ANEKA WACANA TENTANG HUKUM

Satjipto Rahardjo
M. Kafrawi
Hermien Hadiati Koeswadji
Sarsintorini Putra
Faiq Bahfen
Endang Kusuma Astuti
Raphaella Diah Imaningrum S
H. Barda Nawawi Arief
Setiawan Nurdayasakti
Abdul Madjid
H. Achmad Sodiki
Moh. Slamet
Peter Mahmud Marzuki
Dewi Astutty Mochtar
Indriati Rini
Lanny Kusumawati
Yuhari Robingu
Umu Hilmy

Tanda Mata 70 Tahun
Prof. Hj. Hermien Hadiati Koeswadji, S.H.

ANEKA WACANA TENTANG HUKUM

Tanda Mata 70 Tahun
Prof. Hj. Hermien Hadiati Koeswadji, S.H.

Satjipto Rahardjo
M. Kafrawi
Hermien Hadiati Koeswadji
Sarsintorini Putra
Faiq Bahfen
Endang Kusuma Astuti
Raphaella Diah Imaningrum S
H. Barda Nawawi Arief
Setiawan Nurdayasakti
Abdul Madjid
H. Achmad Sodiki
Moh. Slamet
Peter Mahmud Marzuki
Dewi Astutty Mochtar
Indriati Rini
Lanny Kusumawati
Yuhari Robingu
Umu Hilmy

Aneka Wacana tentang Hukum
027897

Susunan Panitia

Ketua	:	Prof. Dr. Abdul Rasjid, S.H., L.L.M.
Wakil Ketua	:	Dr. Moh. Slamet S.H.
Sekretaris I	:	Dr. Dewi Astutty Mochtar, S.H., M.S.
Sekretaris II	:	Dr. Faiq Bahfen, S.H.
Bendahara I	:	Dr. Endang Kusuma Astuti, S.H., M.Hum.
Bendahara II	:	Dr. Lanny Kusumawati, Dra., S.H., M.S.

ISBN 979-21-0807-6

Dicetak oleh Percetakan Kanisius Yogyakarta

KATA PENGA

Pada tanggal 29 Agustus 2003, Profes
S.H., akan menginjak usia 70 tahun, suatu
Pegawai Negeri. Namun demikian, rekan- re
bimbingan beliau pada waktu menyelesaika
bahwa memasuki masa purna tugas, bukan
beliau di bidang pengembangan keilmuan'k

Pendalaman beliau di berbagai bidang
Pidana, Hukum Pidana Anak-anak, Hukum
Kedokteran, sangat bermanfaat dalam pe
sebagai Promotor.

Ketegasan beliau yang "mencambuk"
sisi sangat telaten memberikan masukan, p
suatu cerminan betapa kepedulian beliau un
mencapai keberhasilan sesuai dengan yang

Tiada kata-kata yang dapat diungkap
kepada beliau selain dalam wujud buku ken
punan karangan dari mantan anak didikny
jawatnya.

Semoga buku ini merupakan kenangan
semangat beliau untuk tetap mengabdi ke
pengetahuan.

Surabaya, 11 Ag
Ketua Pa

Prof. Dr. Abdul Rasj

KATA PENGANTAR

Pada tanggal 29 Agustus 2003, Profesor Hermien Hadiati Koeswadji, S.H., akan menginjak usia 70 tahun, suatu usia purna tugas bagi seorang Pegawai Negeri. Namun demikian, rekan- rekan kami yang pernah merasakan bimbingan beliau pada waktu menyelesaikan S-2 maupun S-3, berkeyakinan bahwa memasuki masa purna tugas, bukan berarti berakhirnya pengabdian beliau di bidang pengembangan keilmuan khususnya di bidang ilmu hukum.

Pendalaman beliau di berbagai bidang hukum antara lain Ilmu Hukum Pidana, Hukum Pidana Anak-anak, Hukum Lingkungan Hidup, dan Hukum Kedokteran, sangat bermanfaat dalam pengabdiannya sebagai guru dan sebagai Promotor.

