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ESTEFANÍA VELA

# Current Abortion Regulation in Mexico

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Fax: 5727•9800 ext. 6314  
Correo electrónico: [publicaciones@cide.edu](mailto:publicaciones@cide.edu)  
[www.cide.edu](http://www.cide.edu)

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*If it wasn't for Alejandro Madrazo, this never would've happened.*



## Abstract

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*The following document is designed to be a guide on current abortion regulation in Mexico. It is a brief survey on what has happened over the last decade and what is currently happening, legally, in relation to abortion. In this sense, it reviews major legislative transformations –like Mexico City’s 2000 and 2007 reforms–, major judicial cases –specifically: the two decisions brought forth by the Supreme Court on the matter–, and current state and federal legislation –which includes all the States’ reactions to the 2008 Supreme Court ruling–.*

## Resumen

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*El presente documento está diseñado para ser una guía de la regulación actual del aborto en México. Recapitula lo que ha ocurrido en la última década y lo que está ocurriendo, jurídicamente, en esta materia. En este sentido, revisa las transformaciones legislativas más importantes –como las reformas en el Distrito Federal de 2000 y 2007–, los casos judiciales más relevantes –específicamente las dos decisiones de la Suprema Corte de Justicia de la Nación (de 2002 y 2008)– y la legislación federal y local actuales –y se incluyen todas las reformas constitucionales locales que surgieron como reacción a la decisión de la Corte de 2008–.*



## Introduction

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The past decade has been especially relevant for abortion regulation in Mexico, especially in Mexico City: it has gone from criminalizing abortion with very restricted exceptions, to broadening the exceptions in some states, to decriminalizing abortion on demand during the first trimester, to initiating the debate over whether abortion is to be recognized as a fundamental right of women, guaranteed by the State. Until now, only in Mexico City can women freely interrupt their pregnancy during the first trimester, and in doing so, importantly, they receive the support —both financial and medical— of the city government. The reforms made to Mexico City’s Criminal Code and Health Law —adopted in 2007— and their challenge before the Supreme Court are the most visible and dramatic events in the recent transformation of abortion law, but they neither begun the transformation nor do they seem an end-point to the revision of the law regarding abortion in Mexico.

In its 2008 ruling, the Supreme Court did not give much consideration to women’s right to decide over their own bodies and their right to health, but rather emphasized *(i)* that the Federal Constitution did not protect the right to life;<sup>1</sup> and quite independently *(ii)* that criminalizing abortion is not an obligated policy for the legislatures to adopt. Misunderstanding the Court’s ruling (i.e. thinking that the Court’s position is that criminalizing abortion is not an constitutionally obligated policy *because* the right to life is not consecrated in the Constitution), sixteen out of thirty two States have amended their Constitutions to expressly establish the right to life. This has given way to increased reports of States criminally persecuting women who have abortions, whereas before these reforms, criminalization was mostly dead-letter law.

In this sense, Mexico is divided on the law governing abortion: some argue that abortion is to be recognized as a matter to be decided by women that has to be both respected and guaranteed by the State by virtue of a constitutional right to choose, while others argue it incompatible with the fetus’ fundamental right to life from the moment of its conception. Five cases pending before the Supreme Court are surely to contribute to the development of the constitutional doctrine regarding abortion, but are unlikely to settle the issue just yet.

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<sup>1</sup> This position, included in the Court’s Opinion was in fact openly disavowed by most of the Justices in the majority who found the decriminalization to be constitutional, and thus has doubtful force as precedent.

## A. Legal Framework

### 1. Recent history

Before describing the current legal framework we will review, briefly, the recent history regarding the regulation of abortion in the country, focusing on the most prominent reforms and cases.

- A. In the year 2000, Mexico City's local congress approved a reform to the local Criminal Code that increased the number of exceptions under which abortion was not to be punished —abortion being defined as the death of the product of conception at any moment during the pregnancy. Adding the already allowed abortion in cases of rape and imprudence (*i.e.* accident), it included three cases in which “sanctions were not to be applied”: when a woman is artificially inseminated without her consent, when there is a threat to the woman's health, and when there are adverse genetic and congenital conditions affecting the fetus “which may result in physical or mental damage, to the extent that they put the product of conception's survival at risk.” The reform also eliminated the alternative sanction that allowed diminished punishments if three conditions were met: *a)* the woman had a “good reputation”, *b)* she managed to “conceal her pregnancy”, and *c)* the pregnancy was the result of an illegitimate union (*i.e.* marriage). The reform also established that the crime of abortion was to be punishable only if it was successfully carried out, excluding failed attempts from punishment. Finally, it included procedural regulations for authorizing abortions in cases of rape and involuntary insemination limiting to 24 hours the lapse of time in which authorities were to decide whether to authorize abortion.
- B. The reform was challenged before the Supreme Court by a legislative minority. In 2002, the Court decided to uphold the reform.<sup>2</sup> In short, its line of reasoning was the following:
  1. The legal question was defined as follows: does the reform violate the right to the protection of life from the moment of conception? For this, the Court had to establish whether or not the Federal Constitution protected a right to life. After interpreting several articles of the Federal Constitution, it reached the conclusion that it does protect the right to life, in general,<sup>3</sup> and life from the

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<sup>2</sup> This was the *acción de inconstitucionalidad 10/2000*, decided on January 28 and 29, 2002. Five Justices voted in favor of the invalidation of the reform and six Justices voted in favor of upholding it.

