

**VERSÃO ORIGINAL**

**THE POLITICS OF REPRODUCTIVE HEALTH  
RIGHTS IN URUGUAY: WHY THE PRESIDENTIAL VETO(\*)  
TO THE RIGHT TO ABORTION IS ILLEGITIMATE(\*\*)**

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**INTRODUCTION**

Before the presidential veto of the congressionally approved chapters of the *Ley Sobre Defensa del Derecho a la Salud Sexual y Reproductiva*

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(\*) See the veto by former Uruguayan President Tabaré Vázquez, available at the website of the presidency of the República Oriental del Uruguay, available on-line in Spanish only at: <[http://www.presidencia.gub.uy/\\_Web/proyectos/2008/11/s511\\_\\_00001.PDF](http://www.presidencia.gub.uy/_Web/proyectos/2008/11/s511__00001.PDF)> (last visited on August 15, 2010). Sections of the veto which have been freely translated by the authors have been included throughout the text of this paper.

(\*\*) This paper is an abridged and updated version of an essay published in Spanish by the Uruguayan NGO "Mujer y Salud Uruguay" (MYSU). See Banfi-Vique, A., Cabrera, O., Gómez-Lugo, F., and Hevia, M., *El veto del Ejecutivo Uruguayo a la Despenalización del Aborto: Deconstruyendo sus Fundamentos*, Cuadernos Aportes al Debate en Salud, Ciudadanía y Derechos, Época 1, n. 1, 2010 (MYSU, Montevideo, 2010), available online: <<http://www.archivos.hacelosvaler.org/Cuaderno%201%20Final.pdf>>. Access in: 15 Aug. 2010.

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(hereinafter “Sexual and Reproductive Health Law”), Uruguay had been heading toward becoming the Latin American leader in gender equality regarding sexual and reproductive health. Uruguay had a valuable opportunity to, once again, be a role model in matters of public health policy, as it is in tobacco control<sup>(1)</sup>. Nevertheless, former President Tabaré Vázquez chose instead to continue defending the alleged effectiveness of criminal legislation to stop a widespread practice that does exist and will persist *despite* its punishment<sup>(2)</sup>.

In 1934 Uruguay completely decriminalized abortion, becoming one of the first countries to do so<sup>(3)</sup>. However, debates that arose after this complete decriminalization resulted in the Law n. 9.763 being enacted on January 28, 1938, which amended the text of the Criminal Code to the one that has remained unchanged since<sup>(4)</sup>. Article 325 of the current Criminal Code states that a woman who causes her own miscarriage, or consents to undergoing an abortion performed by another person, is subject to three to nine months’ imprisonment. Additionally, Article 328 states that punishment is waived if the abortion is performed by a physician with the woman’s consent and if performed (a) to save the honour of the woman, that of the wife, or that of a relative; (b) in cases of rape; (c) for serious health reasons; (d) or in cases of economic hardship. Apart from the exemption of punishment in cases where health of the pregnant woman is seriously endangered, all other cases require the abortion to be performed during the first trimester<sup>(5)</sup>.

In 1985, the first legislative project to decriminalize abortion was submitted. That project spurred a series of legislative initiatives for decriminalization. This cycle ended with the approval of the Sexual and Reproductive Health Law on November 11, 2008. Its Chapter II regulated the voluntary termination of pregnancy.

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(1) In Uruguay, the government has successfully defended its tobacco control regulations against industries arguments brought up in Court. See Resolution 514, March 2009; Decree 287/09 of the Executive Power; Ordinance 466, Minister of Public Health. For court decisions, see, for example, *British American Tobacco (South America) Limited (Uruguay) v. Public Health Ministry*. Tribunal de Apelaciones Civil de 6to Turno [Appellate Court], decision 2/2009 (Uru).

At the same time, there are other cases that are currently pending decision, see *Abal Hermanos S.A. v. Legislative Power and others*, (constitutional challenge, arts. 9 y 24 de la ley 18.256) Suprema Corte de Justicia. [Supreme Court] (Uru.)

(2) The punitive effect of abortion legislation is ineffective. COOK, Rebecca J.; DICKENS, Bernard M.; FATHALLA, Mahmoud F. *Salud reproductiva y derechos humanos: integración de la medicina, la ética y el derecho*. Oxford: Oxford and Profamilia, 2003. p. 157.