Ketegasan beliau yang "mencambuk" anak didiknya, namun di satu sisi sangat telaten memberikan masukan, pada akhirnya dirasakan sebagai suatu cerminan betapa kepedulian beliau untuk mengantarkan anak didiknya mencapai keberhasilan sesuai dengan yang dicita-citakan.

Tiada kata-kata yang dapat diungkapkan sebagai tanda terima kasih kepada beliau selain dalam wujud buku kenangan ini yang merupakan himpunan karangan dari mantan anak didiknya, maupun dari rekan-rekan sejawatnya.

Semoga buku ini merupakan kenangan manis dan lebih menggelorakan semangat beliau untuk tetap mengabdi kepada dunia pendidikan dan ilmu pengetahuan.

Surabaya, 11 Agustus 2003
Ketua Panitia

Prof. Dr. Abdul Rasjid S.H., L.L.M.

DAFTAR ISI

THE PATIENT' S RIGHT TO INFORMED CONSENT

By: Raphaella Diah Imaningrum Susanti, S.H., M.S.)*

In 1984 there was a case in Sukabumi, West Java, a patient sued a physician cause the physician didn't give him adequate information about the blind risk of the operation of patient's eye . In the patient's opinion, if he knew the risk, he won't permit the physician to perform the operation. While in physician's opinion, just the operation was held to prevent contagious sickness to the other eye.

Still there was another case. Bongguk Kendy, a boxer in emergency situation, wasn't given a prompt help because the physician was still waiting for the patient's family consent.

Once mass media exposed a case about a patient, Hartono, who has lost his penis because of the operation held by physician without his consent, and without adequate information about purpose and benefit of the operation. The signatory of the form of Informed Consent is his son, whereas the patient is capable to make consent according to the law.

In our daily life we often hear about patients who step out from the physician's room without knowing what happens to them.

Some of the above examples indicate that people as well as physicians still don't realize the importance of the right of patient to informed consent. The right of a patient to autonomous choice is widely recognized in medical practice, but its meaning and practical implication remain uncertain.

* The Writer is a lecturer at Faculty of Law of Widya Karya Catholic University, Malang.

It is widely believe that the physician has a moral obligation to make it possible for patients to decide important matters that affect their health. However, the ability to "make a decision" is largely dependent upon the information available to the patient. A patient's consent to a medical procedure would be insignificant in the absence of relevant information. For example Suppose it is believe but not well confirmed that a patient has cancer. If this patient is asked to submit to dangerous exploratory surgery, it may be of fundamental importance that he or she understand that cancer is likely before consenting to the surgery. If the patient is only informed that exploratory surgery is needed, a piece of true but incomplete information has been provided. Unless additional information is supplied, the consent will be probably invalid from moral a view standpoint. Hence, it is often said that before a physician performs a medical procedure on a competent patient, he or she has an obligation to obtain the patient's voluntary informed consent. This writing is focused in the right of patient to information and the right to consent, from ethical aspect as well as law.

The Ethical and Legal Basis

Informed Consent or Persetujuan Berdasarkan Informasi or Persetujuan Tindakan Medik is the right of patient to get complete and true information, about his or her health from the physician. This concept was originated from the autonomy ethical principle or respect of person. This right most frequently asserted as fundamental right to be told the truth and the right to receive adequate information so that a responsible decision may be made. This principle contains of two sub-principles: First, every person has the right to decide freely what will he choose based on his adequate understanding; Second, the decision must be made in the situation which enables him or her to make a choice without intervention or force.Because every person is autonomous, then he needs information to make considerations so that he can make the choice according to the considerations. The person who doesn't autonomous or lack of autonomous, has the right to be protected. In ethical term, this autonomy principle is called as "umbrella consideration", because other major ethical principles such as beneficence, non-ma-

leficence, confidentiality, and veracity, are assumed originated from the autonomy principle.

The autonomy principle then was broken down into the Code of Medical Ethics. In Indonesia, this can be found in article 9 which states: Before surgery is held, there must be a consent from the patient or his family. Later PB IDI Nomor 319/PB/A/4/88 about Informed Consent stipulates: Adult and mentally health person has the right to decide what will be done to his body. Physician has no right to do medical action which is in conflict with the patient's will, although the action is intended for the benefit of the patient.

