

# Medico-Legal Examination of Sexual Assaulted Victims Unable to Consent in Portugal: Ethical Decision-Making

## Exame Médico-Legal de Vítimas de Agressão Sexual Incapazes de Consentir, em Portugal: Tomada de Decisão Ética



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### ABSTRACT

Medical decision-making is a complex task in any field. In the medico-legal examination of victims that have (allegedly) been sexually assaulted there are many specific variables and features influencing the decision. It is essential to complement the clinical intervention with a forensic approach. Clinical parameters such as the victim's physical and cognitive state along with circumstantial information such as the elapsed time from the event and the type of abuse (described or suspected) grant different levels of priority to the forensic medical assessment. In such cases, forensic medical doctors or other medical doctors responsible for attending to the victim may have to decide whether to perform the examination prior to a judicial analysis of the case if consent cannot be obtained. This implies the need to deliberate about performing the examination and/or reporting the case to legal authorities. This article discusses the forensic medical decision-making process in cases of alleged recent sexual assault of victims who are legally unable to consent or unable to consent for other reasons. We aimed to identify possible ethical problems that can arise in this context and discuss which elements should be considered by medical doctors when making decisions about such cases. The Portuguese legal framework of medico-legal examinations is analyzed. The authors also make considerations about reporting these cases from a legal point of view. The discussion turns to an ethical perspective where possible ethical problems arising from medical deliberation are identified. Issues about legally incompetent victims and incompetent victims due to other reasons are addressed. A decision-making tree, based on the problems identified, is proposed.

**Keywords:** Child Abuse, Sexual; Crime Victims/legislation & jurisprudence; Forensic Medicine; Informed Consent; Mandatory Reporting

### RESUMO

A deliberação médica é uma tarefa complexa. Na área médico-legal, em contexto de avaliação de alegadas vítimas de crime sexual, existem muitas especificidades que influenciam a deliberação. Nestes casos é essencial complementar a intervenção clínica com a abordagem forense. Parâmetros clínicos tais como o estado físico e cognitivo em conjugação com a informação circunstancial, nomeadamente o período de tempo decorrido desde o evento em apreço e o tipo de prática sexual suspeitada, conferem diferentes níveis de urgência à realização da perícia médica. Em certos casos pode justificar-se que o médico forense ou outro que preste assistência à vítima avance com o a perícia médica previamente à existência de uma ordem judicial. Tal implica que a deliberação deverá contemplar a tomada de decisão sobre a realização da perícia, mas também sobre o dever de denúncia às autoridades judiciais. Neste artigo, os autores discutem o processo de deliberação ética nos casos de alegações de crime sexual cometido recentemente, quando a vítima se encontra em situação de incapacidade para consentir no momento da realização da perícia. O objetivo é identificar os problemas éticos subjacentes e determinar que elementos deverão ser considerados pelos médicos para deliberar neste contexto. Com esse foco os autores fazem uma análise do enquadramento legal das perícias médicas em Portugal. Numa segunda fase identificam e discutem os problemas éticos em relação com este tipo de casos. São abordadas questões relacionadas com vítimas incapazes de consentir. Conjugando os elementos resultantes das primeiras fases do trabalho é, por fim, apresentada uma árvore de decisão passível de ser usada no processo de deliberação neste tipo de casos.

**Palavras-chave:** Abuso Sexual de Criança; Consentimento Informado; Denúncia de Crime; Medicina Forense; Vítimas de Crime/legislação e jurisprudência

### INTRODUCTION

In Portugal, forensic and medico-legal examinations of (allegedly) sexually assaulted victims are a competency of the National Institute of Legal Medicine<sup>1</sup> and are usually performed following orders from legal authorities. However, clinical parameters such as the victim's physical and cognitive state along with circumstantial information such as the elapsed time from the event and the type of described or suspected abuse grant different degrees of urgency to forensic medical assessment. The Portuguese law, which has a code-driven 'civil law' legal framework, as do other coun-

tries of mainland Europe, establishes that if a forensic medical examination is particularly urgent<sup>2</sup> it should be carried out as soon as possible in order to collect traces or samples that may be lost or modified rapidly over time. Therefore, forensic medicine physicians or other medical doctors responsible for attending to the victim may have to decide whether to perform the examination prior to a judicial analysis of the case if informed consent cannot be obtained.<sup>2,3</sup> That can be the case when recent non-consensual sexual activity between the victim and the offender is suspected.