(3) Chapter IV, Title XII of Book II of the 1934 Criminal Code, sanctioned by Law n. 9155 on December 4, 1933, only criminalized abortion if it was carried out without the woman’s consent. See ABRACINSKAS, Lillian; LÓPEZ GÓMEZ, Alejandra. *Mujer y salud Uruguay. Mortalidad Materna, Aborto y Salud en Uruguay: un escenario cambiante*. Uruguay, 2004. Available (in Spanish only) at: <<http://www.mysu.org.uy/Libros>> or <[http://www.mysu.org.uy/IMG/pdf/libro\\_MYSU\\_201.pdf](http://www.mysu.org.uy/IMG/pdf/libro_MYSU_201.pdf)>.

(4) See the 1937 Parliamentary discussions in MYSU, *Mujer y Salud Uruguay*, National Observatory in Gender and Sexual and Reproductive Health in Uruguay (Observatorio Nacional en Género y Salud Sexual y Reproductiva en Uruguay). 2008 Report, Montevideo, 2007. p. 106-109.

(5) It is important to note that, in cases of abortions to save the honor or cases of economic hardship, the exemption from punishment is a prerogative of the judge.

In 2010, the *Frente Amplio* party achieved majority in the General Assembly. This, in conjunction with the public statement issued by President Mujica that he favored decriminalization of abortion and that his government would not veto a law approved by Parliament<sup>(6)</sup>, suggests that conditions are present for Uruguay to regain its leadership in the field of reproductive and sexual health in Latin America. *Frente Amplio*'s senator Mónica Xavier has been at the forefront of reintroducing this debate at the Legislature, and everything indicates that it has been included in the Parliament's agenda for 2011. Anti-choice parliament members have announced their intention to use similar arguments during the debates as those used in Vazquez's veto of 2008.

The aim of this paper is to show that the arguments offered in the veto have neither factual nor legal basis. The paper is divided into four sections devoted to the factual, legal, gender-based, and medical criticism of the veto, respectively. This paper argues that in vetoing the Sexual and Reproductive Health Law as it had been approved by Congress, Uruguay is violating its international obligations to respect and guarantee the human rights of women and, more particularly, its duty not to discriminate against women in the access to health care services<sup>(7)</sup>.

## I. FACTS-BASED APPROACH

### 1. Decriminalization and statistics

The veto states that "[i]n those countries where abortion legislation has been liberalized, the number of abortions has increased. In the United States, in the first ten years the number tripled, and since then, this figure has remained constant: the custom has become entrenched. The same thing has occurred in Spain".

Indeed, most studies have concluded that after the 1973 Supreme Court *Roe v. Wade* decision legalizing abortion in the United States, the number of abortions increased. However, such an increase was reported to be partially due to "a change from unreported abortions, to reported legal abortions"<sup>(8)</sup>. On

(6) El PAÍS Digital. José Mujica promueve plebiscito por aborto. Nov. 16, 2009. Available (in Spanish only) at: <<http://www.elpais.com.uy/091116/pnacio-454575/politica/jose-mujica-promueve-plebiscito-por-aborto>>.

(7) Regarding this, the CEDAW Committee has stated that: "[m]easures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women." CEDAW Committee, General Recommendation N° 24 (20° period of sessions, 1999). "Women and Health," para. 11.

(8) SCHAEFER, Richard T. (Ed.). *Encyclopedia of Race, Ethnicity, and Society*. London: SAGE Publications Inc., 2008.

the other side, the total has been never reported to have tripled, and the initial increase that took place in the '70s and '80s did not remain a trend; rather, there has been a significant decrease in the number of abortions in the past years<sup>(9)</sup>.

## **2. Unsafe abortion, maternal mortality and poverty**

The veto objected that "it is necessary to attack the real causes of abortion (...) There is a great number of women, particularly from the poorest sectors, that endure the domestic burden alone. Because of this, it is necessary to bolster such vulnerable women with essential protective support, instead of helping providing them with greater access to abortion".

It is a fundamental duty of the Uruguayan State to guarantee conditions that allow women to achieve the highest possible standard of health and wellbeing. However, providing protective support to vulnerable women and facilitating access to safe abortion are not necessarily mutually exclusive.