In legal term, the principle is clarified and sharpened by the issuing of Minister of Health Law Regulation Number 585/Per/Men.Kes/IX/1989 on Persetujuan Tindakan Medik (Informed Consent) and Law Number 23/1992 on Health. By the issuing of the regulation , then the right of patient's informed consent which previously ethically bound now has been stronger because it has been the substance of law and legally bound.

The Information

The most important element of Informed consent is disclosure of informed consent. Often by signing the form of informed consent, the patient or physician feel free from liability. They may assume that any risk has been approved by consenting or signing the form of operation. Whereas there must be information before the consent. Information can be explanation, education, or guidance to the patient.

Standards of disclosure in informed consent context can be varies. The standard are not at present well articulated in either biomedical ethics or case law, and much of informed consent focuses on this problem.

The first standard is Professional Practice Standard (Beauchamp, 1982). This standard holds that adequate disclosure is determined by the customary rules or traditional practices of a professional community – e.g., a community of physicians, psychologists, or anthropologists. The custom in profession establishes both the topics to be discussed and the amount and kind of information to be disclosed about each topic. However may problem

this professional practice standard for disclosure. First, it is unclear if there even exist a customary standard of disclosure for a particular practice within the medical profession. How much consensus – and within which of the field of medicine – is necessary to establish that a professional practice standard for disclosure does in fact, exist? Second, if custom alone is taken as conclusive, then pervasively negligent care can be perpetuated with impunity, for relevant professionals will jointly offer the same inferior information and precautions. Finally, a third and principal objection to the standard is that this standard undermines patient autonomy, the promotion of which many hold to be primary function and justification of informed consent requirements. If the standard is followed, then paternalistic model can be implemented, that physician is treated as the person who has known the best about the patient. The result of the paternalistic model is, giving adequate information is being the part of physician's policy who knows the best treatment for the patient.

The second standard is the reasonable person standard. Approximately 12 percent of legal jurisdictions in the United States now accept this criterion (Beauchamp, 1982). According the standard, information to be disclosed is determined by reference to a hypothetical reasonable person, and the materiality of a piece of information is measured by the significance a reasonable person would attach to a risk in deciding whether to submit to a procedure. Most proponents of the reasonable standard believe that considerations of autonomy generally outweigh those of beneficence and that the reasonable standard better serves the individual than does the professional practice standard.

Unfortunately, this standard has difficulties. Application of the abstract reasonable person standard to a concrete case would require reference to specific facts of the case, a pressing conceptual puzzle is how to understand what information the reasonable person would want "under the same or similar circumstances" as those of the patient.

The third standard is subjective standard. *Canterbury* case (*Canterbury v Spence* (464 F.2a 772, 1972)) was the first and most influential of the informed consent cases. The case involved a form of surgery on the back (*laminectomy*) that led to unexpected paralysis, the possibility which

had not been disclosed. Judge Spottswood Robinson's opinion focuses on the right to self-determination: "The root premise is the concept, fundamental in American jurisprudence that every human being of adult years and sound mind has a right to determine what shall be done with his own body..." (Beauchamp. 1982). The specific focus in Canterbury and similar subsequent cases has been on the development of an adequate standard for adequate disclosure. The third standard focuses on individual information needs. Patients may have highly personal or unorthodox beliefs, unusual health problems, or a unique family history that require a different informational base that that required by most persons.

In Indonesia, how far is the disclosure of information needed? According to Regulation of Minister of Health Law; the information must be complete and true. Information also includes benefit and risk of the medical treatment, both diagnostics or therapeutic. Information also include the need of medical action and the possible risk.

The regulation stipulates exceptions. Physician may not give information when it will make the condition of patient getting worse. It means that risk is thus material when a reasonable person , in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forgo the proposed therapy.

The topics importantly demanding a communication of information are the inherent and potential hazard of the proposed treatment, the alternatives to that treatment, if any, and the results likely of the patient remains untreated. The actors contributing significance to the dangerous of a medical technique are, of course, the incidence of injury and the degree of the harm threatened. The disclosure doctrine, like others marking lines between permissible an impermissible behavior in medical practice , is in essence a requirement of conduct prudent under the circumstances.

