

# Step by Step: Mexico's Supreme Court Rulings on Abortion



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# Introduction



Mexico's Supreme Court of Justice (SCJN, for its Spanish initials) has played a fundamental role in the defense of reproductive rights in the country. Since 2007, it has issued rulings relevant to ensuring the recognition of access to abortion as a human rights matter. Over the last two decades, it has made steady progress on this issue, adapting its arguments to new human rights standards, to recent and more interesting questions raised by civil society organizations and other authorities, as well as to a political context in which the social demand for liberalizing the regulations restricting abortion is increasingly greater.

However, because of their very nature, the SCJN's rulings are not always accessible to the general public or to all those interested in the issue. Legal technicalities or even the Court's own structure and processes can be an obstacle that hinders each ruling's most important arguments from transcending the legal sphere and becoming concrete improvements in the lives of those they seek to protect, namely women and people with the capacity to gestate.

With this in mind, this document uses simple language to analyze the nine emblematic rulings<sup>1</sup> on abortion issued by the country's most important court between 2002 and 2021. A brief political and contextual analysis is included along with the rulings to highlight their relevance at the time they were issued as well as their impact. Each of these rulings, in its own way, has laid the foundations for abortion to be legally recognized today as a mandatory service in cases where the pregnant person's health is at risk, and it is also considered a right for victims of sexual violence and a cornerstone of the freedom of choice.

<sup>1</sup> There are more SCJN rulings on issues related to abortion. However, the rulings were chosen based on the significance of their substantive judgments and with a time limit set of 2021.

Despite this significant progress—and the fact that abortion is legally permitted—it is still defined as a crime in most of the country’s criminal codes, and access to public health services to perform this procedure is still very limited. However, today there is a Green Tide—a social movement in favor of legal, safe, and free abortion that continues to innovate in its strategies aimed at improving laws and facilitating access to information for those who decide to have an abortion.

As part of this movement, at GIRE we developed this document with the purpose of bringing the most relevant content of these nine rulings to the general public, as a tool to support the outreach, advocacy, and accompaniment processes that are already carried out by activists, scholars, legislators, and all those interested in ensuring that women and persons with the capacity to gestate in Mexico are able to exercise their rights.

## Chapter 1.

# What You Need to Know to Understand the Supreme Court's Rulings

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How many times have you heard or read: “The Supreme Court stated that...,” “The Supreme Court granted a constitutional protection (*amparo*) to...,” or “The Supreme Court declared the invalidity of article...”? How many of those times have you clearly understood what is being communicated? In this first chapter, we will explain what the rulings of the Supreme Court of Justice of the Nation are. (Throughout the text, we will refer to it as the SCJN, the Court, or the Supreme Court.)

### What is the Supreme Court of Justice of the Nation and Why Are Its Rulings Important?

To position the Court and its work on the abortion issue, we must first remember that the Mexican government is divided into three branches—each with different functions—that balance its responsibilities before its citizens: the legislative branch, the executive branch, and the judicial branch.<sup>2</sup> They exist at both the federal and state levels (the latter are also called local levels).

### The Legislative Branch

Who are its members? Legislators. At the federal level, they are the people who work in the Chamber of Deputies and the Chamber of Senators, which together constitute the Congress of the Union. However, at the local level, each state's congress is only comprised of deputies.

<sup>2</sup> There are also other equally important government offices that are not part of any of these branches; they are formally known as autonomous constitutional bodies. Examples of these are the human rights commissions and the prosecutors' offices.

What does it do? It creates, modifies, or removes regulations. By regulations we mean any written rule contained in the Political Constitution of the United Mexican States (also known as the Federal Constitution) or in a law (such as criminal codes). These rules are typically referred to as articles. General laws (such as the General Health Law) and federal laws (such as the Federal Criminal Code) can only be modified by the Congress of the Union.<sup>3</sup> Each state's constitutions and laws can only be altered by its own state congress. However, changes to the regulations, made by any of the congresses, must never be in conflict with what is stated in the Federal Constitution.

What does this branch do in relation to the abortion issue? Each state's criminal code as well as the Federal Criminal Code contain rules that prohibit or allow abortion under certain circumstances. When we celebrate the decriminalization of abortion in a state, what we are celebrating is that the majority of legislators in its congress voted in favor of changing one or more articles of the criminal code that prohibited abortion, thus giving people the opportunity to decide to have an abortion—typically during the first weeks of pregnancy.<sup>4</sup>

## The Executive Branch

Who are its members? At the federal level, the executive branch is headed by the President of Mexico, while the state levels are led by the governors of the country's 31 states along with Mexico City's head of government. However, when we speak of the executive branch, we also refer to the teams that work with the president or the governors, known as *secretarias*

<sup>3</sup> An exception to this is when amendments to the Federal Constitution are proposed, because, although it is a general law, the state congresses must also vote on it.

