MEDICO-LEGAL CONSIDERATIONS ON THE RAPE CAUSAL CONTAINED IN THE ABORTION BILL CURRENTLY PENDING IN CHILE

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Abstract: The Chilean senate is discussing a proposal to decriminalize abortion in 3 situations. One of these is when the pregnancy occurs as a result of a rape. To access a legal abortion in this circumstance, a healthcare team must confirm the facts constituting the offence. Regardless of the patient’s will, the accusation will be reported for judicial consideration. In its current status, the proposed rule does not consider certain legal medicine and procedural issues, such as: a) wrongful convictions as a consequence of false allegations of rape; b) some who are pregnant due to a rape will not have access to an abortion; c) some accusations of rape will not be accredited nor criminally sanctioned. A fictitious case will be used to illustrate how those scenarios can be managed in practice. It also will emphasize the difficulties and limitations that the healthcare team will encounter if the bill is approved under the current conditions. The paper encourages the professional societies, involved in this area of legal medicine practice, to contribute to the legislatorial debate. Furthermore, the paper offers a set of proposals aimed to improve the bill before it may be enacted as a law.

Keywords: Abortion; Legal; Abortion; Induced; Chile; Criminal Law; Legislation; Rape

Nearing the end of the summer of 2018, Kate, an 18-year-old young woman just graduated from school, met George at a party. They had a brief romantic encounter which ended the following morning, after they had consensual sex. Kate returned to her town and they have had no further contact.

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A few weeks later she experienced menstrual delay and performed a pregnancy test which was positive. She did not wish to continue with this pregnancy, attended a medical centre, convinced that the legal modifications, approved some time ago, gave her the right to request an abortion.

The doctor performed echography and verified a normal pregnancy of 11 weeks, with no vital risk for the mother and with an apparently viable embryo. He advised Kate that the abortion could only be carried out if the pregnancy was the result of a rape. The young woman, seeing no other choice, told the physician that she did not remember what happened because she had drunk a lot of alcohol on the day but was sure that she had not wanted to have sexual intercourse with George. Despite that, considering the doubt she had, she had preferred not to report the incident, a situation which she wanted to maintain to the present.

Following the protocol, established by the abortion law, an ad-hoc meeting of health staff was held, and the case analysed. It made no sense to obtain samples for a blood alcohol determination nor a toxicological screen to corroborate Kate’s story. There were no features to suggest violent penetration (such as bruising, erosions or abrasions) and forensic examination only revealed a healed hymeneal tear, compatible with sexual intercourse but insufficient to confirm or refute consent. The physicians (who are not judges to decide whether there was/was not a rape) performed an abortion based on the patient’s history. The physician in charge also completed the prescribed documentation for the District Attorney. He also retained a chain of custody with part of the material obtained after the procedure, should it be required as evidence.

The police interviewed both Kate and George. She reiterated that she did not remember well what had happened, but she thought that she had been raped. The young man insisted that he had had consensual sexual intercourse with Kate on one occasion. He consented to a buccal swab sample and collaborated with whatever was asked of him.

The sample confirmed that George was the father of the aborted embryo. With this information, the district attorney formalized an investigation for rape and obtained precautionary measures against George.

During the investigation, other youngsters that participated in the party were contacted by the police. They all affirmed that Kate was with George. Some of them also mentioned that he gave her a lot of alcohol to drink. Kate, on the other hand, refused to testify to the district attorney. She did go to the Medico-Legal Office and repeated her story: she did not remember clearly
what happened but she thought that she had been raped. The expert report concluded that the woman’s account did not allow rape to be ruled out.

After concluding the investigation, George was tried for rape. Kate – because of fear – did not testify, a decision respected by the prosecutor. George invoked his right to remain silent. His defence affirmed that the alleged victim consented fully to the sexual act. It manifested that the case sustained itself on evidence obtained with an infraction of fundamental rights, as the doctor was not authorized, by law, to retain the tissue from the abortion. The prosecutor affirmed that George maliciously took advantage of Kate’s drunken state, had sexual intercourse with her without her consent. He added that the genetic analysis was in accordance with due procedure, because the doctor was obligated to practice the biological tests leading to proof of the criminal act, having to conserve the corresponding samples.