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Moreover, the examinee is expected to be in a state of particular vulnerability, not only because (s)he is an alleged victim of a crime but also because (s)he may foresee the future legal investigation as disruptive and stressful. From a clinical point of view, medical assessment implies a physically invasive examination or procedure(s) to document bodily harm and preserve evidence. It is relevant to respect the victim's will and rights, but medical doctors cannot overlook their social, deontological and legal duties when deciding whether to report the case and help the justice system (in any possible way). But any negative consequences of reporting false allegations are not any less serious than those of failing to report actual abuse.

This article discusses the forensic medical decision-making process in cases of alleged recent (usually up to 72 hours) sexual assault of a victim unable to consent. Our aim was to identify possible ethical problems that can arise in this context, analyze its components, and argue about which elements should be considered by forensic medical doctors when deciding whether to perform the examination and/or report the alleged crime to legal authorities.

## LEGAL FRAMEWORK

Legal provisions dictate that expert evidence (in the form of report or testimony) is essential whenever specific knowledge in a particular scientific field is necessary to assess the facts related with a crime. If such field is Medicine, a medico-legal examination should take place.<sup>5</sup>

### Medico-legal examination

Respecting the autonomy of examinees is a critical topic in our discussion. The Portuguese Criminal Code and the Law 45/2004 of August 19<sup>th</sup>, which establishes the legal framework of medico-legal examinations, describe the subjects' obligation to undergo a forensic medical examination if deemed necessary to the investigation or pre-trial phases of a criminal proceeding, provided that a competent legal authority ordered it. The rights and values protected by criminal law may justify a (proportional) restriction of individual rights, namely to bodily and moral integrity.

There are many examples, in distinct judicial contexts, of the obligation to provide biological samples (blood or others) and/or to be evaluated by a medical doctor. The Road Traffic Code<sup>6</sup> and Law-decree 15/1993 of January 22<sup>nd</sup> on illicit drug trafficking consider the possibility of compulsory blood/urine collection for alcohol or another drug determination. A medical examination may be requested when deemed useful.

The examinee's refusal to undergo to such tests constitutes a crime of disobedience. Moreover, the physician who refuses to perform the necessary examinations without a valid reason is legally punished for disobedience. In short, the Portuguese law states not only that the examinees are obliged to undergo a forensic medical examination but also that physicians (and other healthcare professionals) have a duty to ensure that the technical procedures required to preserve evidence are carried out. How should we deal with

refusal of consent in this context?

The Ethical Code of the Portuguese Medical Association states that medical doctors must comply with all deontological principles even when performing medico-legal examinations. In its 103<sup>rd</sup> article, this Professional Code of Ethics highlights that medical doctors should not perform a medico-legal examination if the examinee does not provide consent. It is also stated that pharmacological or other methods that may impair the examinee's volitional capacities cannot be used.<sup>7</sup> Both the Portuguese Constitution, in its 33<sup>rd</sup> article and the Criminal Procedure Code in its 126<sup>th</sup> article, assume that the evidence obtained through torture, coercion, physical or psychological harm or by abusive privacy intrusion is not valid and cannot be used in court.

The 150<sup>th</sup> article of the Portuguese Criminal Code states that interventions and treatments which, according to the state of knowledge and experience of medicine, are indicated and carried out, in accordance with *leges artis*, by a medical doctor or another legally authorized person, with the intention of preventing, diagnosing, debating or reducing disease, suffering, injury or bodily fatigue, or mental disturbance cannot be considered an offense to physical integrity, regardless of its outcomes.<sup>8</sup> But it may be considered a crime against freedom if the clinical intervention is performed without the patient's consent.<sup>9</sup>

