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Conscientious objection and abortion: rights and duties of public sector physicians

ABSTRACT

The paper analyzes conscientious objection by physicians, through the concrete situation of legal abortion in Brazil. It reviews the two main ethical frameworks about conscientious objection in public health, the incompatibility thesis and the integrity thesis, to analyze the reality of legal abortion services in the referral services of the Brazilian public health care system. From these two perspectives, a third perspective is proposed – the justification thesis, to manage the right to conscientious objection among physicians in referral services. This analysis may contribute to the organization of services for legal abortion and to the education of future physicians working in emergency obstetric care.

DESCRIPTORS: Abortion, Legal. Physicians, ethics. Health Knowledge, Attitudes, Practice. Health Law. Conscientious Objection.

INTRODUCTION

Conscientious objection is a formal mechanism for professional codes and public policies to protect the integrity of people involved in a situation of moral conflict.⁸ This mechanism is utilized to protect individual values in a conflict between public duties and individual rights, as in the case of the physician who declares conscientious objection to refuse care to a woman that wants a legal abortion. Conscientious objection protects the physician's moral integrity by authorizing non-participation in a legally permitted procedure they believe to be morally wrong although legal.^{8,9} Recently, the fundamentals of this right have been discussed, regarding if it is absolute or subject to the rights of people in need of health services.

In the case of abortion in public health services, the conflict is not only between the physician and woman. Conscientious objection can be analyzed as a conflict between professional responsibilities and individual rights; between different individuals (right to intimacy, freedom of conscience, autonomy, health, among others); or between individual rights and institutional obligations.^{1,4,5}

This article discusses conscientious objection by physicians, through the concrete situation of legal abortion services. The two principal interpretations of this framework are discussed (“incompatibility thesis” and “integrity thesis”) given the organization of legal abortion services in Brazil. From these two perspectives, the “justification thesis” is proposed as a form to manage the use of conscientious objection by physicians in these services. The discussion focuses on the physician, since legal abortion is considered a medical practice.

LEGAL ABORTION SERVICES AND CONSCIENTIOUS OBJECTION

In Brazil, services for legal abortion are referral units in the Unified Health System (*Sistema Único de Saúde, SUS*) for the care of women in situations

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described by law. A health service is recognized as a referral facility for legal abortion through an institutional decision by the health unit in accordance with the technical guidelines of the Ministry of Health (MoH).^{a,b}

Services for legal abortion in SUS were designed to care for victims of rape and women at risk of death, two situations where the Penal Code does not punish physicians nor women for abortion. MoH policies do not restrict assistance for legal abortion to the public sector. Nonetheless, it is presumed that abortion will be performed in public hospitals due the multi-professional team care model and due to Decree 1,508/2005, by the MoH, regulating assistance for legal abortion in SUS.^c

The physician can conscientiously object to a request for abortion, as long as it is not done in disbelief of the rape, for example. Objection can only be motivated for private beliefs, as in the case of religious beliefs. The physician cannot judge the narrative of the rape, and the police report is not even necessary, since there is a “presumption of veracity in the woman’s word”.^b In alleging conscientious objection, the doctor solicits permission to not fulfill their obligation. The woman is attended by another physician, referred to another service or, in extreme cases, can be left without assistance. MoH technical guidelines do not recognize the right to conscientious objection if there is a risk of death, if there is no other physician or if lack of medical attention harms the women, but recent cases reveal non-adherence to the normative criteria.^d

INCOMPATIBILITY THESIS

For Savulescu, conscientious objection in certain situations, such as those previously described, should be prohibited because it violates the fundamental medical responsibility to assist patients with their health needs.⁷ There is a medical monopoly in the practice of abortion, including in Brazil, where according to the Penal Code “abortion *practiced by a physician* is not punished” (italics ours).^e Therefore, refusal by a physician to assist a woman at a referral service for legal abortion can constitute a definitive obstruction of the woman’s right to health, if there is no way to immediately substitute the health professional. Savulescu considered countries with public health services. This is a specific context for the discussion of the right to conscientious objection by physicians, similar to what occurs in Brazil, where

legal abortion services are organized in SUS referral units and presumed to occur in public sector services.

The ethical rationale by Savulescu is that morals have different roles in the public and private spheres.⁷ A physician should have the right to privately profess their religion or philosophical beliefs, which can include political advocacy against abortion, but should remain neutral when representing the State in a public health service. According to this perspective, religious or philosophical freedom is subordinate to the duty to care, and refusal of care can be considered discriminatory, immoral or illegal depending on the motivations and consequences for the woman’s life.