The court found George guilty and he was sentenced. As the young man had a criminal record for a traffic accident, the court decreed an effective custodial sentence. The defence presented an annulment but the Court of Appeals upheld the sentence. But George was anyway imprisoned being found guilty of the crime of rape.

When Kate found out, she asked a lawyer for help. A plea of revision was redacted, in which she retracted her previous statements. The libel was not admitted into procedure by the Supreme Court, as the legislation established that “it shall not be possible to prove the facts in which the request for revision is based on by witnesses”.

**DISCUSSION**

In Chile, approximately 2.1% of abortions are justified by the claim that the pregnancy was caused by a rape¹. Some have voiced an opinion that an abortion, mandated by law, would not constitute a medical act, but rather, a gesture with social significance². From the medico-legal perspective the authors of this paper disagree, because the procedure can also be considered at an individual level (in the bio-psycho-social status of the woman who requests it). Correct interpretation of findings in a forensic examination requires competence and knowledge pertinent to the field. The practical implications for professional practice should motivate the medical community to get involved in the debate of the bill which is currently in its second legislative procedure. For that reason, this paper aims to alert – through the presented fictitious case – on certain relevant questions which have not been adequately discussed.
Regardless of the reason, since 1989, in Chile, a non-spontaneous abortion is always considered a crime. The current Bill\textsuperscript{3} proposes decriminalizing abortion in 3 circumstances: a) when there is life-risk for the mother; b) when it is a non-viable fetus; c) when the pregnancy is due to a rape. The central element of analysis is that the current proposal lacks sufficient and ideal safeguards, allowing the decision of abortion to eventually result in a judicial error. In the fictitious case, Kate never meant to harm George. The compulsion of producing a cause for the desired interruption of pregnancy, the young woman began a process the outcome of which she could hardly foresee. One must not forget that the woman who resorts to abortion is under pressure, with great angst and, probably, feelings of guilt\textsuperscript{4}.

The undesired consequence stated is not the only possible outcome. The fact that the norm in discussion has not taken into account certain medico-legal and procedural issues may also allow situations in which:

- an opportune request for an abortion, by a pregnant woman due to rape, may not be accepted;
- some complaints of rape will not be accredited nor criminally sanctioned

Below is an analysis of the scenarios presented.

1. **The possibility of erroneous sentencing due to a false rape report**

Regardless of whether there is malice (with the intent to harm) or – as in the example case – negligent (without consideration of consequences) intent, the concrete fact is that the bill currently in progress does not grant the necessary guarantees that ensure the opportune enquiry of a false rape report. The main problem lies in the fact that the proposed law only provides a glimpse of autonomy for women\textsuperscript{5,6}, a scenario in which a pregnant woman can see herself persuaded to misleadingly invoke the rape claim. Added to this, is the improper mandate for the healthcare team to “confirm the concurrence of the facts which constitute” rape. Is this even medically possible?

One must remember that rape is a crime, not a disease, hence no doctor and in no circumstance, can the accuracy of the claim of rape be certified with certainty.\textsuperscript{7}. It is possible that legislators, or the judiciary, have falsely believed that in a rape case there necessarily will be some trace of physical violence compatible, with the fact, which will not be present in consensual intercourse. Scientific evidence is to the contrary. There is a wide consensus that, in most
cases in which a sexual aggression is suspected, there will be no significant signs of injuries, healed trauma or sexually transmitted diseases\(^8\). This is valid for children\(^9\)–\(^13\), teenagers\(^10\)–\(^14\) and adults\(^15\),\(^16\).