<sup>3</sup> It interpreted article 14 (“No one shall be deprived of his or her life, freedom, properties, possessions or rights, without a fair trial before previously established courts, according to the essential formalities of the proceedings and



moment of its conception, in particular.<sup>4</sup> It then reviewed the Convention of the Rights of Children and found that it “protects the rights of children both before and after their birth”, thus protecting life from the moment of its conception.

2. The Court then proceeded to review the legal reform and found the following:
  - i. By defining abortion as “the death of the product of conception at any moment during the pregnancy”, it protected life from the moment of conception (for the Court, the Code implied that “the product of conception ‘is alive’, because it is through abortion that it is killed, and one cannot kill something that is not alive”).
  - ii. Regarding the exceptions in which “sanctions were not to be applied”, the Court found that they did not violate the protection of life from the moment of conception because abortion remained a criminal act, and thus disallowed by the state, and the reforms merely resulted in the non-application of criminal sanctions to the woman because it was considered that the specific situations merited clemency from the State. (For the Court, the exceptions placed a pregnant woman before a “very difficult decision: the heroic one of accepting to continue the pregnancy and the one of accepting the interruption of the pregnancy with the consequence of it being a crime as well as all others derived from it.”)
3. The Court, in the ruling, did not consider the constitutional clause that literally states: “every person has a right to choose in a free, responsible and informed manner on the number and spacing of their children.”
4. Because of the nature of the procedure and the complex plurality that upheld the decision, it is not binding on future cases.
- C. In 2004, Mexico City’s Criminal Code and Health Law were reformed again. The first established that in case of rape, congenital malformation of the fetus, risk to the woman’s health and unwanted artificial insemination, abortion was not to be considered a criminal

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laws issued beforehand”) and article 22 (“The death penalty for political crimes is also prohibited, and as far as the other crimes are concerned, it shall only be applied to...”) as enshrining the right to life.

<sup>4</sup> It based its interpretation on the reasons behind the 1983 constitutional reform that incorporated the right to health, particularly on one reason: the need to protect a pregnant woman’s health because of her child’s health, which implied that such child benefited from the protection of the law even before its birth. The Court also emphasized on the Framers’ intent to protect the family (protected by the State, according to the second paragraph of article 4). Lastly, it based on its interpretation on article 123, which establishes the rights of workers, especially on the rights of pregnant female workers. To the Court, granting pregnant women the right to a twelve-week leave and to not do forced labor during the pregnancy, implied that the Framers were interested in protecting life, from the moment of conception.

conduct (instead of being cases in which the conduct is considered criminal but sanctions are not to be applied). The local Health Law was reformed so that in the cases in which abortion was permitted, the public health institutions were to provide –free of charge and in a term of five days since it was requested– the health service consisting in the legal interruption of the pregnancy. It also mandated that women were to be provided with information regarding alternatives to abortion and the possible consequences suffered in their health if they practiced it.

- D. In 2007, the Inter-American Commission on Human Rights issued the Report No. 21/07 in which it approved the friendly settlement that ended the Paulina Case.<sup>5</sup> In summary, the facts of the case were the following: Paulina del Carmen Ramírez Jacinto was raped on July 31, 1999. She was fourteen years old. The incident was immediately reported to the local authorities in the state of Baja California. The rape resulted in a pregnancy, so Paulina and her mother went to the Public Prosecutor and requested authorization to have an abortion performed (Baja California's Criminal Code excludes punishment to abortion in the case of rape). The Public Prosecutor authorized the abortion, so Paulina and her mother went the local public hospital to have the procedure done. Once admitted, irregularities soon began to occur: (i) the medical staff postponed the procedure giving different reasons for the delay; (ii) the State Attorney General, in order to dissuade Paulina from having the abortion, took her to see a Roman Catholic Priest; (iii) Paulina was visited at the hospital (without her mother's presence) by two women with no connection to the health services who had been invited by the hospital's Director and showed Paulina violent videos of abortions in order to dissuade her; and (iv) finally, moments before the procedure was to take place, the hospital's Director decided to inform Paulina and her mother on the risks of the procedure. "According to the doctor, these risks included 'sterility, perforation of the uterus, massive hemorrhage, Asherman's syndrome, and death'; he also said that if Paulina del Carmen Ramírez Jacinto were to die, responsibility for that would fall to her mother alone. The petitioners maintain that this biased and imprecise information succeeded in scaring the mother, who decided to ask the medical staff to refrain from proceeding with the procedure."<sup>6</sup> The case exploded in the national media, causing uproar among feminist groups, politicians and intellectuals. The case was brought to the Inter-American Human Rights Commission in 2002 by several NGOs, and eventually resulted in a friendly agreement (the State agreed to repair

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<sup>5</sup> Available at: <http://www.cidh.org/annualrep/2007eng/Mexico161.02eng.htm>.

