

Conscientious objection to abortion: how to strike a legal and ethical balance between conflicting rights?

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Abstract: The Italian Supreme Court ruling no. 18901 of May 13, 2021 has determined that doctors who are opposed to abortion can refuse to perform it on grounds of conscience, but such a refusal does not exempt them from providing assistance to the woman before and after the procedure itself. The legalization of abortion should be considered within a broader strategy to put an end to underground and unsafe abortions, to raise awareness and enhance reproductive education and accessibility to contraceptive methods. The authors have set out to briefly analyze the legal and ethical complexities inherent in the effort to reconcile women's reproductive autonomy and freedom of choice with conscience-based refusal on the part of numerous health-care professionals. Such an apparent conflict highlights the need for an ethically tenable solution that takes into account the dignity of unborn children, based on the conviction of many healthcare professionals primarily based on moral and religious tenets, that life begins at conception as well as the reproductive freedom and autonomy of women. (www.actabiomedica.it)

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Legal abortion a currently relevant issue

How and to what extent national legislative frameworks govern access to abortion can have major, even life-changing consequences on women.

A dramatic instance of such a correlation was reported in early 2022 in Brazil, where an 11-year-old girl who had been raped, realized that she was twenty-second week pregnant. She was therefore taken to the hospital by her mother in order to undergo pregnancy termination, as required by current legislation, but the hospital had a policy of only performing abortions up until 20 weeks. It is worth noting that in Brazil, there is no legal time limit on when a rape victim can get an abortion (1)

Abortion is in fact legal in three cases: in the event of a risk to the life of the woman, fetal anencephaly and when the pregnancy is the result of sexual violence (2). In all such instances, there is no gestational age limit set by criminal statutes. The judge and a prosecutor then pressured the girl into completing her pregnancy and potentially putting the child up for adoption, although she was on the right side of the law and within their rights to request that the pregnancy be terminated. This case just shows how difficult it is for women to get abortions, even in cases where they are legally allowed to, when external elements such as refusal to provide abortion on grounds of conscience come into play. This short review aims to highlight the legally controversial and ethically charged issue of

guaranteeing the women's right to choose and reconcile it with the doctors' freedom of conscience.

In Europe, conscientious objection to abortion is guaranteed by law in most European Union states where abortion itself is legal, with the exception of countries such as Sweden, Finland, Bulgaria and the Czech Republic (3). The conditions are substantially similar in EU Member States and take as an example what is stated in Article 18 of the Ticino (Switzerland) Cantonal Health Law (4), which states that "no health care worker may be required to perform or participate in medical procedures or therapies that run counter to their ethical or religious beliefs. However, they cannot, with their objection, "compromise the execution of legal services or therapies by the health facility where they operate". It is therefore clear that objectors cannot be discriminated against, punished or penalized because of their moral convictions. Still, in case of imminent and serious danger to the health of the patient, all health professionals are required intervene and provide care.

Italy is the only European country to collect information on conscientious objection. According to a recent research (5), in twenty-one EU countries, including Norway and Switzerland, the right of doctors to appeal conscientious objection is guaranteed by law.

The development and availability of new procedures and treatments for the voluntary termination of pregnancy undoubtedly entail major ethical quandaries, at least in theory, which also impact the women's willingness to terminate a pregnancy. Abortion in fact is viewed as a means to uphold women's autonomy, but such a decision is never made lightly, nor is it ever devoid of consequences from a psychological standpoint. A 2019 comprehensive study (6) has highlighted how environmental factors, namely age, level of education, place of residence, marital status and economic circumstances generally do not decisively affect the decision-making process. On the other hand, it is mostly personal experience which defines how acceptable termination of pregnancy is perceived by each patient. Such a highly consequential decision is typically made by well-educated women in total awareness, emotionally and biologically independent with a degree of stability in their lives. In Italy the issue of ensuring procreative freedom has unfolded along two distinct

and apparently irreconcilable lines: if, on the one hand, medically assisted procreation has enabled women of relatively advanced age to achieve motherhood (7, 8), abortion upholds the woman's right to choose not to become a mother (7). Nowadays, access to abortion services, as codified by Italian statutes, presents considerable difficulties, even more so in cases of unplanned pregnancies, when contraceptive methods fail or when sexual abuse leads to pregnancy. Indeed, access to emergency contraception, which has positively contributed to lower abortion rates, may not always be readily available in a timely manner (9-12).

Conscientious objection in Europe

To date, in some European countries that have legalized abortion on demand, pregnant women face several obstacles to gaining access to safe assistance in terminating their pregnancy. In fact, many member states lack an adequate legislative and regulatory framework to ensure that women can access legal services for the voluntary termination of pregnancy in the event of assistance by conscientiously objecting doctors (13).