Even when there are injuries, because of the rape, these tend to be superficial and they often heal in a few days, many times without leaving traces or visible scars\(^17\)–\(^20\). It is also important to note that a consented sexual intercourse may also present injuries, without a distinctive morphological pattern which is different to those produced in a non-consented act\(^16\),\(^21\)–\(^23\). Victims of a sexual crime do not always manifest behavioral changes or psychosomatic disorders as a response to the facts. Even when this happens, there are nonspecific indicators that need to be interpreted with caution\(^24\)–\(^27\).

A current forensic sexology paradigm is: the existence of injuries must not be interpreted as a synonym of rape and the absence thereof does not disprove the crime. It remains that the existence of a crime relies heavily on the story of the alleged victim. According to our legal frame (Table 1) and when dealing with women over 14 years old, the essential issue is not the medical evaluation but rather whether the sexual act was consensual or not. Deliberation of that should rest exclusively and completely with the justice system rather than the medical healthcare team.

**TABLE 1**

**CONTEMPORARY HISTORICAL EVOLUTION OF THE LEGAL FRAMEWORK WHICH PENALIZES THE CRIME OF RAPE IN CHILE**

<table>
<thead>
<tr>
<th>LAW</th>
<th>YEAR</th>
<th>HIGHLIGHTS</th>
</tr>
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<tbody>
<tr>
<td>19.617</td>
<td>1999</td>
<td>Defines rape as the vaginal, anal or oral carnal access, without the consent of the victim</td>
</tr>
<tr>
<td>19.874</td>
<td>2003</td>
<td>Grants mandatory public criminal action for sexual offences committed against minors</td>
</tr>
<tr>
<td>19.927</td>
<td>2004</td>
<td>Raises from 12 to 14 years the age to consider consent as legally valid for sexual intercourse</td>
</tr>
<tr>
<td>20.084</td>
<td>2005</td>
<td>Establishes special rules for the criminal prosecution of rapes committed by adolescents</td>
</tr>
<tr>
<td>20.207</td>
<td>2007</td>
<td>Modifies the statute of limitations for rape when the victim is a minor</td>
</tr>
<tr>
<td>20.480</td>
<td>2010</td>
<td>Modifies the concept of inability to oppose to a sexual act</td>
</tr>
</tbody>
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For practical purposes, in light of this bill, the judicial sentence for the crime of rape is substituted by the mere affirmation of non-consented sexual intercourse. In this scenario, what would be expected and ethically correct, with regard to the interests of the patient and the principle of non-maleficence, is that the ad hoc committee that is designated for such purposes should simply believe the patient’s version and proceed to undertake the abortion and later report. From that point onwards, an avalanche of unpredictably evolving events is precipitated. Even if there is, in theory, the possibility that the criminal procedure does not begin (because of provisional archiving of the case) and it concludes without a trial (by a decision to dismiss or to drop the case), it is also plausible that in certain circumstances – what started as a request for an abortion – concludes with an innocent man incarcerated. This can occur, in the light of the current bill, without the alleged victim even reporting it or testifying, as was the basis of the scenario.

2. The possibility that a pregnancy caused by rape does not get access to an abortion

In view of the lack of valid medical criteria, there could be a situation in which the designated committee for the case doubts the version provided by the patient and does not “confirm” the rape. In the presented fictitious example, the ad hoc committee could have also concluded that – the absence of injuries and lack of toxicological tests, added to the uncertainty of Kate on the circumstances of the fact – there were sufficient reasons to doubt that the pregnancy was as a result of a rape. They could have denied the abortion request.

In a time in which the incidence of drug-facilitated sexual assaults has increased, in theory the story of Kate could have the genuine notification of a crime, committed by the use of some chemical agent. The sedative, hypnotic or amnestic properties of drugs, utilized in these cases, may alter the behaviour of the victim, increasing susceptibility to suffer an attack of this nature with diminished capacity to recall information ad post on the events surrounding the fact. Because of this, it is characteristic that the victims only perceive the sensation of having been raped, not having memories of the attack or these memories being very vague or fragmented.