<sup>6</sup> Inter-American Commission on Human Rights, Report No. 21/07, Petition 161-02, Friendly Settlement, March 9, 2007.

- the damages caused on Paulina and to take measures to make abortion an effective alternative in cases permitted by law).
- E. In 2007, Mexico City's Criminal Code and Health Law were reformed once again. The changes were the following:
1. The reform redefined the crime of abortion as "the interruption of the pregnancy after the twelfth week", leaving it up to a woman to decide freely on her continuation of the pregnancy during the first trimester. That is, it withdrew voluntary abortions during the first trimester from criminal regulation altogether.
  2. It redefined pregnancy as "the process of human reproduction starting with the implantation of the embryo in the wall of the uterus", making emergency contraception fall outside the definition of both pregnancy and abortion.
  3. In the case of rape, the congenital malformation of the fetus, risk to the woman's health, unwanted artificial insemination, and imprudence, it established –yet again– that abortion is not to be considered criminal. In the first four cases, doctors have the obligation of providing objective and accurate information regarding alternatives to abortion and the possible consequences suffered in terms of health if women are to practice it.
  4. It established that all women are entitled to free legal abortions in city hospitals, even if they are covered by private or other public healthcare systems. The service must be provided within a term of five days after it is requested. It also established that the government has the obligation to provide medical services to women after the abortion has been practiced.
  5. It established that the government was to provide medical and social assistance in matters of sexual and reproductive health, in a "permanent manner", thus making it a governmental priority.
- F. The 2007 reform was also challenged before the Supreme Court (the plaintiffs this time were the federal Attorney General and the President of the National Human Rights Commission, the *ombudsman*). In both cases, the challenge hinged on a violation of the right to life of the fetus and it invoked the Court's 2002 decision. In 2008, the Court ruled by an overwhelming 8 to 11 majority to uphold the reform.<sup>7</sup> In short, its line of reasoning was the following:<sup>8</sup>

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<sup>7</sup> This was the *acción de inconstitucionalidad* 146/2007 and 147/2007, decided on August 28, 2008.

<sup>8</sup> There was another legal question to be decided, besides the ones developed in this summary, regarding whether the reform violated the federal system enshrined in the Constitution. In particular: whether the Federation's power to regulate on matters of health was undermined with the new definition of "pregnancy" established in Mexico City's Criminal Code and Health Law. The Court found that the Federal Health Law did not establish a definition of pregnancy, and that Mexico City had the constitutional power to establish crimes. Therefore, its definition of "pregnancy" in the Criminal Code did not violate the federal pact.

1. The legal question, as formulated by the Court, was whether “the State is under obligation to criminalize a specific conduct and not whether a criminalization of a particular conduct affects or violates constitutional rights”.<sup>9</sup>
  - i. Instead of adhering to its own non-binding precedent, and reaffirming the constitutional protection of the right to life and of life from the moment of conception, the Court decided on this occasion that such a right and protection were not established in the Constitution. And it went further: even if they were established in the Constitution, they still would have to be balanced with other rights.
  - ii. It then reviewed several international treaties<sup>10</sup> and found two things: 1) that the right to life is not an absolute right and 2) that no treaty specifies exactly when the protection of life begins.<sup>11</sup> Regarding the latter, it analyzed extensively article 4 of the American Convention on Human Rights, which establishes that the right of life “shall be protected by law and, in general, from the moment of conception”, and concluded that the expression “in general” had as a specific purpose avoiding a possible violation of the obligations acquired by the States in which abortions were already being practiced or by those that were to allow them afterwards.
  - iii. For the Court, the Constitution establishes the State’s obligation to make rights that protect life effective (such as the rights to health, the environment, housing, the protection of children, and those connected with a pregnant woman’s health), but does not establish *a right to life*. That is, “the Constitution does not recognize a right to life in a normative sense, but rather establishes that, once life is a possibility, the State has a positive obligation of promoting it and ensuring the conditions in which the individuals subject to the constitutional norms” can enjoy the rights enshrined in it.
  - iv. Further, the Court held that “we cannot find a constitutional or international base for an obligation to

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<sup>9</sup> With this formulation, the Court sidestepped the discussion of whether criminalizing abortion violates the explicitly established right to choose the number and spacing of one’s children, focusing not on whether it is constitutional to criminalize but only on whether it is constitutional to decriminalize.

<sup>10</sup> The Court reviewed the following treaties: the Convention on the Rights of Children, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

<sup>11</sup> In a reasoning that can only be interpreted as debating with its prior conclusion, the Court now affirmed that the Convention on the Rights of Children is silent in regards to the moment in which life is protected. To the Court, the preparatory documents are clear regarding the fact that article 1 of the Convention has the purpose of avoiding a conflict between the Convention and national legislation in relation to the right of children before their birth.

criminalize” a conduct that affects such right. The Court also pointed out that “the mere existence of a constitutional right does not imply an obligation to criminalize a conduct that affects it.” With this statement, the Court limited the effects of any reforms that contemplate the right to life, as not meaning—automatically—that the right to life must be protected through criminal law.