INTEGRITY THESIS

On the other extreme, conscientious objection is understood as an absolute and individual right.⁶ Not only physicians, but all people directly or indirectly involved in health care could use conscientious objection to refuse to perform their duties whenever their moral integrity was challenged by a woman’s demand. In the case of legal abortion, the integrity thesis ensures that physicians, psychologists, social workers, nurses, pharmacists or administrative staff, each in their own role, have the right to refuse care or provision of services due to personal motivations. This thesis assumes an overlap between the roles of the health professional and a moral human being; before being a physician in the service of State neutrality, the person is a member of a moral community that determines their conscience, including limits between what is right and wrong for medicine to perform.²

The integrity thesis has degrees of interpretation. On one side there are defenders of moral integrity as an absolute right of physicians, to the point of argument that even procedures such as informing a woman of her rights, another physician or about other health services violate the individual integrity.⁶ According to Pellegrino, respect of one’s conscience is a fundamental individual right and should therefore be guaranteed by the health services.⁶ In this interpretation, the use of conscientious objection to actively obstruct a woman’s right would be morally justified.

In contrast, Wicclair argues that from a principled perspective there is no contradiction between professional duty of physicians and recognition of conscientious objection as a right for moral integrity.⁹ Brock,

^a Ministério da Saúde. Atenção humanizada ao abortamento: norma técnica. Brasília; 2005 [cited 2010 Oct 17]. (Série A. Normas e Manuais Técnicos. Série Direitos Sexuais e Direitos Reprodutivos – Caderno, 4). Available from: http://bvsm.s.saude.gov.br/bvs/publicacoes/atencao_humanizada.pdf

^b Ministério da Saúde. Prevenção e tratamento dos agravos resultantes da violência sexual contra mulheres e adolescentes: norma técnica. 2. ed. Brasília; 2005 [cited 2010 Oct 17]. (Série A. Normas e Manuais Técnicos. Série Direitos Sexuais e Direitos Reprodutivos - Caderno, 6). Available from: http://www.ipas.org.br/arquivos/NT_prevencao_violencia.pdf

^c Ministério da Saúde. Portaria nº 1.508/GM, de 1º de setembro de 2005. Dispõe sobre o procedimento de justificação e autorização da interrupção da gravidez nos casos previstos em lei, no âmbito do Sistema Único de Saúde – SUS. *Diário Oficial União*. 8 jul 2005;Seção1:31.

^d Diniz D, Brum E. Uma história Severina [movie]. Brasília: ImagensLivres; 2005. 23 min.

^e Brasil. Decreto-lei nº 2.848, de 7 de dezembro de 1940. Código Penal. *Diário Oficial União*. 31 dez 1940:2391.

in turn, proposes three normative criteria to protect the conscience of physicians. These criteria combine protection of integrity and the moral obligation of physicians to women: relevance, referral and burden.³ Physicians can object to their duties because of relevant beliefs but are responsible to refer women to other services, as long as this does not result in significant burden to the women. For Brock, there is no reason to assume that demands for conscientious refusal are insincere. Therefore, it would be reasonable to balance these requests through a moral agreement with objecting physicians on the three normative criteria. A conscience does not only inform judgments about right and wrong, but also guides individuals to not participate in acts discordant with their values.³ This is how freedom of conscience is interpreted for a physician to refuse to care for a woman in a legal abortion service.

The proponents of the non-absolutist integrity thesis, as in the case of Brock and Wicclar, recognize the moral pluralism and establish basic parameters to regulate the practice of conscientious objection so it is not understood as an absolute right of physicians. A similar accommodation between rights and responsibilities was proposed by the new Brazilian Medical Ethics Code, which recognizes the right to conscientious objection, but imposes restrictions on its practice: the physician “is not obligated to provide services that contradict the dictates of their conscience or to whom they do not wish, except in situations where another physician is lacking, in urgent or emergency cases or when refusal can harm the health of the patient”.^f The Brazilian Medical Ethics Code, like Brock, seeks to guarantee the right of conscientious objection to physicians together with a normative obligation to not engage in active obstruction to, for example, block women from abortion.

LEGAL ABORTION SERVICE AND SELECTIVE CONSCIENTIOUS OBJECTION

The physician, who works in a reference facility for legal abortion, knows they have a responsibility to perform abortion in legally permitted cases and that it is prohibited by the Medical Ethics Code to “not follow specific legislation in the case of abortion”.^f Participation in these teams results from an accord between institutional obligations and the individual motivations of health professionals, and working in reference facilities is not imposed on the physician. Respect of the physician’s moral integrity should precede their participation in the service: as a general rule, physicians with *absolute conscientious objection* to abortion should not be part of the reference services for legal abortion. The conflict occurs, in situations of “selective conscientious objection”, i.e. when the physician responsible for care requests the right to refuse care in a specific case.