On an international level, it has been understood that unsafe abortions are a public health issue and that, likewise, the solution to the problems they cause must be sought from a public health perspective. According to the World Health Organization (hereinafter "WHO"), maternal mortality from unsafe abortions is partially due to women's reluctance to being treated at public health care facilities for fear of being prosecuted on the basis of restrictive abortion laws<sup>(10)</sup>. This is particularly the case in Uruguay, where the correlation between maternal mortality and unsafe abortion is stunning. *Mujer y Salud*, an NGO from Uruguay, reports that, compared to most countries where unsafe abortion is the second or third major cause of maternal mortality, in Uruguay, unsafe abortion is the primary cause of maternal mortality<sup>(11)</sup>. This fact was acknowledged in 2008 by the Committee overseeing implementation with Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (hereinafter "CEDAW Committee"), which stated its concern for the high incidence of maternal mortality in Uruguay "fundamentally due to the practice of unsafe abortion"<sup>(12)</sup>. On the other hand, a study cited by the WHO

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(9) Since the 1990s, the United States has experienced a decrease in the number of abortions performed. See GUTTMACHER INSTITUTE. Facts on Induced Abortion in the United States. July 2008. Available at: <[http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf)>. Access in: August 15, 2010). Benjamin B. Ringer & Elinor R. Lawless, *Race-ethnicity and society*. New York: Rutledge, 1989.

(10) WORLD HEALTH ORGANIZATION. Unsafe Abortion. Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003. 5th ed., 2003, Available at: <[http://whqlibdoc.who.int/publications/2007/9789241596121\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596121_eng.pdf)>. (last visited on August 15, 2010).

(11) See ABRACINSKAS, Lillian; LÓPEZ GÓMEZ, Alejandra. *Mujer y salud Uruguay. Mortalidad Materna, Aborto y Salud en Uruguay: un escenario cambiante*, cit. p. 81.

(12) CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, Uruguay, 42 Period of Sessions, CEDAW/C/URY/CO/7, Nov. 14, 2008. p. 38.

concluded that whenever abortion is provided by qualified persons using appropriate techniques, under hygienic conditions, it is a procedure that, in the United States, is as safe as a penicillin shot: the mortality rate per induced abortion is extremely low (0,6 per 100,000 procedures)<sup>(13)</sup>.

Women from worse-off classes and those who belong to traditionally marginalized social groups are the most affected by the criminalization of abortion. Thus, women from those socioeconomic groups are the ones who die or suffer from irreversible damages to their health or physical integrity due to clandestine, unsafe, and unhygienic abortions.

## II. LEGAL APPROACH

### 1. The veto through the lens of Uruguayan law

The veto stated that the law violated “the constitutional order (Articles 7, 8, 36, 40, 41, 42, 44, 72, and 332)” The veto enumerated the articles, in the Constitution of Uruguay, that establish, respectively, the rights to life, equality, work, to raising a family, to education, to the protection of maternity, and to health. However, the veto did not explain in what sense decriminalizing abortion would infringe upon those rights. On the other side, the argument is easily undermined by the constitutional recognition of those very same rights in countries where abortion is legal<sup>(14)</sup>.

Article 72 establishes that: “[t]he enumeration of rights, duties and guarantees made by the Constitution, shall not exclude others that are inherent to the human persona or that derive from a republican form of government.” There is consensus in the legal doctrine regarding the fact that a right is inherent to the human person when it is so stipulated in international human rights treaties<sup>(15)</sup>. Therefore, the right to reproductive autonomy established in CEDAW, which was ratified by Uruguay in 1981, must be deemed included in the

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(13) GOLD, R. B. *Abortion and women's health: a turning point for America?* New York and Washington, DC, The Alan Guttmacher Institute, 1990 cited in WHO, *Unsafe Abortion. Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003*. 5<sup>th</sup> Ed. 2003. Available at: <[http://whqlibdoc.who.int/publications/2007/9789241596121\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596121_eng.pdf)>. Access in: August 15, 2010).

(14) From a comparative law perspective, it is important to note that the fundamental rights mentioned in the veto are also recognized in constitutions of countries where abortion is legal. For instance, Article 31.2 of the Italian Constitution expressly states the duty to protect maternity; nevertheless, abortion has been legal in Italy since 1978.

(15) RISSO, Ferrand; MARTÍN, J. La libertad de enseñanza en la Constitución Uruguaya. Institute of Legal Investigation, National Autonomous University of Mexico (UNAM), p. 502. *Instituto de Investigaciones Jurídicas, UNAM*. Available at: <<http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20042/pr/pr4.pdf>>. (in Spanish only) Access in: August 15, 2010).

constitutional order. Thus, the chapters vetoed not only *do not* violate article 72 of the Constitution but, on the contrary, they fulfill the international obligation assumed by the state because they protect a *right inherent to the human person*.

