



**NATIONAL COUNCIL OF ETHICS FOR THE LIFE SCIENCES**

**58/CNECV/2010**

**OPINION No. 58 OF THE  
NATIONAL COUNCIL OF ETHICS  
FOR THE LIFE SCIENCES**

**OPINION ABOUT PERFORMING  
AUTOPSIES OR OTHER *POST MORTEM* EXAMINATIONS  
AT THE REQUEST OF INDIVIDUALS**

**(June 2010)**



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### I

His Excellency the Secretary of State for Justice requested from the National Council of Ethics for the Life Sciences (CNECV) an opinion on whether the National Institute of Forensic Medicine (NIFM) may, or may not, perform at the request of individuals, albeit relatives to the deceased, autopsies or any other *post mortem* examinations, such as those aimed at the understanding of hereditary diseases or the establishment of affiliation, without any suspicion of crime or its invocation.

Although the opinion request did not identify the reasons and objectives that led to it, it was accompanied by Opinion no. 53/2007 of the Advisory Board of the Attorney General's Office of 17 September 2009, also prepared at the request of His Excellency the Secretary of State for Justice, which allowed the contextualization of the problems about which the opinion of the CNECV is asked. It should also be noted that this Council had access to two legal opinions on the same subject, responsibility of the NIFM Legal Advisory Council and the NIFM Medico-Legal Council.

Thus, under the terms of article 3, paragraph b), and article 6, no. 1, paragraph c) of Law no. 24/2009 of 29<sup>th</sup> May, the CNECV issues the following opinion.

### II

In the current legal framework, conducting investigations, examinations and biological sample taking by the NIFM is generally oriented toward cooperation with the courts in the administration of justice through the taking of evidence in accordance with the applicable procedural laws and depends, on principle, on the initiative of the judicial authorities in connection with a legal proceeding.

However, since 1998, the law also generally recognises the possibility of the NIFM providing services to private entities and individuals on matters involving the application of medico-legal expertise and other forensic sciences, with the particularity of the amounts charged for the provision of services in this context to be considered as NIFM's own revenue.

However, contrary to what would be desirable, especially because one may be dealing with ethically sensitive issues and matters, the law has never regulated, or even discriminated against, the type of services that NIFM is authorised to practise in this area at the request of individuals, as well as the terms and conditions under which investigations, examinations and *post mortem* samples may be performed by NIFM at the request of individuals.

Thus, there is currently no statutory provision that, expressly and specifically, authorises or enables NIFM to perform autopsies or any other *post mortem* examinations at the request of individuals.

In this context, when the CNECV is asked for an opinion on this matter, there are, from an ethical relevance perspective, two types of issues on which this Council has to express its opinion: first, whether, in the absence of the legislation or at least in the absence of a clear and indisputable legal position on the issue, it is ethically sustainable or, rather, inadmissible that NIFM perform autopsies, sample taking or other *post mortem* examinations at the request of individuals without any suspicion of crime or its invocation; second, assuming there are no ethical objections crucial to



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performing this type of intervention or some of them, what are the assumptions and requirements to be met so that they are not ethically objectionable.

### III

When analysing these issues, there are values, principles and interests that are ethically relevant and possibly in opposition that are worth considering.

There are, on the one hand, individual interests, namely those of the closest relatives of the deceased, to know or obtain further information about the causes and circumstances of death or specific information about factors relating to his/her health or genetic characteristics. Since these elements cannot always be known or obtained through the channels specifically provided for in the law in force, the satisfaction of those legitimate interests may advise or require the possibility for the NIFM, at the request of the individuals concerned, to perform those autopsies or other *post mortem* examinations.

Indeed, the interest of individuals in obtaining those elements can range from simple, but legitimate, curiosity about the causes of death to the need for a thorough knowledge of the circumstances in order to discharge any responsibility and to support the defence of moral or material interests affected.

It can also be in respect of motivations relevant to pursuing fundamental rights such as the right to personal identity, when attempting to obtain elements that contribute to establishing a paternity relationship, or the right to protection of health or that of relatives, when seeking information on hereditary diseases or genetic traits on which to act for therapeutic purposes. They are, in any of these cases, cogent and ethically justified interests, although very different in terms of relevance, urgency of completion and justification for NIFM intervention at the request of individuals.

In this regard, and because the law already broadly provides that the NIFM can provide services to public and private entities and individuals, there will not be, on principle, any ethical objections to the NIFM providing those services, in satisfaction of the abovementioned legitimate interests and while technically qualified to do so.

There are, however, on the other hand, principles, values or interests that, from an ethical point of view, can advise or require a ban or at least the possibility of a constraint, in these circumstances and for these purposes, to the NIFM performing autopsies or other *post mortem* examinations or sample taking at the request of individuals.

