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VIEWPOINT

Medical confidentiality in underage consent sex in Brazil

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This paper is a theoretical discussion that explores medical confidentiality within the context of Brazilian law about underage consent sex. Brazilian law determines that the age of consent for sexual intercourse is 14 years. Before this limit, physicians should report the sexual activity of adolescents, breaking the confidentiality of the consultation. The medical code of ethics prohibits the breach of professional confidentiality of a minor patient, including their parents or legal representatives, unless a lack of disclosure may cause harm to the patient. The legal issue seems to go beyond the ethical issue; however, the breach of confidentiality can cause more risks than benefits by removing these adolescents from health services. The law aims to protect the sexual dignity of teenagers under 14 years old, but the particularities of each case must be considered, and flexibility concerning medical confidentiality should be included.

Brazilian Law

Adolescence is a period characterised by rapid physical, cognitive and social changes. Changes in the timing and duration of adolescence are accompanied by alterations in patterns of health risk, particularly around sexual health.[1]

Changes in emotional and cognitive functioning that occur during adolescence have an impact on health care. These changes associated with the social contexts in which adolescents live affect health and health risk behaviour, regardless of childhood influences.[2]

The Penal Code of Brazil protects sexual dignity and considers victims of vulnerable rape of those under 14 years old, among other situations. Unlike rape, which requires embarrassment through violence or a serious threat, vulnerable rape is a crime even with the consent of the victim. If there is any kind of sexual activity, it is considered rape. The law understands that someone of this age is unable to consent to this practice.[3]

The legal age of consent varies in different countries around the world. For instance, Nigeria has the lowest age of consent at 11 years, whereas Bahrain has the highest at 21 years. In some countries, there is no legal age of consent, but all sexual relations are forbidden outside of marriage.[4]

In the countries of South America, Bolivia, Brazil, Colombia, Ecuador, Paraguay, and Peru have the age of consent at 14 years. The age of consent is 15 years in Uruguay and 16 years in Guyana, Suriname, and Venezuela. In Chile and Argentina, the age of consent is 18 years.[4]

In 1990, Brazil enacted the Child and Adolescent Statute through Law No. 8069, which considers a person less than 12 years of age a child and a person between 12 and 18 years old an adolescent. Despite the WHO defines that adolescence begins at the age of 10 years, vulnerabilities in the Child and Adolescent Statute and the Penal Code are under 12 and 14 years old, respectively.[5]

A patient's trust of the physician is more strongly associated with self-reports of improved health than is any other characteristic of the patient-physician relationship in the primary health-care setting. Trust has been shown to affect a patient's satisfaction with health-care services and the willingness to disclose sensitive information, adhere to treatment, continue with a physician and recommend that physician to others.[6]

Faced with these laws, physicians find themselves in an ethical and legal dilemma, that is, in cases where the relationship was consented without coercion, do the presumptions of rape cease to exist in the care of an adolescent aged below 14 years? Or should they always opt for the presumption of rape, reporting sexual activity, keeping in mind that a breach of confidentiality may cause adolescents to avoid medical services?

Rights of Adolescents and Obligation of Physicians: Legal and Ethical Analysis

The Child and Adolescent Statute focused on child and adolescent's rights. With this statute, children and adolescents were no longer considered an object of rights but the subject of them, which changed the image and meaning of infancy and adolescence in Brazil.[7]

Statutory rape laws are intended to punish adults who have sex with minors. The assumption behind these laws when they were originally enacted was that only teenagers who exceeded the age of consent could make informed decisions about engaging in sexual behaviour. However valid that argument may have been, the reality is that an increasing percentage of teenagers is participating in consensual sexual activity in underage dating relationships. The issue is whether these cases should be processed through the juvenile or adult justice systems or not prosecuted at all.[8]

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The controversy over the potential criminal prosecution of teenager's close-in-age engaging in consensual sex is illustrated by the tendency in scholarship, law and policy to refer to them as 'Romeo and Juliet' cases in the USA. These cases relativize vulnerability, by implementing exceptions where there is only a very small age difference between the victim and the alleged perpetrator, which varies from state to state.[9]

The emergence of sexuality is a process that extends beyond biological age. Sexual activity is occurring earlier and earlier. The younger a child is when they engage in sexual activity, the less chance of discernment and the higher the possibility of sexual abuse. Therefore, on the one hand, there are risks; on the other, there is an opportunity for prevention.

Young people in developing countries are less willing to seek professional help for more sensitive issues and tend to turn more often to friends or family they can trust or to health educators for sexual counselling. Even if available and accessible, health services might not be acceptable to young people. Fear that health professional will not maintain confidentiality, especially from parents, is a major reason for young people's reluctance to seek help.[2]

In Brazil, the frequency of live births to teenage mothers varies between regions, reflecting economic conditions, cultural differences and access to health services and contraceptive methods.[10] Unintended pregnancy can have major consequences for the young woman, her family and society.[11]

These laws can also be a potential barrier to adolescents accessing contraception and relevant sexually transmitted disease testing. Increase HIV testing and counselling uptake have been associated with a lower incidence of HIV infection over time.[12]

As young people move through early adolescence, confidence beliefs change and are associated with developmental scepticism, imaginary audiences, self-awareness and increased risky behaviours.[13] In adolescents, there is preliminary evidence linking age and confidence of health professionals. A survey measuring health-care professionals' trust in maintaining confidentiality reported that adolescents aged 13 to 18 years trusted their health-care professionals less than their parents.[14]

Considerable controversy exists whether a physician can analyse the vulnerability of a minor. When adolescents require medical assistance, sensitive issues should be considered. Medical confidentiality should be safeguarded in cases where the adolescent reported that the relationship was consensual. In this individual analysis, it is necessary to assess the age of the adolescent and partner, the existence of emotional bonds, the consent of the adolescent, existence of signs of physical violence, the presence of coercion and evidence of possible sexual exploitation. Health professionals involved in this process will only be effective if it allows them to consider the individuality and life of each adolescent. It is important to note that when no cases of suspected or confirmed maltreatment are present, this will certainly cause these young people to drop out of medical outpatient clinics with a consequent increase in cases of unplanned pregnancy and sexually transmitted infection.

It is not a matter of modifying the age of consent; in fact, Brazil is not at the highest ages. The issue is the punishment of the physicians, who find themselves in a dilemma between confidentiality, the law, and the effective protection for adolescents. It seems unreasonable to think that reporting a consented sexual relationship will prevent the young teenager from having sex. But it seems quite likely that this will drive other teens away from health services.

In summary, physicians must align with the ethical and legal requirements of confidentiality and, in some circumstances, they must weigh up the potential harms of losing the adolescent's trust, which may cause more harm if they are required to report under-age sexual activity in Brazil. The capacity to protect and provide appropriate health care may be compromised by the law, which states that any sexual activity in a child under 14 years of age must be reported as an assault and illegal.

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