Despite the lack of records of criminal prosecutions, the Uruguayan Public Prosecutor's Office on 8 May, 2008, implemented a resolution requesting that two doctors be convicted for performing repeated illegal abortions. However, the Public Prosecutor decided not to initiate criminal prosecution proceedings against the women (who had sought the abortions), "[c]onsidering that [abortion] is a very debatable issue, with deep philosophical and moral connotations, about which strongly conflicting opinions are held within the society"<sup>(16)</sup>. This reflects how, when confronted by an obsolete law on one hand, and a social demand for the right to legal and safe abortion on the other, the Public Prosecutor can decide not to apply the legal penalty, at least regarding the women involved.

## **2. International law and the decriminalization of abortion**

Concerning the international legal order, the veto stated that, had the law been passed as it was originally drafted, Uruguay would have had to denounce the American Convention on Human Rights (hereinafter "the American Convention"). The tacit premise in the veto was that this treaty arguably protects life "from the moment of conception". However, Article 4.1 reads in full: "Every person has the right to have his life respected. This right shall be protected by law and, **in general**, from the moment of conception. No one shall be arbitrarily deprived of his life."<sup>(17)</sup>

Case-law from the inter-American human rights bodies on this issue is limited. However, there is an important precedent commonly referred-to as the "*Baby Boy*" case. In 1981, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission"), analyzing the *travaux préparatoires* of the American Convention, interpreted that the expression "in general", had been deliberately included, among others, to ensure that domestic legal orders that permit abortion for specified reasons — such as therapeutic abortion (as was, and continues to be, the case of the Uruguayan Criminal Code) — would not be in conflict with the treaty<sup>(18)</sup>.

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(16) PUBLIC PROSECUTOR'S OFFICE. Report 8/05/08 quoted in MYSU, *Mujer y Salud Uruguay. Aborto: las mujeres bajo Sospecha. Cuadernos de Divulgación sobre Derechos y Salud Sexual y Reproductiva, Época II*, n. 1, May 28, 2008. *Mujer y Salud*. Available at: <[http://www.mysu.org.uy/publicaciones/pdf/cuadernos/separata\\_8.pdf](http://www.mysu.org.uy/publicaciones/pdf/cuadernos/separata_8.pdf)>. (in Spanish only — free translation).

(17) See Article 4.1 of the AMERICAN CONVENTION ON HUMAN RIGHTS (OAS Treaty Series n. 36; 1144 UNTS 123; 9 ILM 99, 1969). Emphasis added.

(18) IACHR, Resolution 23/81, Case 2141, United States, March 6, 1981. *Inter-American Commission on Human Rights*. Available at: <<http://www.cidh.oas.org/annualrep/80.81eng/USA2141.htm>>. (Known as the *Baby Boy Case*). The petition in the *Baby Boy Case* was filed by the president of the

On the other hand, in accordance with the object and purpose of the American Convention<sup>(19)</sup>, former Inter-American Court President Cecilia Medina-Quiroga explains that the interpretation of Article 4.1 requires that it be given a dynamic meaning in ways that favor the person<sup>(20)</sup>. Further, under the principle of harmonious interpretation of treaties, any reasonable interpretation of the provision should simultaneously consider (i) that the woman is a *person*, and as such, is entitled to all the rights set forth in the American Convention, and (ii) that the fetus, inside the woman's womb, is dependent on her and, therefore, its interests can only be considered in ways that are consistent with the women's rights<sup>(21)</sup>.

In connection to this, arguing (as the veto does) that decriminalization of abortion violates the right to life is not consistent with Uruguay's domestic law (which has considered abortion lawful under certain circumstances since 1938). In other words, if it were truly the case that the fetus' life had the highest value, then it should always prevail when in conflict with other values, including the woman's life, which results in a *reduction ad absurdum*.

Additionally, the veto states-without specifying its reasons-that the law would affect the commitments made by Uruguay upon its ratification of international treaties, such as the Convention on the Rights of the Child. It is difficult to develop a specific legal argument to answer such a general statement. The legalization of abortion does not affect the rights set forth in this Convention. The treaty neither mentions the fetus, nor identifies at which moment life begins, a decision which is left to each State. Finally, again, the fact that all the countries that have legalized abortion have also ratified the treaty is an indication that conflict does not exist between the decriminalization of abortion and the Convention on the Rights of the Child, as it is understood around the world.

### 3. Discrimination against pregnant women

The veto failed to mention Uruguay's international obligations under the Convention on the Elimination of All Forms of Discrimination Against

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organization Catholics for Christian Political Action and other petitioner against the United States on behalf of a fetus that had been legally aborted in a Massachusetts hospital.