The main aim of a forensic medical examination is to collect evidence (and only indirectly to prevent, diagnose or treat diseases). Such conducts can be considered a bodily harm offence if performed without the examinee's consent. The 149<sup>th</sup> article of the Portuguese Criminal Code allows interventions that may cause bodily harm to other people upon their consent, provided that the motives and purposes of the agent or the victim are taken into account, as well as the means employed and the foreseeable extent of the offense. Accordingly, forensic medical doctors have not only an ethical but also a legal duty to obtain consent prior to their intervention. Since forensic and clinical interventions have distinct objectives, having consent to perform a clinical intervention does not imply that the forensic intervention has also been consented and *vice versa*. It is essential to explain to the examinee the scope and the aims of the forensic examination and mention the duty to notify the legal authorities about its results.<sup>10</sup>

The examinee usually signs an informed consent form allowing the physical examination and evidence collection to be made and the biological samples to be analyzed. Young age and temporary or permanent cognitive impairment (due to mental health disorder or acute drug/alcohol intoxication) may render the examinee unable to provide a valid consent. Moreover, forensic medical doctors may have to decide whether the alleged crime should be reported to legal authorities even if the victims or their representative (for example when the legal representative is also the alleged offender) do not consent to the medico-legal examination or do not want to file a criminal complaint.

For these reasons, some authors argue that legal authorities may coercively lead the subject to undergo a

medico-legal examination.<sup>11</sup> If the subject still refuses to undergo the examination, the forensic medical doctor should not endanger the examinees' physical and moral integrity. However, (s)he must be informed about the consequences of such refusal since it will interfere with the criminal investigation.

### Reporting the alleged crime

The need to report an alleged crime to legal authorities is another important issue to address. When legal authorities or civil servants become aware of a crime within the context of their professional activity they must report it.<sup>12</sup> Therefore, medical doctors working in the Portuguese National Health Service have the duty to report sexual crimes particularly when the criminal procedure does not depend on a complaint or an accusation (public crimes). In addition, there is still an ethical duty to report a sexual crime in private medical practice.

The Portuguese law states that some crimes should be reported regardless of the victim's will (public crimes). That is the case, for example, of domestic violence that includes sexual assault within an intimate relationship according to the 152<sup>nd</sup> article of the Portuguese Criminal Code and sexual abuse if the victim is a child or another legally incompetent person or a person held in a health institution. These victims are particularly vulnerable due to their age and/or cognitive impairment and/or the type of relationship they have with the offender.

When deliberating about such issues one must question if there is reasonable suspicion and whether reporting is the right thing to do (Fig. 1). Whenever there are reasons to suspect that a crime was committed, the forensic medical doctor has the duty to perform a medical examination. However, the medical examination does not always confirm or rule out the 'diagnosis' of sexual abuse promptly. In fact, there are some physical findings that are specific of sexual abuse (for example pregnancy at a young age), with the majority being ambiguous and often inconclusive. Furthermore, absence of physical findings does not rule out abuse since it does not always cause visible injuries, and when it does, these may rapidly heal. The analysis of biological samples may later confirm recent sexual activity/contact even when physical evidence supporting the abuse allegations were absent. For these reasons, the decision to report the case after performing the forensic medical examination is not easy.

Reporting does not (and should not) demand clear evidence of abuse but should follow reasonable suspicion since a legal intervention brings stress into people's lives, often disrupting family unity. There is no specific guidance in this field and there are currently different perspectives about when to report.<sup>13,14</sup> In addition, the existence of conflicting data that increases uncertainty is common. It is important to analyze the circumstances that raised the suspicion and determine the factors that should be considered when assessing the likelihood that a legally (temporarily or permanent) incompetent person has been sexually abused.

### ANALYSING CIRCUMSTANCES TO IDENTIFY ETHICAL PROBLEMS

Moral dilemmas or problems usually arise in circumstances where the agent has (or apparently has) a moral obligation to perform two or more mutually exclusive courses of action. Since the individual cannot perform all the required courses of action simultaneously, (s)he faces a moral conflict. There are also cases where the agent finds facts suggesting that a particular course of action is morally permissible and other facts (with similar strength) indicating that the same course of action is morally wrong.<sup>15</sup>

Gracia highlighted that ethical deliberation is the answer to solve such conflicts between moral values and/or deontological duties.<sup>16</sup> The deliberation process is based on facts that support values. Such (moral) values support both duties and responsibilities (professional, legal and social). In each step of the ethical deliberation, the values and duties in conflict should be weighted according to their importance under the circumstances.