In Brazil, the organization of legal abortion services in referral units means that the request for conscientious objection by the physician is always selective, since attending to women for abortion is part of their routine work. If on one hand the incompatibility thesis subordinates the physician’s freedom of conscience to their professional obligation to provide care, on the other hand the integrity thesis is insufficient to validate the reasons for which a physician refuses to care for a specific woman in a referral unit for legal abortion. In this context, the integrity thesis and an agreement with objecting physicians are still insufficient to accommodate the physician’s right to integrity and woman’s right to health, since it does not establish validation criteria for the relevance of a belief. Reliance on the moral sincerity of the objector is insufficient for subordination of the fundamental and absolute rights of women below the physician’s moral integrity.

JUSTIFICATION THESIS

The moral standings of the woman and of the physician invoking selective conscientious objection do not have equal worth. Frader & Bosk⁵ describe conscientious objection as an “abuse of professional power”. In Brazil, women depend on assistance from the State for safe abortion, besides undergoing mental and physical suffering due to the sexual violence or risk of death. In the latter case, delay in care or refusal of treatment can cause serious consequences for the woman. In this situation, there is no way to invoke conscientious objection without infringing upon the normative criteria for burden, given the risk from lack of aid or the risk of death to the woman. Requests for abortion due to rape and, more recently, with judicial authorization in cases of malformation incompatible with fetal survival, arouse conscientious objection by physicians in legal abortion services.

For proponents of the integrity thesis, requests to refuse treatment for racist motivations should not be accommodated, since it is not a relevant belief and is illegal. The liberal foundation of the integrity thesis does not discuss the relevance of a belief beyond normative rules and accepts individual sincerity as sufficient in regards to suffering in participation considered morally wrong. It is this framework in which religious beliefs prevail as a legitimate and reasonable cause to refuse assistance. The reasonableness of a religious belief is not discussed during a request for conscientious objections, since its validity would compete with the woman’s right to health. The integrity thesis attempts to resolve the conflict between the right to religious liberty and a woman’s right to health through a moral compromise by the physician with the criteria for regulating conscientious objection proposed by Brock.³

^f Conselho Federal de Medicina. Código de ética médica. Brasília; 2010. p. 4.

and incorporated in the Brazilian regulations on legal abortion and in the Medical Ethics Code.

It is critical to discuss the place of religion and private beliefs in the public institutions of secular states in order to regulate conscientious objection, especially given the potential for invocation by all people involved in the health sector. The interpretation of conscientious objection as a universal and absolute right can destabilize the health system, through the constant risk of health professionals refusing assistance. Nonetheless, for the sake of argumentative simplicity, it is reasonable to assume that the physician who conscientiously objects to all abortion would not work in referral service for abortion in SUS. Therefore, it is the validity of the beliefs that motivate selective conscientious objection and which should be discussed for the services to function justly.

The logic of a belief and the extent they determine the moral integrity of an individual do not need to be questioned by an abortion service in order to authorize or not authorize a refusal to care because of conscientious objection. Freedom of conscience is an inalienable individual right, but its exercise can be regulated by the State.⁴ Conscientious objections is one of the ways to protect individual liberty of conscience, but the moral reasons for which a physician refuses to attend a woman should be evaluated by the State. The right to conscientious objection does not constitute a free pass to refuse medical assistance. The reason should be relevant, related to the moral integrity of the individual and be reasonable within the bounds of human rights. The objecting physician should justify the request to refuse care in a specific case; therefore

the “justification thesis” was proposed. The onus of justification is on the physician invoking *selective conscientious objection*, and it is the responsibility of the health unit to evaluate its relevance.

The justification thesis does not ignore the ethical and democratic fundamentals of the integrity thesis, nor does it ascribe to the incompatibility thesis to regulate conscientious objection. The justification thesis emphasizes that the relevance of the belief should have a central role for the model of legal abortion in Brazil. By justifying the way that care for a specific case violates their private moral beliefs, the objecting physician makes their values public and submits them to an evaluation of relevance by the health unit.

CONCLUSION

The right to conscientious objection is not absolute, and its invocation should depend on accommodation between reasonable rights and values for a just society, such as minimal risk for the woman who seeks medical care.

This article analyzed the two main thesis on conscientious objection, the incompatibility thesis and the integrity thesis, given Brazilian reality, and proposed the justification thesis. The justification thesis allows for protection of the physician’s moral integrity but also controls calculated obstructionism and violations of the woman’s right to legal abortion. It is not reasonable to always accommodate individual beliefs, especially when the right in dispute is the protection of a basic need, such as the health of women.

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