Therefore, the State bears the duty to protect and safeguard the respect due to the dead that, by itself, has ethical relevance, especially as that duty can be seen as a result, reflection or objective extension, beyond death, of the State's duty to protect human dignity. Accordingly, any intervention on the corpse that is purely frivolous and unnecessary should be prohibited or at least the *post mortem* interventions that are not sufficiently justified by the pursuit of other ethically relevant interests should be limited.

On the other hand, for the same reasons relating to the principle of human dignity, the State also bears the duty to protect the confidentiality of private or intimate personal data beyond death that third parties, even family members, should not have access to, except when they present sufficiently serious reasons. In this context, respect for the person's ethical autonomy duly obliges



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emphasizing the person's will, whether in situations where the person explicitly expressed his/her will in this respect, or when this will can be inferred from his/her behaviour as when, for example, the person, while living, intentionally did not reveal to his/her relatives, or even hid, some important element of his/her health or personal life.

Then, the possibility of refusing to perform autopsies or other *post mortem* examinations at the request of individuals may be ethically justified or, at least, may prove to be necessary to restrict access to the information therein in terms of the need to reconcile respect for the will of the deceased with the pressing concern of access to personal data of the deceased on the part of his/her relatives. In fact, in a non-paternalistic state that respects the person's ethical autonomy, the person's will is a crucial factor to consider, as, although not an absolute value not subject to compromise in any circumstance, it is an element of great importance as a criterion for solving ethically difficult or complex cases.

Admittedly, as is apparent from the existing legal framework, there are situations in which the person's will is not decisive, and may have to give in to other public or private interests worthy of consideration, as in situations of performing autopsies or certain sample taking under criminal or civil proceedings. However, in the case of autopsies or other *post mortem* examinations requested by individuals, the due respect to the deceased person's will, freely and consciously expressed while he/she lived, can only be given in to when that request is based on equally relevant values or interests, such as the protection of health or other fundamental rights of themselves or others that cannot be adequately pursued without a proportional compression or non full satisfaction of the will previously expressed by the deceased.

There are also reasons not ethically indifferent of other kinds, i.e. not exclusively related to the dignity, autonomy, the confidentiality of personal data and privacy that can advise a ban or at least a conditioning of the possibility of investigations or other *post mortem* examinations conducted by NIFM at the request of individuals.

On the one hand, the interests of fairness and proper administration of justice could be frustrated or significantly affected when, upon starting a judicial proceeding or the possibility of resorting to the courts, it were admitted that private parties could, in the meantime, refer directly to NIFM intervention without the mediation or authorization of the magistrates who run the proceedings and knowledge of other interested parties. That is, there could be situations in which individuals could, through the use of unilateral and extrajudicial NIFM intervention at their own expense, obtain decisions, opinions or information issued in conditions of partial information - as the NIFM would only have informative and contextualized elements transmitted by themselves - and through which these individuals seek to influence the later course of the proceedings in their favour.

On the other hand, even in the absence of current judicial proceeding, there is always an objective risk of possibility of instrumentalisation, ethically reprehensible, of a public institution like the NIFM, especially when, in the absence of legal framework regulating the procedures involved, individuals seek to unilaterally obtain, through the NIFM, advantages over other individuals or public or private entities in a context where the NIFM is called to act without full information and preliminary hearing or notice of all public and private interests involved.

Moreover, when the legislator opened to the NIFM, as from 1998, the possibility of providing services to individuals, it stated in the Preamble of the statute that introduced this possibility



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(Decree-Law No. 11/98 of 24 January ), that it aimed to achieve, by consensus, solution to issues that otherwise would necessarily be obtained by judicial means. Thus, it would not be acceptable that the opening of such a possibility - which involved the consensus of all concerned - was "twisted" with an exactly opposite meaning, that would be the possibility of instrumentalising the costly provision of NIFM services in the litigious interest of some individuals against other individuals or other public or private entities.

Finally, it should be noted that, under the generic name "autopsies or any other *post mortem* examinations", as has been used in the opinion request addressed to this Council, interventions or very differentiated acts are covered and, in turn, these could be carried out in very diverse circumstances and moments. One and the other reason advise correspondingly diverse responses that complement or correct a position of principle on the general question that is posed to us.

In fact, medico-legal autopsies or anatomical-clinical autopsies may be at stake. There may or may not be an ongoing judicial proceeding over the controversial issue. There may or may not be the possibility of opening such a proceeding. There may be unanimity or consensus among all family members or different opinions among them regarding the request for or the provision of services by NIFM. There may be agreement on the use of NIFM among all individuals and public or private entities involved or there may be conflict or disagreement in that regard. This may involve interventions on the corpse before or after the burial and, in the latter case, before or after the expiration of three years during which, according to the existing regime, exhumation is only possible by decision of the judicial authority.

