake of the proper functioning of justice, the legislator has made the act of disclosing medical secrets a reason for permissibility, if

it is carried out by the custodian of the medical secret for the purpose of testifying before the judiciary in a matter for which he was summoned, or in order to carry out the work of an expert commissioned to prepare it, within the conditions and limits established by the legislator in order to balance between preserving the medical secrets of patients on the one hand and ensuring the proper functioning of justice on the other.

The interest of the proper administration of justice over the interest of protecting medical secrets leads to the permissibility of the act of disclosure, with the aim of reaching the judicial truth and achieving the desired justice. Since ancient times, humanity has been striving in its search for justice to find a way to reach the truth with the least possible error (Marwan, p. 33).

The principle in providing testimony before the judiciary is that it is a duty imposed by law on every person summoned to do so, in order to reach the desired truth in disputes before the ruling authorities, in order to prove or deny the charge, and those who fail to attend and perform the testimony are held accountable.

However, the situation in the matter of the doctor's performance of testimony before the judiciary was widely debated, and the jurists differed in this matter and many questions were raised to the effect that does the doctor have the right to disclose the patient's secret or does he prevent him from doing so and is subject to punishment if he discloses some of the secret by performing the testimony?.

Some of them said that there is no punishment for this disclosure, since even if one is one of the professions whose owners are obligated to keep the secret, one is forced to clarify what he was informed of by virtue of practicing his profession,

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if this helps the judiciary to reach the truth.

While another aspect of jurisprudence considered that it is not permissible to divulge the medical secret by the profession, regardless of the circumstances, even if this relates to the performance of the testimony before the judiciary, but a third party believes researchers in this field that it is the most likely, went on to say that if the statements of the witness lead to the disclosure of the medical secret and in return helps to perform a public service that benefits society, there is no objection to the performance of the certificate that includes the disclosure of the medical secret and does not entail any punishment and this last trend was adopted by the French judiciary in several judgments and decisions.

As for the Algerian legislator, Article 97 of the Code of Criminal Procedure stipulates that: "Every person who is summoned to hear his testimony is obliged to attend, take an oath and take the testimony, taking into account the provisions related to professional confidentiality...".

We also find Article 100 of the Code of Ethics of Algerian Medicine, which states as follows: "Doctors or dental surgeons shall, if asked questions...To disclose, to the extent consistent with the duty to respect professional confidentiality, the facts they know that could assist the investigation.".

To note, we conclude from the extrapolation of these legal texts that the Algerian legislator obligated the doctor and the like who are bound by professional secrecy, when summoned as witnesses before the judiciary, to abide in their answer to the questions addressed to them within the limits of what was directed to them, so they are entitled to answer only the questions posed without exceeding their limits.

Based on the aforementioned, the legislator has created reasons that allow the doctor and his equivalent to deviate from the general principle that requires adherence to the sanctity of patients' medical secrets, and allows the disclosure of medical information and secrets during the performance of testimony before the judiciary or during the conduct of an ordered judicial experience, all of which is aimed at achieving an interest that is mainly embodied in preventing the occurrence of crimes and ensuring the proper functioning of justice.

(a) Reporting infectious diseases.

Scientific progress in the medical field has led to the need to take measures to protect individuals from infectious diseases, in order to preserve public health and the health of the people around the patient in particular.

Infectious diseases are transmitted from one patient to another in different ways, some of which are transmitted by respiration such as respiratory diseases, such as influenza and pulmonary tuberculosis, or by oral means such as diseases of the digestive system such as typhoid, and some of which are transmitted through sexual relations such as syphilis and gonorrhea, and some of which are transmitted through contact such as root and leprosy, and some of which are transmitted by injection or blood transfusion such as viral hepatitis or by insects such as malaria that are transmitted by mosquitoes. The disease may have more than one means of transmission(Ahmed, 2008, p. 285), and these cases must be reported, as the community needs to resist infectious diseases in order not to spread, which requires disrupting the patient's interest in keeping his medical secret in front of the public interest of the community in preventing the spread of diseases in order to maintain a healthy society free of deadly diseases. The duty to report is a public social duty that imposes the

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public interest.

It is worth mentioning that the Health Law No. 18-11 included the penalty resulting from the non-obligatory declaration of ambulatory diseases referred to in Article 39, which stipulates that: "Every medical practitioner must immediately declare to the health services concerned in each suspicious or confirmed case of the diseases mentioned in the list of diseases with the obligatory declaration mentioned in Article 38 above, under penalty of the penalties stipulated in the law."

Article 400 of the Health Law stipulates that: " Anyone who violates the provisions of Article 39 relating to diseases with a compulsory permit shall be punished by a fine of DZD 20,000 to DZD 40,000."

Although the Algerian legislator provided for the notification of infectious diseases to the doctor, he did not specify the method of reporting, and this means that they are carried out in all possible ways available to the health departments concerned, and the burden of proving this falls on him. The Algerian legislator also confirmed through Article 38, paragraph 2, of the Health Law that the list of infectious diseases that must be declared is determined by regulation (Lalouche, 2022, p. 636).

Accordingly, the Algerian legislator has determined the list of diseases that the doctor must report compulsorily and immediately without any hesitation under Resolution No. 176 issued on November 19, 1990 by the Ministry of Health and limited it to 31 infectious diseases.

Accordingly, it is permissible to disclose the medical secret to report infectious diseases, because this disclosure has a great interest in resisting infectious and epidemic diseases, in order to take the necessary measures by the competent and

qualified authorities to resist the exacerbation of those diseases, and this can only be done quickly reported by a doctor, who is in front of a legal and social duty imposed by the public interest.

(b) Reporting births and deaths.

In order to control the records of births, the law obliges doctors to declare births, so the doctor is obligated to report this to the concerned authorities, and to report the birth, which is mandatory even if the child is born dead, and the doctor under whose supervision and knowledge the birth occurred may not argue that he did not report the birth by keeping the professional secret.

With reference to the text of Article 442, third paragraph of the Algerian Penal Code, which stipulates the following: "A penalty of imprisonment from at least ten days to at most two months and a fine from DZD 8,000 to DZD 16,000 shall be imposed:

Conclusion

Medical confidentiality is one of the ethical principles that a doctor must have, and it is also one of the most important obligations incumbent upon him. In this article, we have reached a set of conclusions and recommendations. As for the results, they are as follows:

- A medical secret is a legal obligation from which no derogation is permitted except in cases permitted by law.

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