Whenever the victim is not able to consent the deliberation about whether to proceed with the medico-legal examination one must first consider the available circumstances and facts such as the reasonableness of the allegations, the characteristics of the alleged sexual abuse and the ones of the victim and her/his relationship with the offender (Fig. 1). For example, if the type of the abuse may leave physical or biological evidence, the urgency to preserve/collect evidence may justify performing the examination when consent cannot be obtained.

### Legally incompetent victims

The victim of sexual abuse may not be able to consent due to one's age or a clinical reason that warrants legal incompetency. When their legal guardian does not consent to the medico-legal examination, legal authorities should be notified promptly.<sup>17</sup> The need to collect/preserve evidence may justify carrying out the examination immediately. Recent injuries (in particular at the hymen and mucosal surfaces of body cavities), depending on their severity, may heal rapidly. Biological samples, such as saliva and/or sperm (that may be used to identify the offender's DNA profile which in turn can be compared with the suspect's) may degrade quickly or be lost or destroyed.

Consent for minors is valid from 16 years old if one has the capacity to understand its meaning and extent.<sup>18</sup> But their right to be heard and to have his or her views considered, in decisions that affect them, should be respected according to their age, level of understanding and maturity. For example, the Law 112/2009, of September 16<sup>th</sup>, which provides the legal framework for the prevention of domestic violence, states that the interventions assisting children under 16 years of age who suffered domestic violence should be preceded by his/her legal guardian's consent. When the physician is unable to contact the legal guardian or (s)he is the alleged offender, the public prosecutor's office may be consulted. The will of a child over the age of 12 years should also be considered according to his/her cognitive