In Poland there is a legal context very similar to Brazil's. Women who try to access legal services for voluntarily terminating their pregnancies, they are likely to be met with repeated refusals of assistance, due to the widespread opinion which considers abortion a crime. According to official data, 1100 pregnancies were aborted in Polish hospitals in 2019, 1074 of which were due to embryonic anomalies. Therefore, about 98% of abortions performed in Poland, according to government statistics, were cases of serious and irreversible fetal anomalies and malformations.

In 2021, an abortion law came into force, then considered the most restrictive in Europe, which makes abortion legal only in the event of rape or to save the mother's life. This controversial legislation prohibits abortion even in the case of fetal malformations, thus making the termination of pregnancy illegal for most women who request it because of an unwanted pregnancy. In addition, doctors in many hospitals are conscientious objectors, making it even more difficult for Polish women to have a legal and safe abortion. This has contributed to making illegal abortions widespread

and encouraged travels abroad in order to terminate the pregnancy (14).

In Hungary, a 2011 constitutional reform protects life from the moment of conception. In 2013, the Council of Europe criticized the country's strict limits to abortion access. According to the jurisprudence of the European Court of Human Rights, once the state has passed regulations that allow abortion in certain circumstances, it cannot then structure a legal framework that severely constraints access to such medical services (15).

Italian scenario: legal framework and conscientious objection

The high degree of sensitivity in Italy to ethically and religiously controversial issues has most likely played a role in hindering and delaying scientific progress in terms of access to abortion and medically assisted procreation (MAP) procedures. While objection on religious grounds is frequently invoked by physicians, it is interesting to observe the different effects of personal religious beliefs on women who choose to terminate their pregnancies. Most women who declare themselves Catholic do not in fact view abortion (or other controversial practices such as contraception or medically assisted procreation) as despicable or running counter to their religious beliefs (16). According to Law 194 (Norms on the social protection of maternity and on the voluntary termination of pregnancy), women can legally resort to the termination of pregnancy in national public structures within the first 90 days of gestation, after which the pregnancy can be terminated for therapeutic purposes only (17). In the current state of affairs, the possibility of declaring oneself conscientious objectors actually hinders the right enshrined in the law to resort to voluntary termination of pregnancy, with extremely high rates in southern regions (Tab. 1).

In the last 10 years, the rate of conscientious objection to abortion has risen by 12%, reaching 90% in regions such as Molise, Trentino-Alto Adige and Basilicata (19). Significantly, in the entire Molise region, there is currently only one registered doctor willing to perform abortions (20) as of January 1st 2022. Currently in Italy

the professionals who declare themselves conscientious objectors are in most cases driven by ethical and moral reasons, which, in a society with deep Catholic roots such as Italy's, are perhaps revealed more frequently than in other countries.

In 2014, the European Committee of Social Rights of the Council of Europe formally reprimanded three hospitals in the central Marche, Jesi, Fano and Fermo, where all the medical staff had expressed their refusal to perform or partake in abortion procedures. The Committee argued that this situation constituted a violation of the right to health of women, enshrined in the European Social Charter (21). Regions used to require women seeking abortion drugs, such as RU-486, to be hospitalized to terminate a pregnancy (22). Due to this requirement and the organizational and ethical challenges which it entails, many facilities chose to offer mostly surgical abortion, so much so that in 2018 less than 25% of Italian women were able to resort to medical abortion (10). Such a restriction was repealed by Ministerial Decree on 13th August 2020 (23).

After the intervention in 2015 of the Association of Italian Doctors for Contraception and Abortion (AMICA), which urged the Ministry of Health to adopt less restrictive medical abortion procedures and in a day hospital or outpatient regime, on 8 August 2020 the Ministry of Health updated the guidelines governing access to the abortive drug RU-486, allowing its administration on an outpatient basis, i.e. without the need for hospitalization, and also extending the deadline for abortion from the seventh to the ninth gestational week, which sparked controversy both in political and church environments.

The Italian Supreme Court of Cassation (24) has recently expressed an opinion on this issue, addressing the necessary levels of assistance after termination of pregnancy which even objectors are required to perform. In fact, the Supreme Court ruled out the legality of invoking conscientious objections and deny care following abortion, whether the procedure was performed by pharmacological or surgical means. This is because it is a "merely an activity aimed at monitoring" patient's conditions through instrumental means after an abortion, and not directly involved in its execution.