<sup>4</sup> Do you want to know what each criminal code contains? You can find them on GIRE's website: <https://gire.org.mx/plataforma/causales-de-aborto-en-codigos-penales/>

(for example, the Secretariat of Health, the Secretariat of Public Security or the Secretariat of the Interior).

What does it do? The executive branch has an important role when laws are modified, as it is responsible for publishing them in the official journals<sup>5</sup> so they will be enforced once approved by the legislators' votes. It is also in charge of ensuring that the articles created or modified by the legislative branch are complied with and not left as words without action.

The executive branch drafts public policies that allow the regulations to be implemented; in other words, it makes work plans that involve one or more government offices. Public policies include a diagnosis of the right that people want to make a reality and detail the goals to be met as well as the activities that must be carried out to achieve them. Moreover, there is an explanation of how the plan will be monitored to ensure that it works, and the offices that will be responsible for carrying out each of the activities are listed. The public policies issued by the executive branch, as well as the work done by the legislative branch, should never go against the Federal Constitution's provisions.

What does this branch do in relation to the abortion issue? Safe abortion<sup>6</sup> is one of the objectives of the Specific Action Program for Sexual and Reproductive Health 2020–2024, which is a public policy on reproductive health developed by the Federal Secretariat of Health.<sup>7</sup> This program states that safe abortion services must be provided for the circumstances allowed in each state. The executive branch also creates and applies technical

<sup>5</sup> Newspapers, gazettes, or official journals are the means of communication used by a government to publish laws and regulations when they are created or modified.

<sup>6</sup> A safe abortion is one that is performed according to the method recommended by the World Health Organization (WHO), that is appropriate for the gestational period, and performed by a knowledgeable professional. WHO, *Guidelines on abortion care: executive summary*, 2022. Available at: <https://www.who.int/es/publications/i/item/9789240045163>

<sup>7</sup> It can be consulted here: [https://www.gob.mx/cms/uploads/attachment/file/644374/PAE\\_SSR\\_24\\_5\\_21.pdf](https://www.gob.mx/cms/uploads/attachment/file/644374/PAE_SSR_24_5_21.pdf)

standards, such as the Official Mexican Standard (NOM) 046-SSA2-005 on *Sexual and Family Violence against Women. Criteria for Prevention and Care*, which states that health institutions are obligated to guarantee access to abortion services to every girl, woman, and person with the capacity to gestate who has been impregnated as the result of sexual assault.

### The Judicial Branch

Who are its members?<sup>8</sup> Judges, magistrates, and ministers. They are named according to which office they work in. At the local level, the judicial branch's highest office is usually called the Supreme Court of Justice or Supreme Tribunal, and it is made up of magistrates. At the federal level, the Supreme Court of Justice of the Nation is the office with the highest authority; it is made up of eleven ministers who, when working together, are called the Plenary. One of them is the Supreme Court's president, who serves for four years; the other ten ministers are divided into two groups of five, known as the First Chamber and the Second Chamber. Despite being called first and second, the work they do is equally important.

What does it do? It delivers justice, mainly by enforcing rules in order to settle disputes. Its final decisions are written down in rulings. Depending on the type of conflict at stake, the choice of the judge responsible for dispensing justice will vary. Some conflicts that are related to the violation of our human rights involve an authority and one or more people. It may also be the case that two or more authorities violate the human rights of one or more people. In such cases, only the Plenary can resolve the conflict.

<sup>8</sup> There are other authorities of the federal judicial branch that are not discussed here because they are not as relevant to the issue of abortion. Some examples are the Council of the Federal Judiciary and the Electoral Tribunal of the Federal Judiciary. The former is responsible for organizing the entire federal judicial branch, while the Electoral Tribunal is responsible for settling disputes related to elections.

So why is the Court's decision important? The Supreme Court also determines if the way an authority acts or if a regulation's content goes against the human rights enshrined in the Federal Constitution. Moreover, in Mexico, all judicial authorities are bound to obey its decisions. That is, when judges—both local and federal—must rule on conflicts similar to cases already decided by the Court, they must do so in the same manner in which the Court ruled. Likewise, congresses should modify any laws that are contrary to the Court's rulings, and the executive branch cannot enforce regulations if the Court has stated that they are contrary to the Constitution.<sup>9</sup>



<sup>9</sup> The SCJN may also intervene to settle conflicts between the different branches regarding the enforcement of laws or the limit of each branch's authority (this is called a "constitutional controversy").