- v. For these reasons, the Court found that, with regards to criminal law in general, the Legislature is the one that has to “evaluate the elements to regulate or deregulate a specific [criminal] conduct.” In this sense, Mexico City’s Legislature “had the power to determine the conducts that were to be sanctioned criminally, and given the lack of an explicit constitutional obligation [to criminalize], it is such a Legislature’s responsibility to balance all the facts, problems and rights that might be in conflict.” The Court made it clear that criminalization of abortion cannot be held to be a constitutional obligation of the legislature *unless the constitutional text explicitly established that a specific conduct should be held as a criminal offense.*<sup>12</sup>
- vi. The Court reviewed the “reasons” behind the legal reform and found that Mexico City’s Legislature had, in effect, balanced and weighed all the issues in question. It noted how the Legislature’s exercise reflects “the legislative tendency reflected in comparative law that has been establishing legal exceptions to the interruption of pregnancy or limits to the criminal persecution of abortion, pinned on the specific balancing of two conflicting values.”
- vii. For the Court, the reform is an “ideal” measure tailored to safeguard women’s rights, since “the decriminalization of the interruption of pregnancy has as a counterpart women’s freedom to decide over their own bodies, their physical and mental health, and the respect to their lives, even.”
- viii. The Court made several statements regarding the rationality and necessity behind such a sanction. Importantly, it stated that criminalization of abortion is not an effective measure to protect the fetus. It also

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<sup>12</sup> The Constitution establishes several of those cases, but they all refer to authorities abusing their power, and overwhelmingly in the realm of criminal prosecution and adjudication (i.e. torturing a suspect).

stated that a “criminal threat is not the first and only solution to the eradication of clandestine [abortions], since regardless of the theory we use to justify the imposition of a punishment, such a sanction cannot ignore rationality and necessity” without turning vengeance into its primary justification. For the Court, “criminalizing the conduct would be like using criminal law as a symbolic tool” because of its ineffectiveness to inhibit abortions.

2. A second legal question to be decided was whether the reform violated the right to equality of two groups: men and minors. The first group was discriminated, according to the plaintiffs, because they were not guaranteed to be part of the decision process that lead to the interruption of the pregnancy. In other words, the plaintiffs requested that, at the very least, the consent of both the woman and her male partner be required so the abortion was deemed legal. The second group was discriminated because there was no specific regulation regarding their situation. The Court noted that the arguments were directed against the rationality of the legislature’s decision of decriminalizing abortion, and not against its discriminatory character per se. For this reason, it considered the arguments only to the extent that they could affect “the legislature’s power to allow the legal interruption of a pregnancy”. For the purpose of this summary, only the arguments regarding discrimination towards men shall be exposed, for they were pinned –ironically– on the constitutional clause that establishes right to choose on the number and spacing of children. Only the couple can exercise this right, according to the plaintiffs, since the pregnancy is the result of a man and a woman, and not just the latter. The Court responded as follows:
  - i. It distinguished between sexual freedom and reproductive freedom, and established that the former cannot be reduced to the latter, since they protect different things (*sexuality* as different from *reproduction*).
  - ii. It then established that the right to paternity is not a right that is necessarily exercised jointly with another person. It is an individual right. The Court exemplified with adoption: it can be realized by one person or by a couple.
  - iii. For the Court, placing the final decision upon the woman is based upon the fact that it is she who suffers in a greater extent the consequences of an undesired pregnancy. This “original asymmetry” justifies such a measure, especially if one considers how the legal system can only guarantee in an imperfect manner the male’s

participation throughout the process. In this sense, the Court makes reference to the possibility of initiating a trial regarding the recognition of paternity or granting child support and affirms that such possibility is “too uncertain and imperfect” to erase the “original asymmetry that exists between the position of the mother and the potential father in a way that justifies the invalidation of the general rule that allows the mother to make the decision.”

- G. After the 2008 Supreme Court decision, several States began amending their own Constitutions in response. The amendments, practically replicated with little variations, consisted in explicitly establishing the right to life “from the moment of conception and until natural death”. To date, 16 out of 31 states (Baja California, Campeche, Chiapas,<sup>13</sup> Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo,<sup>14</sup> San Luis Potosí, Sonora and Yucatán) have made this reform to their Constitutions.<sup>15</sup> In 7 more states, such a reform is awaiting approval (Aguascalientes, Baja California Sur,<sup>16</sup> México, Sinaloa, Tabasco, Tamaulipas, and Tlaxcala).<sup>17</sup> The specific legal effects of the constitutional reforms are yet to be

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<sup>13</sup> Although the local Congress of Chiapas approved a constitutional reform, it has to be published twice for it to be valid. The second publishing is still pending.