(19) VIENNA CONVENTION ON THE LAW OF TREATIES, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force on January 27, 1980. Vienna, May 23, 1969, article 31.

(20) See I/A Court of HR, *In the matter of Viviana Gallardo et al.* Series A n. 101, para. 16 cited in QUIROGA, Cecilia Medina. *La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*, publication sponsored by the University of Chile School of Law and the Human Rights Center, Dec. 2003. p. 73.

(21) In this sense, *Medina Quiroga* states that "it is clear that human rights limit State power, therefore, any action undertaken by the State in relation with the woman's body must take her rights into consideration" (free translation). QUIROGA, Cecilia Medina. *La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial.* p. 74.

Women (CEDAW), which Uruguay ratified with no reservations on 9 October, 1981<sup>(22)</sup>. Under the CEDAW, “discrimination against women” is to be understood as

*[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*<sup>(23)</sup>

In particular, Article 16(1) of the CEDAW establishes that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women...(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

In addition, Article 12(1) requires States Parties to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning”. The CEDAW Committee has clarified the meaning and the actual extension of this right in its General Recommendation<sup>(24)</sup> n. 24: health systems that refuse or fail to provide health services that *only* women need —such as obstetric care, emergency contraception, and safe abortion— discriminate against women; states that lack appropriate health services for women are obligated to remedy that discrimination. The Recommendation takes account of different factors that are distinctive to women’s health and that States should take into account when developing their policies: biological factors, such as women’s reproductive functions; socioeconomic factors such as unequal access to health services; psychosocial factors such as stigmatization of unwanted motherhood, among others<sup>(25)</sup>. This means that states are to eliminate laws and policies that are discriminatory or that appear as neutral but have a discriminatory effect.

General Recommendation 24 also states that the obligation by States under Convention to repeal national criminal laws that discriminate against

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(22) For a detailed discussion of the implications of the CEDAW Convention in the abortion context, see COOK, Rebecca J.; HOWARD, Susannah. Accommodating women’s differences under the women’s Anti-Discrimination Convention, cit., p. 1039.

(23) CEDAW Convention, Article 1.

(24) “General Recommendations” are guidelines to be followed by State parties when discharging their reporting duties to the Committee on the Elimination of Discrimination Against Women, which monitors State’s compliance with the CEDAW Convention.

(25) General Recommendation 24, 12.



women includes the duty to remove barriers to health care. Those barriers include “laws that criminalize medical procedures only needed by women and that punish who undergo those procedures”<sup>(26)</sup>.

According to international human rights law, States have two main obligations: the obligation to *respect* and the obligation to *guarantee* human rights to all without discrimination. Concerning health-related issues or rights, a State violates its obligation to *respect* when it maintains actions, policies, or laws that may result in avoidable deaths<sup>(27)</sup>, such as laws that ban abortion and often result in the avoidable deaths of thousands of women. Additionally, a State violates its obligation to *guarantee* when it fails to take all necessary steps to ensure the realization of the right to health, such as the failure to adopt a gender-sensitive approach to health care and the failure to reduce maternal-mortality and morbidity rates<sup>(28)</sup>.

In this regard, General Recommendation 24 states that the obligation to protect women’s right to health “requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons or organizations, [including] the enactment and effective enforcement of laws and the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services”<sup>(29)</sup>.

Now, with the veto and the implementation of the law in its present terms, the Uruguayan State is violating both its obligations to respect and to guarantee women’s rights to life, health and personal security (among others). In this vein, in September 2008 during its periodic review of Uruguay, the CEDAW Committee expressed its concern regarding the high pregnancy rates among teenage girls and young women, as well as the high incidence of maternal mortality, “the leading cause of which is the practice of unsafe abortion” in Uruguay and lamented that “no strategies for the reduction of maternal mortality have been developed and that maternal health policies do not include attention to complications arising from unsafe abortion”<sup>(30)</sup>.

Concerning the fetus, the veto explained that “the criterion is not the value of the individual *according to* the affectations that it inspires in others, nor to the utility that it renders, but the value resulting from its mere existence”<sup>(31)</sup>. However, it is precisely the woman who is being considered *only with regard to* her reproductive capacity, *with regard to* her unique capacity to become

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(26) General Recommendation N. 24, 14.

(27) UN. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. General Comment n. 14 (2000), E/C.12/2000/4, Aug. 11, 2000, par. 50.

(28) *Ibid.*, par. 52.

