

Administrative Legal Challenge to the regulation of voluntary abortion in Uruguay

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I. Introduction

On October 2012, the National Congress of Uruguay enacted and issued the law n° 18,987 that legalized the voluntary termination of the pregnancy within the first 12 weeks of gestation². Afterwards, on November 2012, the President of Uruguay, José Mujica, enacted the decree n° 375/12 regulating the procedure of the abortion³.

On June 23th, 2013 a “non obligatory enquiry” was held in Uruguay. In this special vote, if 25% of eligible voters said they wished to overturn the law, a mandatory referendum would have been held in October, and such law would have become ineffective if the majority of people had so voted in October.⁴ However, the percentage of people that voted to reject the law during the enquiry was less than the needed one, contradicting the results of a previous poll.⁵

On July 2013, several doctors interposed an administrative legal action against the decree n° 375/12 that regulates the abortion law n° 18,987 in Uruguay, due to the fact

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² <http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18987&Anchor=>

³ Decree 375/012, Executive Power.

http://archivo.presidencia.gub.uy/sci/decretos/2012/11/cons_min_604.pdf

⁴ According to section 79 of the National Constitution, 25% of voters registered are able to file a referendum action against any Law enacted by the Congress, within one year of its enactment, except from the laws that establishes taxes.

⁵ According to the information offered by the Electoral Courts, 99.77% of the sections were scrutinized, but the percentage of the people that agreed with annulment of the law reached only 8.88%. However, according to a survey made on May 2013 by the consulting “EQUIPOS MORI” (<http://www.equipos.com.uy/>), 53 % of the population rejects the decriminalization of abortion and 44 percent support it (http://www.montevideo.com.uy/notnoticias_200112_1.html).

that it neglects the right to conscientious objection, among other reasons. That action is still pending.

II. Objections to the regulations

Beyond the particular objections that can be made to the terms of the law n° 18,987 that legalized abortion, the administrative legal action questions the validity of the decree that regulates its procedure, since such decree goes beyond the limits established by the “abortion law”.⁶

More than 100 doctors committed to their profession and to the principles that are the basis of medical practice introduced a *recurso de revocación*⁷ on December 2012 in order to object the decree. Once the term that the Department of Public Health had to respond to this demand had passed, and due to the absence of response of the government agency, on July 17th of 2012, the doctors brought an action to the Administrative Appeals Court in order to obtain a statement of nullity of the law.

The doctors argue that the decree is demonstrably illegal because it restrains their right to conscientious objection and, it contradicts every arrangement made by law in order to offer women due information so she can exercise her right to informed consent.

According to the doctors, the main irregularities of the decree are:

a. Illicit restriction to the right to conscientious objection

While section 11 of the law n°18,987 allows the exercise of the right to conscious objection in a wide way⁸, section 29 of the decree restricts this right only to medical and technical staff that would take part in the practice of abortion. The decree explicitly prevents the administrative employees from exercising their right to conscious objection, and it also leaves unprotected an important part of the health care staff (such as nurses) that are involved in indirect procedures – such as the previous and preliminary procedures needed for the performance of the abortion.⁹

Further, according to the decree, only the preexisting institutions have the right to express their institutional conscientious objection, and they are asked to pronounce themselves on such respect within 15 working days¹⁰. The new medical centers do not have this possibility and are obliged to perform abortions, no matter the moral or religious principles expressed in the institutional ideal.

It is also reprehensible that, according to the decree, the conscious objection shall not be recognized if there is a *bio-psyche-social risk*¹¹ for the mother. This goes far beyond what the law n°18,987 had originally established, i.e., that doctors’ right of conscious objection is limited in the case of a *serious risk for the mother’s health*. Thus, the

⁶ Decree 375/012, Executive Power.

http://archivo.presidencia.gub.uy/sci/decretos/2012/11/cons_min_604.pdf

⁷ Administrative action filled to reverse the Decree.

⁸ This fundamental right it is also provided on the Uruguayan Constitution, Section 54.

⁹ The decree only protects (a) medical and (b) technical staff (c) directly involved in an abortion.

¹⁰ Section 21 of the Decree 375/012, Execute Power.

¹¹ Section 16 of the Decree 375/012, Execute Power.

decree modifies the original purpose of the right of conscious objection under the law, and, at the same time, it extends the number of cases provided as exceptions by the law.¹²

b. Restrictions to the right of information and informed consent

The decree restricts doctors' right (and duty) of giving the patient appropriate advice, and affects women's right to informed consent.

Despite the fact that section 3 of the law n°18,987 establishes the duty of the doctor to inform women about alternatives to abortion, "including the social and economic support programs in existence" and "the possibility of giving her child up for adoption," the decree only allows information to be provided that is concerned about "diminish[ing] the risk and the harm"¹³ for women. In other words, the decree significantly restricts the information that is made available to women.

For instance, based on this decree, the authorities of the Health Care Department forbade doctors to show to the mother the child's ultrasound scan and its heart beats¹⁴, preventing the doctor from giving the woman scientific information about the characteristics of her gestation, the intrauterine development of the fetus and the true nature of abortion, which is fundamental information that would allow the woman to make a "conscious and responsible" decision.

From the reasons expressed above, it can be inferred that the information provided to the patient is incomplete, putting medical ethics on risk¹⁵. The restriction on doctors' provision of information to their patients constitutes an undue interference within the doctor-patient relationship, since it commits an outrage against the professional autonomy.¹⁶

c. Contradictions regarding the interdisciplinary staff function

According to section 3.4 of the law n°18,987, the interdisciplinary staff must "contribute to overcome any causes that might induce [the woman] to ask for the pregnancy termination". However, the decree forbids the interdisciplinary staff to review the reasons the woman has made explicit -in the first consultation with the

¹² Section 6, law 18987 Voluntary Pregnancy Termination.

¹³ Section 12 of the Decree 375/012, Execute Power.

¹⁴ <http://www.elpais.com.uy/130108/ultmo-687122/ultimomomento/medicos-dicen-que-no-mostraran-ecografias-previas-a-abortos/>

¹⁵ Section 3.8 of the Medical Ethics Code of Colegio Médico del Uruguay establishes among other principles, the following: "to be honest at every times during which they are accomplishing their professional duties in order to help the patience and society in general to make the decisions that are part of their prerogatives".

¹⁶ Section 32.1 of the Medical Ethics of the Colegio Médico de Uruguay establishes that "doctors have the right of autonomy and independence when practicing the medical profession, as well as the right of practicing it in a dignified way and not under compulsion".

doctor- when she requested the pregnancy termination (section12). In such respect, a question seems to be obvious: How can doctors give advices to woman, in order to overcome the reasons she has for asking for an abortion, if they are not allowed to discuss those reasons?

d. Other critiques

Without prejudice to the preceding observations, other severe critiques can be made to the decree: (i) the consent of a minor is accepted without consulting her parents; (ii) the decree establishes that the opinion of the baby's father will not be requested; (iii) in the case of an emergency, the doctor will be allowed to perform the abortion without asking due consultancy to the Interdisciplinary Committee.

III. Final Considerations

Not only should it be denounced that a law n°18,987 has been enacted authorizing the practice of an abortion during the first 12 weeks of pregnancy, but also the decree should be criticized for not providing for the support of the mother and child.

However, after the failure of the non obligatory enquiry (making it impossible to call for a referendum to revoke the "abortion law" n°18,987), we must wait for the result of this administrative legal action brought by the Uruguayan doctors, challenging the arbitrary dispositions of the decree, which clearly violates the most fundamental right, the human right to life.