

REVIEW

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Ethico-legal conflict in daily forensic medical practice: two examples from Indonesia

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Abstract

Forensic medicine is a branch of medicine specialising in the application of medical knowledge for the purposes of administration of the law and judicial proceeding. In order to solve criminal cases related to human body, investigators usually seek medical advice from physicians since the doctors have a thorough knowledge of human body. Therefore, only medical officers are authorised to examine the human body because of their competency.

As medical doctors, forensic medicine specialists certainly bind to medical ethics. However, there are lots of conflicts between “ought” and “must” while applying these principles of medical ethics in Indonesian legal system. This paper will discuss the ethico-legal conflicts in investigation phase, which are usually related to medico-legal autopsy. Then, the ethico-legal conflicts in trial phase, which are frequently associated with giving evidence as an expert witness before the court, will be addressed.

Keywords: Ethics, Law, Forensic medicine

Background

According to Smith, forensic medicine could be defined as a branch of medicine specialising in the application of medical knowledge for the purposes of administration of the law and judicial proceeding (Smith, 1951). Based on article 133 and 134 Indonesian Criminal Procedure Law, (Act of The Republic of Indonesia, 1981) in Indonesia, like most other countries, forensic medicine specialists are usually ordered by the investigators to perform either external or internal examination for revealing findings which, when taken together with the results of other investigations and taken together with knowledge of the circumstances of the death, may allow reasonable conclusions to be made about the cause of death. In spite of this fact, the effort of forensic practitioners is to be independent and impartial when the evidence provided does not agree with the investigators.

In the trial stage, forensic medicine specialists have a duty to give evidence as an expert witness before the court, as stated in article 170 and 179 Indonesian Criminal Procedure Rule (Act of The Republic of Indonesia, 1981).

If forensic medicine specialists are summoned by prosecutors, they will become witnesses for prosecution, called *A charge* witness. Meanwhile, if forensic medicine specialists are requested by barristers, they will become defence witnesses, called *A de charge* witness. Indeed, they must be independent and impartial while giving testimony by telling the truth based on the best medical knowledge and the recent scientific evidence (article 8-12 Indonesian Code of Ethics for Forensic Medicine Practitioners).

However, there are lots of conflicts between “ought” and “must” while carrying out these noble roles in daily practice, particularly in the Indonesian legal system. This paper will discuss the ethico-legal conflicts in investigation phase, which are usually related to medico-legal autopsy. Then, the ethico-legal conflicts in trial phase, which are frequently associated with giving evidence as an expert witness before the court, will be addressed.

Main text

Ethico-legal issues in forensic medicine

Campbell stated that universal bioethics is supported by three central pillars, namely informed consent, medical confidentiality, and the prohibition of fraud or deception (Campbell, 2013). The first two principles are derived

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from the principle of respect for autonomy. Beauchamp and Childress bear a meaning of autonomous action as intentionally, understanding, and free of control (voluntariness) without influence, coercion, and manipulation. Autonomy is a personal right which entails that other people have an obligation to respect it. Medically, physicians have positive obligations and negative obligations to their patients. The former are the obligations to provide information to others which foster autonomous decision making, known as informed consent, while the latter are the obligation not to interfere with others, to respect their right to privacy which is recognised in part as confidentiality (Beauchamp & Childress, 2013).

It may be that these two pillars of bioethics do not have quite the universal application they are sometimes thought to have. The emphasis on autonomy does not sit easily in communitarian cultures, such as Indonesia, where family groups and not individuals are the relevant, or more important, social unit. Therefore, the two principles of universal bioethics are in conflict with Indonesian regulation. First, in the investigation phase, the conflict arises when asking consent for performing an autopsy. Second, in the trial phase, the issue develops while maintaining medical confidentiality in the court. These issues which will be discussed further.

Autopsy and informed consent

An autopsy or a post-mortem examination is a medical procedure involving the examination of a dead body to determine the cause of death. It may involve invasive medical procedures to open the body cavities or dissection (Payne-James et al., 2011). As a doctor who has ethical responsibilities, informed consent should be obtained before conducting an autopsy.

The elements of informed consent are threshold, information, and consent. The first element consists of competence and voluntariness. Disclosure, recommendation and understanding make up the second element. Finally, decision and authorisation completed the third element of informed consent (Beauchamp & Childress, 2013). In my opinion, the first element is the most important of the three since it illustrates a capacity to comprehend information. Surely, a dead body does not have these elements. Thus, it is quite impossible to perform informed consent to a deceased person.