Two exceptions to general rule of disclosure need to be noted. Each is in the nature of a physician's privilege not to disclose, and the reasoning underlying them is appealing. Each, indeed is but a recognition that, as important as is the patient's right to know. It is greatly outweighed by the magnitudious circumstances giving rise to the privilege. The first one

play when the patient is unconscious or otherwise incapable of consenting, and harm form a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that impracticality of conferring with the patient dispenses with need for it. Even in situations of that character the physician should, as current law requires, attempt to secure a relative's consent if possible. But if time is too short to accommodate discussion obviously the physician should proceed with the treatment.

The second exception obtains when risk-disclosure poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view. It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient. Where that is so, the cases have generally held that the physician is armed with a privilege to keep the information from the patient, and we think it clear that portents of that type may justify the physician in action he deems medically warranted. The critical inquiry is whether the physician responded to a sound medical judgement that communication of the risk information would present a threat to the patient" (ibid being).

Consent

This element actually is only the consequence or following action after giving adequate information. The consent can be made written or orally. The most important thing is, the adult years (has been 21 years old or married), and sound mind, must give his own consent. For patient in emergency situation, children, and mentally retarded, the consent must be held by the guard or curator.

It need not consent when the patient is in unconscious condition or must accompany with his family and medically under emergency situation which need soon medical treatment for the sake of himself.

Trustful Relationship

From the above explanation, it can be concluded that "[illegible] sent" has two main functions: First, supporting cooperative [illegible] between physician and patient. Second, informed consent can [illegible] sician from suing when rising side effect which doesn't [illegible] physician's negligence.

If the informed consent can be implemented well, then the [illegible] tionship won't only be stated in ethical code, but also expressed [illegible] sician-patient humanistic relationship , which respect patient as "[illegible] whom her/his right must be respected.

References:

Beauchamp Tom L. and LeRoy Walters, Contemporary Issues in [illegible] 1982. Wadsworth Publishing Company, Belmont , California

Charles Culver and Bernard Gert, "Valid Consent" in Beauchamp [illegible] temporary Issues in Bioethics 1982. Wadsworth Publishing [illegible] Belmont California.

Kerbala, Husein. 1993 Segi-Segi Etis dan Yuridis Informed Consent. [illegible] dung, Sinar Harapan

R. Diah Imaningrum Susanti, Hak Pasien atas Persetujuan Tindakan [illegible] Kompas, 22 November 1997.

Peraturan Menteri Kesehatan Nomor 585/1989 tentang Persetujuan Tindakan [illegible] Medik atau Informed Consent

Undang Undang Nomor 23 tahun 1992 tentang Kesehatan

[illegible]-POKOK PEMIKIRA[illegible]
[illegible]-ASAS HUKUM PIDA[illegible]

Oleh: Prof. Dr. H. Barda Nawa[illegible]

[illegible]

1. Mengkaji Asas-asas Hukum Pidana N[illegible] tidak dapat dilepaskan dari kajian [illegible] pikiran/ide dasar atau wawasan/p[illegible] melatar belakanginya. Oleh karena [illegible] didahului/disertai dengan kajian/dis[illegible]
2. Kajian konseptual mengenai ide-ide [illegible] kum Pidana (Materiel) Nasional me[illegible] yang panjang dan sudah cukup lama [illegible] masi". Hasil kajian itu kemudian dicob[illegible] mentasikan, dan diformulasikan dal[illegible]
3. Untuk bahan diskusi, ada baiknya d[illegible] *view/reorientasi/re-evaluasi dan refo[illegible]* kiran atau ide dasar di dalam konse[illegible]

[illegible]-Pokok Pemikiran (Ide Dasar) Dala[illegible]

1. Penyusunan konsep didasarkan pad[illegible] antara lain sebagai berikut:
   a. KUHP hanya merupakan suatu [illegible] pemidanaan' (*sentencing syste[illegible]* 'sistem penegakan hukum pida[illegible] sejak awal bahwa upaya pemba[illegible] nesia tidak dapat dilakukan ha[illegible]