Specifically, based on art. 9 L. n. 194/78, it was ruled out that the objection could also refer to forms

Table 1: Conscientious objection rates based on professional profile. Italian Ministry of Health data issued in 2018 (18)

	Gynecologists		Anesthesiologists		Non-medical personnel	
	Number	% overall	Numero	% overall	Numero	% overall
Italy	3425	69	3471	46.3	9159	42.2
Northern Italy	1478	63.4	1477	37.4	3525	31.9
Piedmont	244	64.4	187	30.3	395	22.8
Valle D'Aosta	1	7.7	6	18.8	6	23.1
Lombardy	508	66.7	593	45.3	1538	44.9
Bolzen	68	87.2	80	59.3	302	76.5
Trento	19	52.8	28	29.8	304	14.5
Veneto	272	70.3	244	35.2	495	47.8
Friuli Venezia Giulia	64	52.9	34	23.3	123	24.3
Liguria	81	60	92	35	109	19
Emilia Romagna	221	52.5	213	32.5	253	19.7
Central Italy	657	66.4	629	424	1766	32.4
Tuscany	215	58.1	130	23.1	324	22.3
Umbria	73	63.5	130	56.3	188	53.4
Marche	95	69.3	97	43.3	696	28.8
Latium	274	74.5	272	58.2	558	45.2
Southern Italy	692	80.1	692	65	1854	70.6
Abruzzo	80	80	86	62.8	223	66
Molise	24	92.3	24	75	130	90.9
Campania	153	77.3	170	65.1	354	70.4
Puglia	330	82.3	260	59.8	822	68.3
Basilicata	39	82.2	33	75	139	88
Calabria	68	72.3	119	76.8	186	66
Italian Island regions	598	76.7	673	67.4	2014	79.1
Sicily	489	82.7	611	76.8	1678	85.3
Sardinia	109	57.7	62	30.5	336	58

of assistance before and after the intervention itself, acknowledging the right of objecting doctors to deny participation in abortion procedures, but not to deny their assistance before or after such procedures, as the right to health of women must always be protected and upheld. A recent relevant study from Poland (a country which shares many a similarity with Italy in terms of abortion availability) has pointed out how such dynamics will probably evolve towards more availability as younger generations of physicians join the workforce (25), while noting that a higher degree of awareness as to issues such as fetal defects, pregnancy termination procedures, and maternal complications/disease leads to more abortion availability. It is also essential to

point out that individual objectors may not be the only determining factors of abortion unavailability: disapproval and pressure from hospital management have been found to play significant roles as well, at times leading to the stigmatization of physicians who do perform terminations. Still, it is noteworthy that such “environment-related pressure” may however be less effective on younger professionals (25).

The European Court of Human Rights provides guidance

Just as significantly, the European Court of Human Rights (ECtHR) has recently laid down a set of

interpretative standards to be applied when weighing the right to conscientious refusal against the reproductive freedom and autonomy of women seeking to terminate their pregnancies (26). In its 2021 ruling *Grimmark vs Sweden and Steen vs Sweden*, centered around Article 9 of the European Convention on Human Rights (ECHR) and involving two Swedish obstetricians who had been banned from performing their duties following her refusal to participate in abortion procedures. The ECtHR remarked that religious freedom is essentially grounded in individual thought and conscience; in addition, the right to hold any religious belief is “absolute and unqualified”, hence no discrimination can be countenanced. Nonetheless, freedom of religion also includes the freedom to manifest one’s belief. In this regard, the Court found, without any elaboration, that the Applicants’ refusal to provide assistance in abortions on religious grounds was to be deemed a free manifestation of religion, hence protected under Article 9 of the ECHR. Still, since such religious expressions can substantially affect others, the ECHR itself conceives possible limitations of such a freedom. Any such limitations should however meet the requirements codified in the second paragraph of ECHR Article 9 in order to be legally acceptable, i.e. they must be prescribed by law and be necessary, within a functioning democratic framework, for one of the legitimate purposes listed. Ultimately, the ECtHR found that a major limitation to the midwives’ freedom was justified: the interference was prescribed by law in a fully democratic country (Sweden), since according to Swedish statutes ‘an employee is under a duty to perform all work duties given to him or her’ (26, 27).

Conclusions

Banning abortion or making it next to impossible to access safe abortion services, even when it is legal, will only make women’s lives even harder in times and situations inherently distressing and complex to begin with. Overly restrictive approaches to abortion will only favor illegal methods which can endanger the lives of women or encourage a sort of “abortion tourism”, not unlike what happens with MAP and “fertility tourism”(26-29), which entails elements of discrimination based on financial means, ethics concerns (30)

and even legal issues for children whose legal status has often been called into question by the judiciary of the intended parents’ country of origin (30, 31). Discrepancies in such a consequential area of healthcare in fact risk jeopardizing the rights of the most vulnerable parties, the children who did not ask to be born and whose well-being must be prioritized (32-34). Each country in the European Union, on the other hand, should offer affordable, easy and safe access to contraception, medical and psychological counseling and support services for women in all member states. Such avenues of support ought to be modeled along a set of standards in keeping with the principles set forth by ECtHR and other human rights bodies, and should be as harmonized as possible for all EU countries, which broadly share a common set of moral and ethical principles and core values. In fact, abortion is a women’s right that should be present in all civilized countries in order to uphold the individual right to reproductive freedom and self-determination.

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