Thus, given the complexity of the controversial issues mentioned above and their ethical relevance, it seems advisable, or even essential, for there to be legal regulations to specifically regulate and define the regime applicable to the situations in question. Indeed, the legislator is the body best able not only to impart certainty, security and predictability in an ethically sensitive area but also to properly address the needs of mutual accommodation of various interests and values eventually in collision, and to regulate the procedures adjusted to such compatibilisation in a manner harmonised with the general legal solutions in force.

Furthermore, and regardless of the legal question on the organic competence to approve such legislation - a problem specifically dealt with in the legal opinions to which reference was initially made - the ethical relevance of the underlying problems would counsel that such legislation should be discussed and approved under conditions of wide publicity and participation.

If so, that is, assuming that the legislator takes over the regulation of the matter under consideration, it would eventually be the occasion to also deal with correlated matter and whose legal regime remains incomplete or is insufficient. We refer, in particular, to the need for setting the general legal regime for anatomical-clinical autopsies as well as, already on another plane, but also regarding the *post mortem* interventions, the need for legal regulation that confers practicality to the will expressly manifested by individuals when they decide to donate their body for educational and scientific research.

However, regardless of any previous decision of the legislator, and taking into account the importance, legitimacy and ethical relevance of the interests involved, the NIFM cannot fail to respond to requests that are in the meantime directed to it by individuals, either because the law already gives it, in a generic manner, the possibility of providing services to public and private entities



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and individuals, or because a general refusal to provide any services to individuals in this field, if strictly based on the absence of specific regulations, would result, in objective terms, in the practical granting of a unilateral, general, undifferentiated prevalence and without the proper material consideration of the public or private interests objectively favoured by that refusal.

Anyway, the position to be taken by the NIFM must be materially informed by ethically justifiable principles and criteria that, precisely because they have this quality, must both bind the NIFM while a public entity, particularly when acting in the absence of express and specific legal provision, and must be observed and upheld by the legislator that will eventually regulate this matter. In consideration of the weight and relevance of the values and interests to take into account in the situation put to us, the CNECV believes that the principles and criteria to be followed should be considered.

### IV

1. In the opinion of the CNECV, there are, on principle, no ethically sustainable objections to the NIFM performing autopsies, sample taking and other *post mortem* examinations at the request of individuals without any suspicion of crime or its invocation. There are, however, principles that must be strictly observed and respected, that only in exceptional circumstances and based on serious reasons can be compressed or yielded to, and only by completing the following requirements.

2. With regard to the bioethical principle of autonomy, the deceased person's will should be respected, whether it was expressly manifested in life, or where it can be unambiguously inferred from his/her intentional behaviour while he/she lived, or even where it can be conclusively established from the testimony of relatives and those who knew him/her.

3. If the deceased person's opposition to *post mortem* examinations is known, these can only be exceptionally performed when justifiably based on strict and serious health protection needs of applicants or third parties.

4. In any case, and even if no one can ascertain the real or presumed will of the deceased, the confidentiality of private or intimate personal data should be kept, especially those that the deceased kept out of public knowledge and relatives, and should only be disclosed that whose knowledge is strictly required for fulfilling the purpose which justified the examination or *post mortem* sample taking.

5. Whenever the NIFM admits the possibility of affirmative response to a request for *post mortem* intervention requested by individuals, it must give prior notice to the public and private entities, as well as the other individuals involved or interested in the results, in particular the family of the deceased.

6. Any *post mortem* intervention conducted by the NIFM at the request individuals should be based, on principle, on a family agreement, only admitting non-consensual interventions when dissent is manifestly unreasonable or unfounded.

7. Where there is already an ongoing judicial proceeding in which the information or conclusions reached through *post mortem* intervention might be relevant, the NIFM may conduct it only through the mediation or initiative of the magistrates and judicial authorities in charge of the proceeding.



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8. When there is no judicial proceeding, but the requirements are met that, under the legislation in force, still allow for or require a *post mortem* intervention, the performance of this intervention by the NIFM should only be made in accordance with the procedures and on the initiative of the magistrates and judicial authorities who are legally empowered to do so.

**V**

**Thus, in response to the request addressed to it, in the terms and on the grounds explained above, the CNECV is of the opinion that, despite the convenience of prior legal regulation on the matters in question, there are no ethical objections to the NIFM performing autopsies, sample taking and other *post mortem* examinations at the request of individuals without any suspicion of crime or its invocation, provided that they comply with the principles and requirements listed in Part IV of this Opinion.**

Lisbon, 23<sup>rd</sup> June 2010

Miguel Oliveira Silva (CHAIR)

This Opinion was approved at the Plenary Meeting of 23<sup>rd</sup> June 2010, which was attended by the following CNECV Councillors, in addition to its Chairman:

Jorge Reis Novais (RAPPORTEUR)  
Rosalvo Almeida (RAPPORTEUR)  
Agostinho Almeida Santos  
Ana Sofia Carvalho  
Duarte Nuno Vieira  
Francisco Carvalho Guerra  
Isabel Santos  
José Germano de Sousa  
José Lebre de Freitas  
Michel Renaud