What does this branch do in relation to the abortion issue? In Mexico, the Court has issued several rulings related to abortion, which are discussed in detail below. Some refer to cases in which women have denounced health authorities for denying them access to a safe abortion. Others are related to government offices claiming that other government agencies have acted against human rights or have made decisions that went against the Constitution. What the rulings have in common is the fact that, in all of them, the Court has been in favor of the right to reproductive autonomy; that is, the ability of individuals to make free and informed decisions regarding their own reproduction.



## Legal Terms

What concepts do we need to know in order to understand the court's rulings on the abortion issue?

- ✧ **Human rights and reproductive rights.** These are rights that all people have just because they are human beings. Human rights are enshrined in the Constitution and in international treaties, but it is up to the authorities to ensure that they are upheld. Reproductive rights are a group of human rights concerning reproduction. The human right to information, for example, is also a reproductive right when it relates to access to information on how to prevent, manage, or terminate a pregnancy.
- ✧ **International treaties.** These are documents in which several countries state that the same human rights must be guaranteed in all their territories, and then they commit themselves accordingly. Some of them are called conventions or covenants. These documents are generally accompanied by the creation of mechanisms (known as international human rights bodies) to ensure that all parties comply with their commitments. For example, in 1978, several Latin American countries committed themselves to respect and guarantee a series of human rights, which they set forth in the American Convention on Human Rights. This same convention created an Inter-American Commission on Human Rights and an Inter-American Court of Human Rights to monitor compliance with the commitments that were agreed on. Mexico joined this convention in 1981.
- ✧ **Constitutional protection (*amparo* trial).** As its name implies, in Mexico, an *amparo* is a legal action that allows any person or group of persons to file a claim when one or more of their human rights are violated by one or more authorities. For example, if someone is denied an abortion, they can demand

it through an *amparo*. Sometimes, these proceedings are resolved by one of the Supreme Court's Chambers.

- ✧ **Action of Unconstitutionality.** This is a legal proceeding in Mexico that also serves to make complaints on issues related to human rights. It is different from the *amparo* because the action of unconstitutionality can only occur between authorities. In other words, it cannot be brought by an individual and can only be filed against changes in the laws or regulations carried out by an authority.<sup>10</sup> Actions of unconstitutionality will always be resolved by the Supreme Court's Plenary, and it can do so in two ways: By stating that what a regulation says is in accordance with the Constitution or by saying that it goes against it. At least eight ministers must vote that a regulation is contrary to the Constitution in order for the Supreme Court to make that decision. An example of an action of unconstitutionality would be one brought by the National Human Rights Commission against a state when it believes that its local congress passed a law that is contrary to human rights.

<sup>10</sup> These authorities are defined in the Federal Constitution and may be as follows: If it is a change in a general or federal law, it is the equivalent of 33 % of the deputies of the Chamber of Deputies or the Senate; when it is about federal or local rules, it is the federal executive power, through the legal counsel; when it is about rules that were changed in a state, it is the equivalent of 33 % of deputies or deputies of a local congress; if it is about a reform to an electoral law, it is the political parties registered in the INE; when it is a federal or local law that violates human rights, it is the National Human Rights Commission or the local human rights commissions if it is about any law in their state that violates human rights; when it is a violation of the right to access to public information or to the protection of personal data, it is the agencies that work for the right to information, at the federal or local level (depending on the type of regulation they denounce); and if it is a regulation related to criminal matters, it is the Attorney General of the Republic or the local prosecutors' offices (depending on whether it is a federal or local regulation).