In view of the former, the current writing of the abortion bill has not considered situations as per those described, leaving loopholes that – in certain circumstances – may result in the spirit of the law not coming to fruition.
3. The possibility that some rapes will not be accredited nor criminally sanctioned

In the fictitious case presented, the prosecutor began an investigation on his own initiative and continued its proceedings until the trial. Given that Kate was of legal age, the prosecutor also had the alternative of not getting to that instance. Therefore, if the young woman really had been raped by George, he might have been left unpunished before the law. This is a procedural matter: in Chile, the crime of rape, committed against people older than 18 years, is not always a public criminal action.

Alternatively, as per the given scenario, the evidence to unequivocally prove that George had sexual relations with Kate was the genetic comparison between the retained material, after the abortion, and the mouth swab sample voluntarily given by the young man. The current bill does not consider the conservation of samples to be used as evidence in a criminal procedure. On the contrary: the rule in discussion establishes sanctions against whoever “facilitates or provides to another any organ, tissue or human fluid resulting from the abortion or interruption of pregnancy”3. The following should be added to that consideration:

a) Unless there is a court order, the obtaining of organic samples from a defendant is conditioned to his will;

b) There usually are no witnesses of a sexual crime;

c) The reporting of such crime does often occur a long time after its perpetration;

d) The findings at the forensic examination never are conclusive nor much less binding for the judicial decision;

The scenario for the criminal prosecutor becomes immensely complicated, by which he may be reduced to the mere confrontation of the version of the alleged victim (who as the bill says, may decide not to appear in court) and the defendant (who may also invoke his right to remain silent). It may also occur that there is a retention of samples, pursuant to §198 of the criminal procedure code. A judge can consider that the aforementioned constitutes an illegitimate procedural act, excluding it from the decision-making process. Depending on one’s interpretation, the doctor who executed the procedure may even be fined and banned from medical practice3.
As rape is a crime which is difficult to prove, the current bill makes things even more difficult. The inadvertent restriction for the obtaining and safekeeping of evidence results in the equivalent to a rule which prohibits the taking of vaginal, anal and/or oral samples in any rape complainant.

CONCLUSIONS

The will to legislate, with regard to rape and abortion, has been approved by the Chilean legislature and this paper is not offered to discourage it. Having said that, the current writing of the bill may generate complex problems that have hitherto not been foreseen. These relate to circumstances in which the spirit of the rule may not come to fruition in practice or may generate adverse socially deplorable effects, such as the erroneous sentencing of an innocent person or the eventual criminal non-sentencing of someone guilty of rape. To avoid these scenarios, it is recommended that the current legislation be modified with respect to the rape causal. It is argued that the professional bodies, involved in the subject (e.g. doctors, midwives, nurses, lawyers), should actively participate in the current discussion in the Senate, proposing:

1. That the team involved needed to “confirm the concurrence of facts that constitute” a rape must include lawyers of the legal staff of the health institution or of the corresponding Health Service.

2. That the conclusion that is decided by this ad hoc board must be duly justified and registered in a unique format form distributed by the Ministry of Health. The design of the said document must be the product of the joint work between the Judiciary, Ministry of Health, Ministry of Justice, universities and professional bodies.

3. That for pregnant females, over 14 years old, the abortion undertaken pursuant to this cause must be restricted exclusively to those women who seek medical attention consequent of Law 19.617 within 2 weeks following the alleged rape. This time frame is based on the time it normally takes for a pregnancy test to become positive\(^{35}\). This measure:

   - would allow the commission of an abortion for those women who reported the rape prior to confirmation of pregnancy

   - would promote an early medical consultation, which could avoid an abortion by the prescription of emergency contraception or (at least), would optimize the integral caring
for the patient and a timely evidence collection of forensic material to prove the criminal act

4. That it is explicitly established that, in abortions based on this cause, the crime of rape will always be a public criminal action. This would contribute to avoiding cases being left unpunished for lack of criminal prosecution.

5. That from §345 bis of the bill were excluded all actions tending to safe-keep evidence pursuant to §198 of the criminal procedure code.

6. That specific resources are destined for an effective civil education and permanent publication of the slogan “If suffered a rape, consult your physician before two weeks”.

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