(29) CEDAW Committee, General Recommendation n. 24, par. 15.

(30) CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, Uruguay, cit., par. 38.

(31) Free translation.

pregnant and to carry the fetus in her womb. That is to say, the veto considered the pregnant women only with regard to the needs of others and her utility to society, not according to her rights and dignity<sup>(32)</sup>. The State must protect and guarantee the right to health, including the right to sexual and reproductive health, on a basis of equality and non-discrimination to both women and men. To deny the right to interrupt the pregnancy as a part of reproductive health is to deny a medical service which can only benefit women and, thus, it is discriminative.

#### **4. Medical and legal aspects**

##### **4.1. Unsafe abortions<sup>(33)</sup>**

The “Defense of the Right to Sexual and Reproductive Health Act”, as it was finally approved by the Uruguayan General Assembly on December 1, 2008 (after the aforementioned chapters were vetoed), states that the Ministry of Public Health is in charge of implementing Ordinance 369-04 adopted on August 6, 2004<sup>(34)</sup>. This Ordinance, entitled “Measures for protecting mothers in cases of unsafe abortions performed under hazardous circumstances”, establishes guidelines for providing comprehensive treatment for unwanted pregnancies or counseling for safe maternity.

This Ordinance acknowledges the fact that Uruguay has a terrible record in terms of maternal mortality from complications resulting from unsafe abortions. It also highlights the increase in the incidence of maternal mortality associated with unsafe abortions, especially in the public health sector. These guidelines are aimed at a multidisciplinary team of health-care practitioners in charge of assisting pregnant women who are considering terminating their pregnancy. They require two consultations with the pregnant woman, one before and one after the abortion. According to the guidelines, during the first consultation, information must be provided “on the characteristics and consequences of an unsafe abortion,” as well as “[attempt to] discourage the practice of abortion as a method of birth control”<sup>(35)</sup>.

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(32) In a case that liberalized the conditions for legal abortion in Colombia, the Constitutional Court held that “when passing criminal laws the legislator cannot be unaware of the fact that the woman, as a human being, has an inherent right to dignity and should therefore treat her as such instead of considering her as and transforming her into a mere instrument of human reproduction, or in certain cases force her to become an effective tool for procreation” (translation by the authors). See CONSTITUTIONAL COURT OF COLOMBIA. Decision C-355/2006, May 10, 2006. *Constitutional Court of Colombia*. Consulted on March 10, 2010. Available at: <[www.corteconstitucional.gov.co/](http://www.corteconstitucional.gov.co/)>. (available only in Spanish—Translation by the authors).

(33) The authors thank Lilián Abracinskas for her input in this section.

(34) See Article 4(b)2.

(35) Free translation.

This Ordinance, however, has three main deficiencies. First, the government failed to institute an effective mechanism to make the Ordinance visible and well-known: in 2008, it was reported that only 28.5% of practitioners were aware of its existence<sup>(36)</sup>. Second, the Ordinance does not seem to provide enough safeguards for health-care practitioners responsible of “preparing” the patient who has decided to interrupt her pregnancy. This creates confusion, since the majority of physicians fear being subjected to criminal proceedings. Lastly, there is no mechanism for the Public Health Ministry to ensure compliance with the Ordinance, nor are there any official data on compliance whatsoever. Such lack of statistical data hinders the possibility for identifying the obstacles for the effective implementation of such measures of protection. This is paramount to effectively address the high mortality rate linked to unsafe abortions<sup>(37)</sup>. These types of deficiencies reflect that Ordinance 369-04 is a *de facto* solution to a strictly legal problem: the criminalization of abortion.

#### 4.2 Conscientious objection

Regarding conscientious objection and women’s access to reproductive health services, the CEDAW Committee has stated that “[i]f health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers”<sup>(38)</sup>. As stated in the veto<sup>(39)</sup>, the bill included language concerning the

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(36) MYSU, *Mujer y Salud Uruguay*, National Observatory in Gender and Sexual and Reproductive Health in Uruguay (Observatorio Nacional en Género y Salud Sexual y Reproductiva en Uruguay), cit., p. 33.