However, it might be possible to obtain her consent while she still alive by finding the late's advance directives. Sanner, et al. found that 84% subjects consent to autopsy of themselves (Sanner, 1994). But, usually, there is a resistance by relatives. Oluwasola, et al. discovered that only 13 of the 150 subjects (8.7%) would consent to autopsy on their beloved family (Oluwasola et al., 2009).

The reasons of refusing an autopsy by relatives are fear of mutilation of body, delaying the funeral, objection expressed by the patient before death, deceased considered too young or too old, lack of feedback of results to relatives, concerns about removal of organs from the body, lack of adequate information on indications for autopsy, dislike of the procedure, little benefit to the patient, religious objections and cultural reasons.

Nevertheless, it is vitally important to respect the late's advance directives. Downie, et al. has argued that the individual interests persist after death (Downie et al., 2008). But, some may claim that a human corpse is not a property so that a dead person no longer has interests.

However, philosophically, there is a possibility of posthumous harm. Wilkinson, citing Pitcher and Feinberg, has contended that people require others to fulfil their goals, especially when they die (Wilkinson, 2011). So, a dead person may be harmed when their interests are hindered.

But, several scholars have assumed that the interests of the living are more important than the interests of the dead. The deceased person's decision could psychologically harm the family's feeling so that the family autonomy should also be respected. The feminist approach of relational autonomy would contend that autonomy develops because of the social environment, which mostly constituted by family members (Ells et al., 2011). Thus, the late's interest could be extended to the living relatives.

Yet, the bereaved family members usually lack the capacity to make valid decisions and to give consent. The family members are in emotional distress because they recently have lost their loved one. Therefore, the first element of informed consent is not met. Rather than seeking for consent, it would be morally proper to inform and educate the next of kin about the benefit of autopsy.

In addition, respecting the decision to refuse an autopsy will lead to the obstruction of justice because of its benefit for the public good. For instance, to decrease the index of crime. It should keep in mind that forensic medicine has specific and unique characteristics because it serves the interface of two professions: medicine and law. It differs from other medical professions relationship which only involves two parties: the doctor and the patient. In forensic medicine, the decision to do an autopsy often involves tension between three parties: the doctor, the next of kin, and the society (as articulated by the law). When this conflict arises, the authorities will usually put the interests of the public good over family preferences in deciding whether or not there will be an autopsy. In other words, balancing the right thing in accordance with law and public benefit while taking into account to the greatest possible extent the views of the family requires considerable ethical sensitivity.

Expert witness and medical confidentiality

An expert witness is one who expresses an opinion about medical facts. He will form an opinion, for example about the cause of death. Before forming an opinion, an expert witness will ensure that the relevant facts from the examination are made available to them (Payne-James et al., 2011). As an expert witness, a forensic medicine specialist must disclose the medical facts to form an opinion since it is required by law. On the other hand, as a doctor, he must keep medical confidentiality since it is a branch of informational privacy of patients (Beauchamp & Childress, 2013). Article 16 of Indonesian Code of Medical Ethics is also deal with the duty of physician to keep the patients' information confidential even after the patients die. Certainly, breaching the duty of confidentiality would destroy patients' trust. But in a forensic context, the forensic doctor should explain at the beginning of the consultation with the patient or family that any information will be revealed before the court.

It is crystal clear that the ethico-legal conflict will arise in the court, particularly when the patients or family do not give permission to share their information. On the one hand, forensic medicine specialists owe a duty of confidentiality to the patient. On the other hand, they also owe a duty to third parties. To resolve this issue, it is vitally important to remember that the concept of justice would incorporate not only justice for the patient, but also justice for society. So, this situation does not imply a doctor-patient relationship and does not carry an obligation of confidentiality. Again, the principle of justice trumps the principle of respect for autonomy. Thus, confidentiality could be infringed under the court order. This regulation has been applied almost worldwide, including Indonesia, which is stated in Article 170 and 179 Indonesian Criminal Procedure Code (Act of The Republic of Indonesia, 1981). However, many judges are not aware of the obligation of expert witnesses to keep patients' confidentiality. They rarely give order to expert witnesses to disclose the medical information before providing expert testimony in the trial proceeding.

Conclusion

There are many ethico-legal quandaries in forensic medicine. This paper identifies and discusses two which commonly arise in practice in Indonesia: issues relating to autonomy and consent to autopsy, and issues relating to confidentiality when giving evidence in court. It becomes clear that the universal framework of bioethics as stated by Campbell may not be completely applicable in a more communitarian society such as Indonesia. Moreover, since the highest concern for law is justice, the code of ethics for forensic medicine specialist should not clash with the regulation. The specialty of forensic medicine in Indonesia has more work to do to articulate a

rational approach to resolving the many other ethico-legal quandaries which arise in our practice.

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