<sup>14</sup> Although Quintana Roo approved the constitutional reform, eighteen months later it also approved a reform to its local Criminal Code, aimed to establish the procedure to have an abortion when the pregnancy is the result of rape. H. Martoccia y J. Chávez, “Aprueban diputados de Quintana Roo reforma que permite el aborto a víctimas de la violación”, *La Jornada*, October 23, 2010, available at: <http://bit.ly/bVWS6Cq>

<sup>15</sup> Most of them were approved with an overwhelming majority. To see the political composition of the local assemblies and the way each political party voted, go to: <http://bit.ly/ajBMhi>

<sup>16</sup> The case of Baja California Sur is special because in 2004 and 2005 it made two reforms that pointed towards a decriminalization of abortion. In 2004, it reformed its Health Law and established a term for the interruption of pregnancy to be performed in (since being authorized by the Public Prosecutor), free of charge. It also made it mandatory for authorities to supply emergency contraception, having 72 hours to do so after unprotected sex had been had (with or without violence). In 2005, the Criminal Code was reformed, establishing one of the lowest penalties in the country for abortion: 2 months to 2 years in prison for the woman who has an abortion. In many ways, if the constitutional reform is approved, it would mean a step back in Baja California Sur’s regulation of abortion.

<sup>17</sup> In Veracruz, the reform was not approved on the second round (for a constitutional reform to pass, it has to be approved on two occasions). Édgar Ávila Pérez, “No pasa penalización del aborto en Veracruz”, *El Universal*, May 6, 2010, available at: <http://bit.ly/ceoTxt> In Michoacán, the proposal wasn’t approved either. However, unlike Veracruz (for instance), the proposal didn’t even go to the Plenary and was rejected at the Commission for Constitutional Reform (“Comisión de Puntos Constitucionales”). Gladis Torres Ruiz, “Rechaza Congreso de Michoacán iniciativa que penaliza el aborto”, *CIMAC*, March 17, 2010, available at: <http://bit.ly/cwKBle>

The State of Chihuahua has protected in its Constitution life “from the moment of conception” since 1994, and is therefore not considered part of the “backlash”. Also, Veracruz has a complex constitutional amendment procedure, which requires approval by two successive legislatures. It has already been approved by one legislature and legal reforms accompanying the constitutional amendment—which require only one approval—have come into force, incorporating “women-protective” language and establishing criminal sanctions for women who have abortions that do not include prison terms.

established: most of the local Criminal Codes have not yet been changed.

- H. Eleven of the amendments to the local constitutions have been challenged on grounds of unconstitutionality under the Federal Constitution (Baja California, Campeche, Colima,<sup>18</sup> Guanajuato, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sonora and Yucatán), 5 of them directly before the Supreme Court (Baja California, Guanajuato, Oaxaca, Querétaro and San Luis Potosí). Now, only in 2 of the 8 cases brought to the Supreme Court can the reform be invalidated with *erga omnes* effects for the whole of the State (Baja California and San Luis Potosí), and 3 more with *erga omnes* effects only for the county whose local authorities challenged the law (Guanajuato, Querétaro and Oaxaca). In all five cases, an 8 out of 11 majority is required. In the rest of the cases, the resolutions would only affect the individuals who brought the challenge.

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<sup>18</sup> The Second Chamber of the Supreme Court decided, on September 22, 2010, three cases related to Colima: the *amparo en revision* 633/2010, *amparo en revision* 644/2010, and the *amparo en revision* 687/2010. Until today (November 5, 2010), two decisions have been published: the *amparo en revision* 633/2010 and the 687/2010; however, all three of them were decided in the same way: they were dismissed because the plaintiffs lacked standing. The *amparo* is designed to deal with *direct damage* inflicted by a law or act upon an individual. For the majority, the new article I in Colima's Constitution –“life is a right inherent to every human being. The State shall protect and guarantee this right from the moment of conception”– did not inflict a direct damage upon the individual: it affected no one and nothing. In order to do so, an additional act –be it legislative and/or administrative– was required. In this sense, women's right to decide the number and spacing of their children was not (yet) violated. In its own words:

“It is not accurate to state that the sole [inclusion] of the norm [that protects life from the moment of conception] violates the plaintiff's constitutional rights since, the content of such norm is not aimed directly at women in a reproductive age that live in that State, in the sense that it imposes on them an obligation to do or not do something; rather, the norm is designed in such a way that it imposes on the State the obligation to take on measures (without specifying if they have to be [judicial] or administrative) to protect life from the moment of conception; also, nowhere in the text is it specified that, in order to achieve that protection, the State has to limit fertile women's sexual activity or ban the use of birth control or criminalize abortion in a way that's different from its current regulation in the Criminal Code.” [*Amparo en revision* 633/2010]



## 2. Current regulation<sup>19</sup>

Perhaps one of the greatest paradoxes regarding Mexico's regulation of abortion is that there is a constitutional right that implies it: in 1974, the Federal Constitution was reformed to include every person's right "to choose in a free, responsible and informed manner the number and spacing of their children" (article 4). Moreover, even though the Supreme Court has ruled twice in the past decade in favor of the liberalization of abortion laws, it has never grounded its decisions on the referred constitutional clause.<sup>20</sup> Only in one out of thirty three jurisdictions (32 local and 1 federal) is the interruption of pregnancy on demand legal during the first trimester and provided—free of charge— by health authorities. Nevertheless, this right should be expected to represent the battleground for abortion cases decided by the Court in the near future. There is also a right to health enshrined in article 4 of the Constitution, as well as a right to information, in article 6. With these constitutional clauses in mind is that one most look at the current legal framework relating to abortion.