(37) A case cited by the *Revista Médica del Uruguay* reveals the consequences of failing to apply these protection measures in cases of unsafe abortions. A 43-year-old woman originally from a poor neighborhood in Montevideo, with a history of five previous pregnancies (three deliveries and two miscarriages), expressed her intention to interrupt her pregnancy while at a first aid clinic. She was informed that this would be impossible without being given additional information or being referred to the Advice Center at the Women’s Hospital. After trying to induce her own miscarriage at home by means of different infusions over the course of several days, she came down with fever, colic, vomiting, and diarrhea, leading to her hospitalization and ultimate death in the operating room. The autopsy showed that the cause of death was post-abortion septicemia. The article concluded that this case reveals a failure in the medical primary care system that deprived a patient of adequate advice. The lack of information pre-determined the loss of various opportunities for efficacious intervention, which would have averted the need for an abortion under such high-risk conditions and the resulting maternal death. LOZANO, Fernanda et al. *Muerte maternal por aborto inseguro como falla del primer nivel de atención. Revista Médica del Uruguay*, v. 23, n. 4, p. 389-390, dec. 2007.

(38) Committee on the Elimination of Discrimination against Women, General Recommendation n. 24 (20th Period of Sessions, 1999), “Women and Health”, para. 11. The same point was made by the European Court of Human Rights in *Pichon v. France* 2001-X Eur. Ct. H.R. See, also, the ethical guidelines of the International Federation of Gynecology and Obstetrics, Available at: <<http://www.figo.org/files/figo-corp/Ethical%20Issues%20-%20English.pdf>>.

(39) In this regard, the veto establishes that “in inadequately regulating conscientious objection, the Draft bill is discriminatory towards those doctors who believe that their conscience forbids them from performing abortions; nor does it allow for doctors to change their minds and cease performing abortions [to opt out]” Free translation.

exercise by doctors of their conscientious objection to performing abortions. However, the bill did not include a specific provision allowing doctors, who had originally agreed to performing abortions, to change their mind. We agree that perhaps this was a flaw in the bill: doctors should be entitled to change their minds provided that is consistent with the patient's rights. Conscientious objectors are expected to refer to other doctors; otherwise, they may be subject to a charge of abandonment. However, instead of vetoing such chapters, the President could have suggested alternative language on the issue, or enacted regulations to address conscientious objection more effectively. The argument that the bill in the terms passed by the Legislature violated doctors' right to freedom of conscience falls short of a reasonable reason.

### **CONCLUSIONS**

Having examined the veto from a multidisciplinary approach, we conclude that it is defective. The arguments used in the veto are imprecise and generic; they are based on false assumptions and, most importantly, they disregard international obligations assumed by Uruguay to respect and guarantee the human rights of women — in particular with respect to their rights to life and personal integrity (by denying them the ability to procure a safe abortion) — as well as their right not to be discriminated against in the access to health care services. Through a veto that failed to include a gender-based perspective and to regard women as fully autonomous persons, the Uruguayan State infringed upon their human rights. We hope that in this new stage of Uruguay's political history, with the majority of Parliament members in favor of decriminalization and a President that has expressed his support for decriminalization, women will finally be allowed to make their own decisions about their bodies.

Some final thoughts: prohibition of abortion disproportionately affects the poorest and most socially marginalized women. Having the legal option to terminate a pregnancy means little or nothing for women who have the economic means to get an abortion in a private clinic under safe conditions. These women *always* have an option. The prohibition of abortion and issues related to abortion should not be addressed in an elitist debate about how sacred life is or about the miracle of women's reproductive capacity. The prohibition of abortion is a social and economic issue that the Uruguayan State is obligated to address effectively. The debate over abortion cannot be removed from the context of poverty and marginalization that affects thousands of Uruguayan women.

### **BIBLIOGRAPHY**

ABAL Hermanos S. A. v. Legislative Power and others (constitutional challenge, arts. 9 y 24 de la ley 18.256) Suprema Corte de Justicia. [Supreme Court] (Uru.).

ABRACINSKAS, Lillian; LÓPEZ GÓMEZ, Alejandra. *Mujer y salud Uruguay. Mortalidad Materna, Aborto y Salud en Uruguay: un escenario cambiante*. Uruguay, 2004. Available (in Spanish only) at: <<http://www.mysu.org.uy/Libros>> or <[http://www.mysu.org.uy/IMG/pdf/libro\\_MYSU\\_201.pdf](http://www.mysu.org.uy/IMG/pdf/libro_MYSU_201.pdf)>.

AMERICAN CONVENTION ON HUMAN RIGHTS (OAS Treaty Series n. 36; 1144 UNTS 123; 9 ILM 99, 1969).

BRITISH American Tobacco (South America) Limited (Uruguay) v. Public Health Ministry. Tribunal de Apelaciones Civil de 6to Turno [Appellate Court], decision 2/2009 (Uru).

CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, Uruguay, 42 Period of Sessions, CEDAW/C/URY/CO/7, Nov. 14, 2008.

\_\_\_\_\_, General Recommendation n. 24 (20<sup>o</sup> period of sessions, 1999).

CONSTITUTIONAL COURT OF COLOMBIA. Decision C-355/2006, May 10, 2006. *Constitutional Court of Colombia*. Consulted on March 10, 2010. Available at: <[www.corteconstitucional.gov.co/](http://www.corteconstitucional.gov.co/)>.

COOK, Rebecca J.; DICKENS, Bernard M.; FATHALLA, Mahmoud F. *Salud reproductiva y derechos humanos: integración de la medicina, la ética y el derecho*. Oxford: Oxford and Profamilia, 2003.

\_\_\_\_\_; HOWARD, Susannah. Accommodating women's differences under the women's Anti-Discrimination Convention. *Emory Law Journal*, v. 56, 1039, 2007.

EL PAÍS Digital. José Mujica promueve plebiscito por aborto. Nov. 16, 2009. Available (in Spanish only) at: <<http://www.elpais.com.uy/091116/pnacio-454575/politica/jose-mujica-promueve-plebiscito-por-aborto>>.

EUROPEAN COURT OF HUMAN RIGHTS. *Pichon v. France* 2001-X Eur. Ct GOLD, R. B. *Abortion and women's health: a turning point for America?* New York and Washington, DC, The Alan Guttmacher Institute, 1990 cited in WHO, "Unsafe Abortion. Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003" 5<sup>th</sup> Ed., 2003., web site "World Health Organization. Available at: <[http://whqlibdoc.who.int/publications/2007/9789241596121\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596121_eng.pdf)>.

GUTTMACHER INSTITUTE. Facts on Induced Abortion in the United States. July 2008. Available at: <[http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf)>. (last visited on August 15, 2010). Benjamin B. Ringer & Elinor R. Lawless, *Race-ethnicity and society*. New York: Rutledge, 1989.

I/A Court of HR, *In the matter of Viviana Gallardo et al.* Series A n. 101, para. 16 cited in Cecilia Medina Quiroga, *La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*", publication sponsored by the University of Chile School of Law and the Human Rights Center, Dec. 2003.

IACHR, Resolution n. 23/81, Case 2141, United States, March 6, 1981. *Inter-American Commission on Human Rights*. Available at: <<http://www.cidh.oas.org/annualrep/80.81eng/USA2141.htm>>. (known as the Baby Boy Case).

LOZANO, Fernanda *et al.* Muerte maternal por aborto inseguro como falla del primer nivel de atención. *Revista Médica del Uruguay*, v. 23, n. 4, dec. 2007.

MYSU, Mujer y Salud Uruguay, National Observatory in Gender and Sexual and Reproductive Health in Uruguay (Observatorio Nacional en Género y Salud Sexual y Reproductiva en Uruguay). 2008 Report, Montevideo, 2007.

PUBLIC PROSECUTOR'S OFFICE. Report 8/05/08 quoted in MYSU, Mujer y Salud Uruguay. Aborto: las mujeres bajo Sospecha. *Cuadernos de Divulgación sobre Derechos y Salud Sexual y Reproductiva, Época II*, n. 1, May 28, 2008. Mujer y Salud. Available at: <[http://www.mysu.org.uy/publicaciones/pdf/cuadernos/separata\\_8.pdf](http://www.mysu.org.uy/publicaciones/pdf/cuadernos/separata_8.pdf)>.

RISSE, Ferrand; MARTÍN, J. La libertad de enseñanza en la Constitución Uruguaya. Institute of Legal Investigation, National Autonomous University of Mexico (UNAM), p. 502. *Instituto de Investigaciones Jurídicas, UNAM*. Available at: <<http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20042/pr/pr4.pdf>>.

SCHAEFER, Richard T. (Ed.). *Encyclopedia of Race, Ethnicity, and Society*. London: SAGE Publications Inc., 2008.

UN. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. General Comment n. 14 (2000), E/C.12/2000/4, Aug. 11, 2000.

VIENNA CONVENTION ON THE LAW OF TREATIES, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force on January 27, 1980. Vienna, May 23, 1969.

WORLD HEALTH ORGANIZATION. Unsafe Abortion. Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003. 5<sup>th</sup> ed., 2003, Available at: <[http://whqlibdoc.who.int/publications/2007/9789241596121\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596121_eng.pdf)>.

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