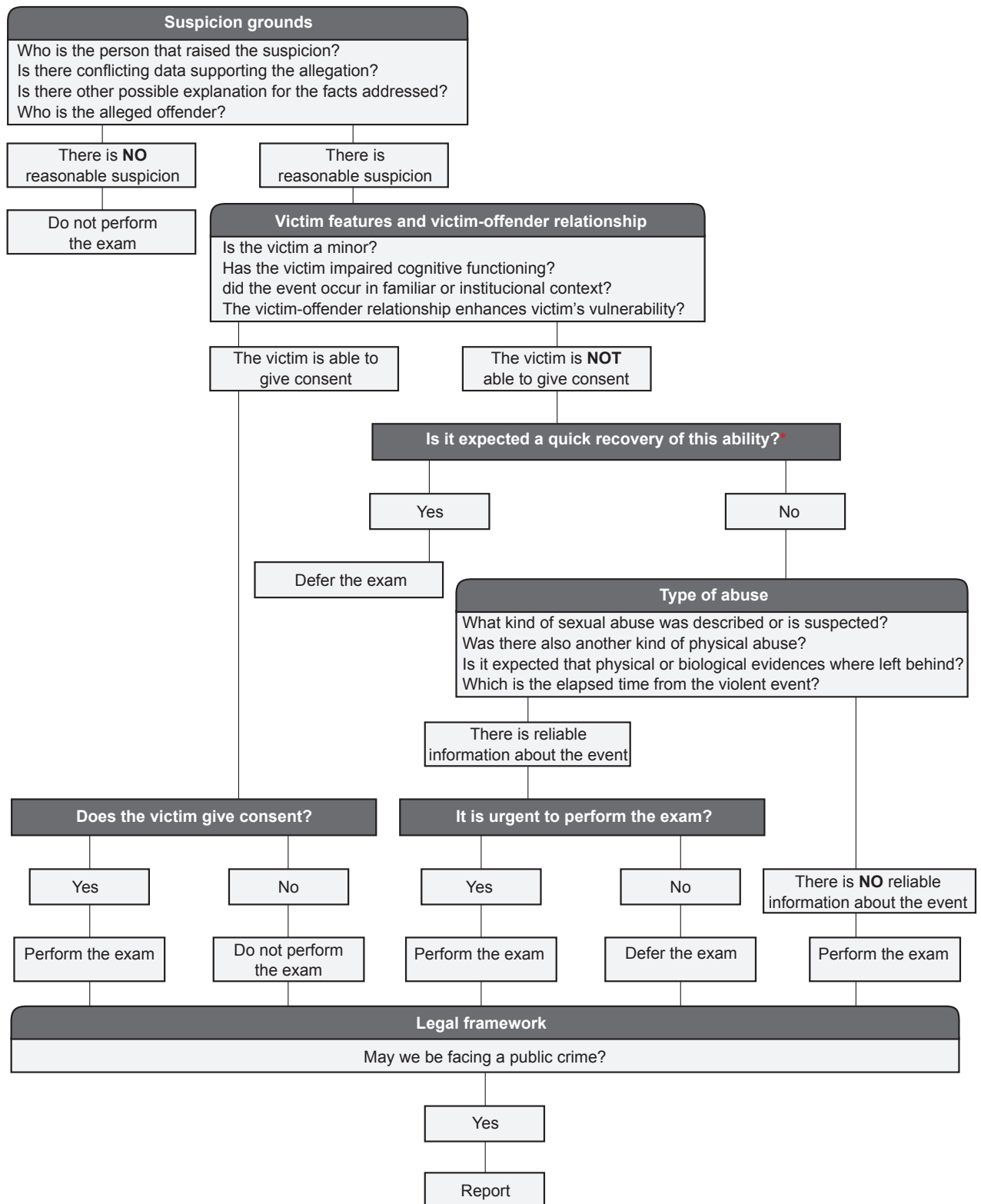


Figure 1 – Decision-making tree

\* The interventions assisting children under 16 years of age should be preceded by his/her legal guardian's consent. When physician is unable to contact the legal guardian or (s)he is the alleged offender the physician may consult with the public prosecutor's office.

competences. Legally incompetent persons over 16 years old should also participate in the decision-making process, whenever possible.<sup>19</sup>

Concerning interventions to assist children under 16 years of age who suffered domestic violence, the Law 112/2009 of September 16<sup>th</sup> states that when it is not

possible to obtain the legal representative's consent in due time or (s)he is the alleged offender and is not possible to obtain the legally approved entities' consent in due time, the consent from children over the age of 12 years is enough.<sup>20</sup>

In the healthcare field, the emancipation granted to teenagers is notorious. The area of reproductive health is not an exception since the 5<sup>th</sup> article of Law 3/1984 of March 24<sup>th</sup> <sup>21</sup> grants full access to medical care and other family planning means to all the population, including teenagers. Therefore, an exception is made regarding parental decision in any issue concerning minors' sexual health and contraception choices.<sup>5</sup> The respect for a person's autonomy is coupled with the respect for his/her privacy, a fact that frequently encourages the medical doctor not to disclose certain information regarding these matters to parents or legal guardians, thus serving the minor's interests.

We know that any event behind the forensic medical examination of a child, namely sexual abuse, can cause important emotional imbalance and frailty. In this context, the forensic examination may be understood as an aversive stimulus leading to avoidance conducts. The medical doctor must provide detailed information about the forensic procedures and their objectives and must be receptive to answering questions, in order to allay fears and uncertainties. It is essential to consider that the examinee is particularly vulnerable since the autonomy impairment due to young age is increased by the fact that (s)he was a victim of a crime. As stated by Ricoeur, vulnerability makes autonomy only a condition of possibility.<sup>22</sup>

In other cases, the legal representative consents to the medico-legal assessment but the child or the legally incompetent person does not allow the medical examination, sometimes offering physical opposition (for example due to cognitive immaturity or impaired development). Under the principle of beneficence, the examination may be essential to understand what really happened and guide the adoption of protective psychosocial measures, promoting his/her emotional balance and harmonious development. Anyway, in this context, performing the examination may endanger the examinee's physical and moral integrity, thereby violating the principle of nonmaleficence. Whenever the allegations are plausible (this issue is important to assess since in most of these cases the victim provides little information), it could be appropriate to use a sedative, provided that the procedure does not put the examinee's health at risk. Accordingly, the administration of this medication should be performed and monitored by a medical doctor such as a pediatrician. Article 105 of the Code of Ethics of the Portuguese Medical Association states that the forensic medical doctor cannot use methods or substances that may impair the examinees' volitional capabilities. However, in this particular case, the aim of the forensic medical doctors is to promote the wellbeing of the examinees during the examination and not to supersede his/her will.