As has been previously stated, Mexico is a federal country and therefore has 33 different jurisdictions regulating abortion (32 local and 1 federal). Regulation varies from state to state in terms of the cases in which abortion is not considered a criminal conduct or is not to be sanctioned; the penalties imposed on women for having an abortion; and the information and services to be offered by the government. The common ground in all jurisdictions regarding abortion is that it is not punished if the pregnancy is the result of rape. In this sense, in Mexico, abortion is never always punishable, at least on the books.<sup>21</sup> In other words, two models coexist in Mexico: the *indications* model, in which abortion is prohibited with few exceptions independently of the time at which it occurs (which is the reigning model in 32 jurisdictions) and a *periodic* model, in which abortion is allowed for a certain period during the pregnancy, but then banned with exceptions (only in Mexico City).

In specific terms, these are the basic points regarding the legal regulation of abortion in all jurisdictions:<sup>22</sup>

### a) Cases when abortion is not considered a criminal conduct

In these jurisdictions, an abortion (defined generally as the death of the product of conception occurring during pregnancy) is not considered a criminal conduct in the following cases:

- When the pregnancy is the result of rape: in Aguascalientes, Chihuahua, Mexico City and Durango.

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<sup>19</sup> The information in this section is updated to November 5, 2010.

<sup>20</sup> The two cases are: 1) Acción de inconstitucionalidad 10/2000 decided on January 2002 and 2) the Acción de inconstitucionalidad 146/2007 and 147/2007 decided on August 2008.

<sup>21</sup> The other common element is that whenever an abortion is practiced without a woman's consent, it is punished.

<sup>22</sup> Attached to the present summary is a Table that includes the specific state regulation on abortion.

- When it is the result of imprudence (i.e. accident) attributable to the pregnant woman: in Aguascalientes, Chihuahua, Mexico City<sup>23</sup> and Durango.
- When, if not performed, the pregnant woman is in grave risk of death: in Aguascalientes and Durango.
- When, if not performed, the pregnant woman risks damage to her health: in Chihuahua and Mexico City.
- When the pregnancy is the result of an artificial insemination practiced without the woman's consent: in Chihuahua and Mexico City.
- When the product of conception suffers grave genetic or congenital alterations that can result in grave physical or psychological disorders, enough to risk its survival: in Mexico City.

**b) Regarding the exceptions to abortion being punished**

In these jurisdictions, an abortion (defined generally as the death of the product of conception occurring during pregnancy) is considered a criminal conduct but is not to be punished in the following cases:

- When the pregnancy is the result of rape,<sup>24</sup> in **29 jurisdictions**: Baja California, Baja California Sur, Campeche, Chiapas, Coahuila, Colima, México,<sup>25</sup> Guanajuato, Guerrero, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Zacatecas, Yucatán, Federation.
- When the abortion it is the result of imprudence (i.e. accident) on behalf of the pregnant woman, in **26 jurisdictions**: Baja California, Baja California Sur, Campeche, Coahuila, Colima, México, Guanajuato, Guerrero, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, Tlaxcala, Veracruz, Zacatecas, Yucatán, Federation.
- When if it is not performed, the pregnant woman is in grave risk of death,<sup>26</sup> in **25 jurisdictions**: Baja California, Baja California Sur, Campeche, Chiapas, Coahuila, Colima, México, Jalisco, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Zacatecas, Yucatán, Federation.

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<sup>23</sup> All exceptions for Mexico City apply only after the first trimester. During the first trimester, abortion is allowed on demand.

<sup>24</sup> Several states make the abortion depend on the consent given to by the authority; others make the consent depend on the proof of the facts; and others establish a time limit for the abortion to be practiced (generally 90 days after the rape has taken place).

<sup>25</sup> That is, the State of México, not to be confused with Mexico City which is a Federal District, much like Washington D.C.

<sup>26</sup> Generally, there has to be a medical diagnosis confirming it, usually requiring the concurring opinion of two doctors unless urgency demands that only one doctor opine.

- When if it is not performed, the pregnant woman risks damage to her health,<sup>27</sup> in **12 jurisdictions**: Baja California Sur, Campeche, Colima, Hidalgo, Jalisco, Michoacán, Nayarit, Nuevo León, Tamaulipas, Tlaxcala, Veracruz, Zacatecas.
  - When the product suffers grave genetic or congenital alterations<sup>28</sup> that can result in grave physical or psychological disorders, in **12 jurisdictions**: Baja California Sur, Chiapas, Coahuila, México, Guerrero, Hidalgo, Morelos, Oaxaca, Puebla, Quintana Roo, Veracruz, Yucatán.
  - When the pregnancy it is the result of an artificial insemination practiced without the woman's consent, in **10 jurisdictions**: Baja California, Baja California Sur, Campeche, Colima, Guerrero, Hidalgo, Morelos, San Luis Potosí, Tabasco, Veracruz,
  - When the woman is in a dire economic situation, provided that she already has 3 living children: only in Yucatán.
- c) **Regarding the penalties imposed on women**
- The lowest penalty possible is of 15 days of prison, a possibility only in Tlaxcala; the highest is of 6 years in prison, contemplated in most states. (Some states establish paying a fine in addition to being imprisoned.)
  - In the following states, the penalty can be reduced, as long as the following situations concur:
    - If the mother who had the abortion does not have a bad reputation and kept the pregnancy concealed, and the pregnancy is the result of an illegitimate union, the penalty can be reduced in Campeche, Jalisco, Nayarit, Oaxaca, Puebla, Tamaulipas, Zacatecas, Yucatán, Federation.
    - If there is reasonable fear that the product suffered from grave genetic or congenital alterations; or the pregnancy was the result of rape and the abortion was practiced after the first 90 days of pregnancy; or other "special circumstances" concurred, the penalty can be reduced in Coahuila.
    - If the woman had an abortion in order to conceal her dishonor, the penalty can be reduced in Mexico and Durango.
    - If the woman had an abortion to avoid social exclusion or because of extreme poverty, the penalty can be reduced in Hidalgo.
    - In Guerrero, Querétaro and Quintana Roo, the judge can reduce the sentence when it is just to do so, considering the mother's health, her education and personal circumstances, the circumstances in which the pregnancy occurred, the time it

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<sup>27</sup> Generally, there has to be a medical diagnosis confirming it, usually requiring the concurring opinion of two doctors unless urgency demands that only one doctor opine.

<sup>28</sup> Generally, there has to be a medical diagnosis confirming it.

lasted, the development and characteristics of the product, and all other circumstances that may lead to the case being resolved “fairly”.

- Several states contemplate alternative sanctions as opposed to prison:
  - In Mexico City, when the abortion is practiced after the first trimester, instead of prison the woman can be sentenced to community service.
  - In Jalisco, Morelos, Veracruz, and Yucatán, if the woman petitions it, she can be sent to an institution to be “rehabilitated”. The “integral medical treatment” that she shall be subjected to has as a purpose “giving attention to the consequences generated by the abortion, as well as reaffirming the value of maternity and the family.”

**d) Regarding the information and services to be provided by the State**

Only the following jurisdictions establish providing information or other services to be an obligation of the State:

- In Mexico City, in all cases in which the interruption of pregnancy is deemed legal, the state provides the service free of charge, as well as the information regarding possible alternatives to abortion and health risks to be suffered from it.
- In Durango, doctors performing the legal abortions are required to provide information regarding possible alternatives to it and health risks to be suffered from it, so that the pregnant woman can make “an informed, free, and responsible decision”.
- In Hidalgo, if the woman cannot afford the abortion (only in cases of rape or artificial insemination), the corresponding expenses shall be paid by the State. In this state, in all cases of legal abortions the Public Prosecutor or the judge are required to provide information regarding possible alternatives to it and health risks to be suffered from it, so that the pregnant woman can make “an informed, free, and responsible decision”.

## ***B. Gender and abortion regulation***

In many ways, there is a correlation between the models that regulate abortion and the way a woman's role is constructed through law. In order to illustrate this, two state regulations shall be compared: the one in Jalisco and the one in Mexico City. They represent extremes and are, therefore, paradigmatic in the way gender is constructed through the law.

### *1. Jalisco*

Jalisco is one of the states that amended its Constitution in order to establish a right to life from the moment of conception. Its criminal code was reformed accordingly and it clearly lays out the expected role of women regarding the protection: the pregnant woman is consistently referred to as "the mother". The Code actually uses the word "mother" when establishing the penalties the woman shall receive in case she gets an abortion. Such a phrasing is, without a doubt, illustrative of the way women are conceived. What is interesting, though, is that what's important to the local legislature is not just that the woman upholds her legally appointed duty, but, importantly, the way in which she came to be "a mother".

Jalisco's Criminal Code allows for the reduction of the penalty for having an abortion (i) if the mother did not have a bad reputation; (ii) she concealed her pregnancy; (iii) if such a pregnancy is the product of an illegitimate union; and (iv) if the abortion is done during the first five months of the pregnancy. One can only wonder, regarding the first exception, what exactly does it mean to have "a bad reputation". To begin with, public appraisal of a woman's conduct -that is, her sexual conduct- is relevant in determining how severe her punishment shall be. The penalty is then a punishment not only for the abortion *per se*, but a punishment of her perceived sexual conduct. Having an abortion represents the opportunity to sanction women for their past behavior.