In the medical forensic setting, there are also other ethical 'doubts'. For example, allegations of sexual abuse during child custody disputes are common. In familiar environ-

ments that is expected to occur, especially between parents and young children, bed-sharing or touching the child's genitalia (when carrying out tasks such as dressing, bathing and changing diapers). Sometimes the allegations of sexual abuse arise from exaggerated attention given to that kind of daily activities, particularly if performed by the parent of the opposite sex. In fact, when one parent is suspicious of the other, his/her behavior may transfer the concern/apprehension towards the child's behavior either intentionally or unintentionally, for instance when asking relentlessly about everything that happened in his/her absence.<sup>23,24</sup> In such example, the child may be brought to the hospital every time (s)he returns from the home of the allegedly abusive parent meaning that the forensic medical examination procedures, which encompasses forensic interview, physical examination and biological sample collection, may become repetitive. This fact raises serious issues about secondary victimization (since behaviors and practices that legal medical personnel engage in may unconsciously be victim-blaming and/or enhance the victims' psychological trauma), thus seriously compromising the ethical principle of nonmaleficence. Once again, the forensic medical doctor must be careful when deciding whether to reexamine the child. It is important to consider elements such as the time elapsed since the last examination, whether biological samples were collected and whether the results/conclusions of the previous examinations are already available. Whenever the child is able to describe the abusive event, such information may also help to decide whether the replication of the medical examination is able to highlight new evidence according to the described circumstances.<sup>25,26</sup>

### Other incompetent victims

There are cases where a competent person over 16 years old is, for some reason, temporarily unable to consent. When it is urgent to perform a medico-legal evaluation, the medical doctor finds a conflict between the examinees' individual rights and the legal and public interests to find justice. In the hospital emergency setting we may find patients unable to consent due to, among other reasons, acute alcohol or drug intoxication, loss or impairment of consciousness or acute exacerbation of a mental disorder. In this context, the medical doctor must evaluate the situation whenever there are signs, symptoms or circumstances suggesting recent sexual assault such as: witnessed sexual abuse, the examinee being partially or totally undressed or wearing underwear inside out without any reasonable explanation, the examinee's clothes being torn or his/her head or pubic hair shaved, the presence of human bite marks, ligature marks or burn injuries in the examinee's body surface, acute anogenital injuries, signs of attempted strangulation, and/or reasonable suspicion (or knowledge) that the examinee is a victim of intimate partner violence.<sup>27</sup>

The medical forensic examination should be deferred if the patient's behavior puts his/her own physical integrity at risk and if a quick recovery of cognitive abilities is anticipated (for example in cases of acute alcoholic intoxication).



Likewise, the medical doctor and any other healthcare professionals performing the forensic examination should not put their physical integrity at risk.<sup>28</sup>

In face of uncertain prognosis and/or when there is a real risk of destruction of evidence through clinical procedures, such as urethral catheterization, or washing the hair and body surface, the forensic medical examination is legitimized. Furthermore, biological samples may deteriorate over time or be lost (for example if the victim eats, urinates or defecates).

In such cases, an ethical problem is raised since the medical doctor must respect the person's autonomy and, considering health in its broader sense of biopsychosocial wellbeing, promote the health of the examinees under the ethical principle of beneficence. In fact, preserving evidence may serve the best interest of the examinee since that may allow the identification or conviction of the offender, which can directly or indirectly affect the victim's wellbeing. In such instance, we may consider that there is a presumed consent since the situation allows the medical doctor to reasonably assume that the examinee would have consented to the forensic medical examination if permission could have been sought, as stated in the article 39 of the Portuguese Criminal Code.

The legal background of the case should be assessed whenever possible. Provided that the sexual assault did not cause the death of the victim over 16 years old, the criminal procedure is usually dependent on his/her complaint. Therefore, if the victim recovers the self-determination abilities, (s)he will be able to decide whether the criminal investigation should be continued, namely using the evidence preserved during the medico-legal examination.<sup>28</sup> If the forensic medical doctor did not preserve the evidence, since the victim was temporarily unable to consent (namely in situations where a quick recovery of this ability is not expected), the legal investigation will be compromised. That may prevent an autonomous choice when (s)he finally recovers her/his cognitive abilities.

On the other hand, when the offender is in an intimate relationship with the victim, the criminal procedure may take place regardless of the victim's will (public crime). There is a need to promote the victim's protection because (s)he is in a particularly vulnerable situation, and is often emotionally and financially dependent.<sup>17</sup>

Gracia believes that the ethical principle of nonmaleficence has a public nature, meaning that it must be formulated in an acceptable way to everyone or at least the majority. The obligation of the forensic medical doctor is to protect the examinee's psychological and physical health. The principles of autonomy and beneficence, being of a private nature, may be observed according to the circumstances of the particular case.<sup>16</sup>

### PROPOSAL FOR PRATICAL ACTION

Medical decision-making is a complex task within the doctor-patient relationship that encompasses clinical, legal and ethical criteria having also, to some extent, anthropo-

logical traits. In forensic medicine, when handling cases of alleged sexual assault, medical doctors face additional difficulties regarding the decision-making process. In this context, there are many variables and features influencing the decision and the different issues of the problem must be addressed individually.<sup>4</sup>

The decision-making process about whether the forensic medical doctor should perform an examination and/or report the crime when assessing an alleged victim of sexual abuse may encompass multiple dimensions such as (Fig. 1):

- Suspicion grounds: Who is the person that raised the suspicion? Is there conflicting data that may weaken the allegation? Or is there another possible or reasonable explanation for the facts addressed by the medical doctor? Who is the alleged offender?
- Victim features: Is the victim a minor? Has the victim impaired cognitive functioning? If not, is the victim competent to provide consent in that moment? If not, is the victim permanently or temporarily incompetent?
- Victim-offender relationship: Did the act of violence occur in familiar or institutional contexts? Does the type of relationship enhance the victim's vulnerability?
- Type of abuse: What kind of sexual abuse was described or is suspected? Was there also another kind of physical abuse? Is it expected that physical or biological evidence was left behind? What is the elapsed time from the violent event?
- Legal framework: May we be facing a public crime? Are there previously filed reports against the alleged offender?

There must be an immediate articulation between medico-legal services, legal authorities and victim-support organizations to gather all the important elements and information so that the victim could be adequately protected, and the alleged perpetrator prosecuted.

### CONCLUSION

In the forensic field, medical doctors may face many ethical problems namely when assessing alleged victims of sexual assault. It is not possible to foresee every possible course of action and its consequences regardless of how detailed our evaluation of the case may be. In this background of uncertainty, the medical assessment of the case does not always point out an unequivocal legal or ethical duty to perform the forensic examination and/or report the alleged crime to the legal authorities. The ethical deliberation process is critical for choosing a reasonable course of action and make decisions that couple technical expertise with human virtues. In fact, the role of medical doctors in this context is not solely to ensure the victim's privacy during the physical examination and/or perform medical interventions, but also to promote the respect for human dignity encompassing all fundamental principles of medical ethics in their practice within the scope of the expert assistance required by the justice system.

Professional ethical codes are not enough to guide medical practice. They highlight important issues to consider in medical practice but do not (and should not) strictly point out the right courses of action. Medical doctors must have ethical theoretical grounds and should understand moral concepts and the ethical framework of medical practice. This 'ethical awareness' facilitates the process of decision-making, enabling medical doctors to recognize ethical problems and solve them adequately.<sup>29,30</sup> A broad understanding of medical ethics is essential to differentiate right from wrong according to the circumstances of the case in order to avoid overlooking important ethical issues or applying general rules in ethical decision-making blindly. If medical doctors overlook an important ethical issue they may fail to act when they should. If they apply general ethical rules blindly, they will not engage in the necessary balancing process that guides ethical decision-making or dictate which ethical values or principles should prevail in a given case.

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## AUTHOR CONTRIBUTIONS

BSR: Design, draft and conception of the work, critical review and final approval of the version to be published.

MS, DNV, FCR: Conception of the work, critical review and final approval of the version to be published.

## PROTECTION OF HUMANS AND ANIMALS

The authors declare that the procedures were followed according to the regulations established by the Clinical Research and Ethics Committee and to the Helsinki Declaration of the World Medical Association updated in 2013.

## COMPETING INTERESTS

The authors have declared that no competing interests exist.

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