Now, the second exception only highlights how this is also a matter of public morality. If the mother manages to conceal her pregnancy, the penalty is to be reduced. To what purpose and from whom must she conceal the pregnancy, it is not clear. Is it to conceal her dishonor? Is it to conceal her family's dishonor? The "father's" dishonor? Whatever the reasons, the state rewards the fact that she covers her pregnancy and, thus, covers her crime (abortion) also.

The third exception is interesting because it upholds, without a doubt, the woman's role as a mother, but also, as a wife. If the pregnancy is the result of an illegitimate union, the penalty is reduced. On the contrary, if it is the result of a legitimate union -it is not clear if this includes marriage and

common-law marriage or just the former- it is not to be reduced. The message is clear: it is worse if the woman aborts the child of her husband, than the child of any other man. It is worse if the woman aborts a future member of an already established family, than to abort an future member of an "illegitimate" father. This also means that, in the logic of the legislator, the "life" of an illegitimate "child" is less worthy of protection than that of a legitimate one (the distinction between *natural* children and legitimate children has long been abolished in Mexico, but can be seen here to still underlie abortion law in Jalisco).

In the case of Jalisco, if one of the exceptions is not present, the penalty of 4 months to 1 year in prison is to be doubled. If two or more are not present, it can triple.

The severity of the punishment may be softer if the woman shows contrition: instead of prison, the woman can petition (as long as she is not a prior offender) that she receive an "integral medical treatment". Such a treatment -to be provided by the state's health institution- has as a purpose "giving attention to the consequences generated by the abortion" and "reaffirming the value of maternity and strengthening the family". The stereotyping of gender cannot be more explicit.

Lastly, in Jalisco the exceptions to the punishment of abortion do not imply that it is not considered a criminal conduct. In this sense, it follows the logic set forth in the 2002 Supreme Court decision, in which it forces the woman to make a "very difficult decision: the heroic one of accepting to continue the pregnancy and the one of accepting the interruption of the pregnancy with the consequence of it being a crime as well as all others derived from it."<sup>29</sup>

## 2. Mexico City

Mexico City's regulation on abortion was similar to the one in Jalisco until 2000. In this sense, it was a regulation pinned on public morality and honor, conceiving women as subjected to their roles as mothers and wives. However, with the 2000, 2004 and 2007 reforms, the focus began to shift first to woman's health and eventually to women's autonomy.

In 2000, two very important changes were made regarding the conception of women: the possibility of reduced penalties was completely eliminated, and the term "mother" was changed to "woman". This implied that the law no longer concerned itself with a woman's honor or gendered duties (as an end in itself), but rather focused on the *health* of both the fetus and the pregnant woman. Furthermore, the 2000 reform broadened the exceptions to the punishment, including pregnancies that were the result of an involuntary

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<sup>29</sup> Now, in Jalisco the exceptions to punishment are imprudence on behalf of the pregnant woman; that the pregnancy is the result of rape; that the woman risks death or damage to her health in case she does not have an abortion.

artificial insemination or when the abortion was crucial to avoiding damage on the woman's health. With this, a muddled message was sent: *(i)* woman's autonomy became something to be considered in abortion regulation, for the highly unlikely case of artificial insemination without consent seems more a symbolic move than the response to an actual social problem (existing exceptions to rape should be read as protecting a woman's honor, not her autonomy, in the context of the pre-2000 abortion regulation); and *(ii)* a woman's health unequivocally came to be a fundamental concern of the law. The 2004 reform was not particularly exceptional in its practical consequences, but conceptually it was relevant in so far as it eliminated the criminal nature of the abortion in cases where the pregnancy was the result of rape or involuntary artificial insemination, or when the abortion was performed because there was risk to the woman's or fetus' health. It also made it mandatory for authorities to provide information to women, strengthening the capacity of women to decide (that is, woman's autonomy), and established that the interruption of pregnancy be provided by the health institutions, ensuring the exercise of the right and securing safety conditions.

With the 2007 reforms the shift was complete: the termination of a pregnancy before the twelfth week is a matter to be decided by women, regardless of their reasons to do it or what is deemed socially acceptable. With this, the value of women's autonomy and their right to decide over their bodies became, finally, the center-piece of abortion regulation in Mexico City.

## *Conclusions*

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As was shown in this article, abortion is a politically and legally relevant matter in Mexico right now. Over the last decade, abortion regulation in this country has gone from criminalizing abortion with few exceptions, to redefining it as the legal interruption of pregnancy after the twelfth week, guaranteed by the State (at least in Mexico City). It has gone from being a strict legislative matter, to part of the Supreme Court's agenda. And, slowly, it has also become a matter of women's autonomy: the right to decide the number and spacing of one's children, established in the Constitution since 1974, is starting to be used discursively, but also —and most importantly— legally. And, if everything goes well, five cases pending before the Supreme Court will push her to (begin) develop(ing) such right, and with it, the constitutional doctrine regarding abortion. If that's not to settle the issue just yet (as it probably won't), at least the discussion will change.



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