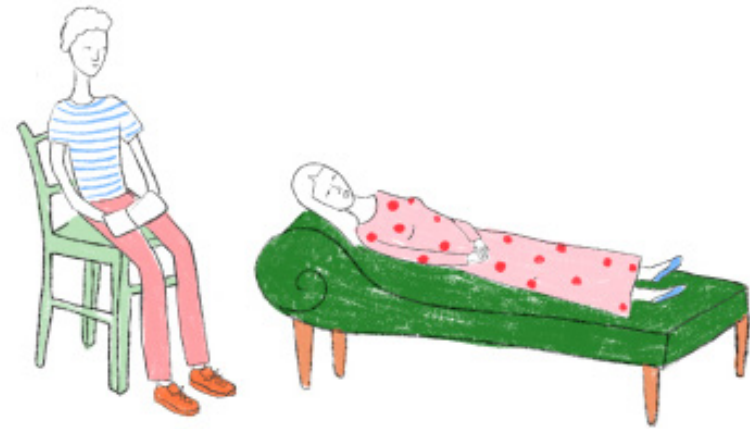
- ✧ **Rulings.** Rulings are also known as resolutions or judgments. It is a document containing a judge's decision to settle a dispute. Depending on the legal process that is involved, some rulings may be appealed; this means that a request is made for a different judge, of a higher level, to verify if the decision was correct. However, since the Supreme Court is the highest authority in the federal judicial branch, its rulings cannot be appealed. It is important to know that rulings must always explain the effects they will have, i.e., to specify to those involved what will change as a result of their decision. For example, if in resolving an action of unconstitutionality, eight of the eleven ministers of the Court state that a regulation is contrary to the Constitution, the effect of their ruling will be to invalidate the regulation. This means that it will no longer legally exist and, therefore, it can no longer be enforced.
- ✧ **Comprehensive reparation.** Comprehensive reparation is a human right of all those who are victims or survivors of a human rights violation. It comprises five types of measures and the authorities must guarantee their compliance, always with the victims' consent:
  - **Restitution.** Whenever possible, it should restore the victims to the situation that existed before the violation of their human rights. For example, if someone is fitted with a contraceptive method—such as an intrauterine device (IUD)—without their consent, they have the right to have it removed.
  - **Rehabilitation.** These are measures to address any physical or psychological harm that a person has suffered as a result of a human rights violation. For example, providing access to appropriate psychological therapy.

- **Compensation.** It is the payment of the material and immaterial damages<sup>11</sup> suffered by a person due to the events that breached their human rights. For example, they must be paid the total wages they were not paid when their rights were violated and they lost their job or the total amount of money spent during their pursuit of justice.
- **Satisfaction.** These are measures that seek to restore the victim's honor. For example, renaming a street or making a monument as a tribute or organizing an event to offer a public apology.
- **Guarantees of non-repetition.** These are measures aimed at ensuring that these human rights violations do not affect the victim or any other person in the future. For example, changing a regulation when it is unjust.

✧ **Criminal law.** Law can be divided into many branches or areas depending on the kind of issues it regulates. For example, family law, among other matters, deals with the legal relationships within marriage and between members of nuclear families. Meanwhile, civil law deals, among other things, with regulations related to the sale or lease of property. Criminal law, in turn, establishes the rules that determine which conducts are crimes, i.e., those that a government may prosecute, investigate, and punish—most crimes are described in the criminal codes (of which there are 33 in Mexico: one federal and one for each state).

<sup>11</sup> Material damages are those that can be quantified in money; immaterial damages include the suffering, anguish, and psychological and emotional damage suffered by a person who has been the victim of human rights violations.

✧ **Principle of legal certainty in criminal matters.** This refers to the fact that legislators must describe what a crime is with great care and detail so that those who apply the law have enough clarity when deciding whether a person should be punished or not. This is why descriptions of crimes are usually very odd, because instead of saying “whoever steals will be imprisoned for X years,” it says, for example, “whoever takes possession of a thing belonging to someone else, without the right or consent of the owner, will be imprisoned for X years.”



✧ **Grounds for abortion.** In Mexico, abortion is still considered a crime and is regulated in the existing 33 criminal codes; however, in all these codes, there are circumstances in which it is not considered a crime or is not punishable. For example, when the pregnancy is the result of rape, abortion is permitted throughout Mexico; by contrast, not all states allow abortion when the pregnant person's economic conditions are precarious. These circumstances are called grounds.

- ✧ **Initiative.** This is the name of the document containing a proposal to create, eliminate, or modify a law. Initiatives may be submitted by any legislator or by the head of the executive branch and, in some cases, also by groups of citizens.
- ✧ **Gender-sensitive judging.**<sup>12</sup> This refers to the judges' obligation to read and understand a regulation with consideration for the different ways it affects those who demand justice. In other words, they must recognize that there are inequalities between men and women, and therefore the problems they experience, as well as the legal provisions and institutional practices, affect them differently.
- ✧ **Conscientious objection.** This is an exception to the obligation to fulfill a duty recognized by law, motivated by moral, religious, and/or other convictions. In order to determine its limits, it is important to review the standards developed by the Supreme Court in the Action of Unconstitutionality 54/2018.<sup>13</sup>

<sup>12</sup> If you want to know more about this obligation you can refer to the *Protocolo para juzgar con perspectiva de género* [Protocol for Judging with a Gender Perspective], published in 2020 by the General Directorate of Human Rights of the Supreme Court of Justice of the Nation, pp. 119–133. Available at: <https://is.gd/Two75w>

<sup>13</sup> It can be consulted here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=238286>

## Chapter 2.

# The First Supreme Court Rulings on Abortion

### Political and Social Context

Between 2000 and 2010, the Supreme Court resolved two important cases related to the issue of abortion in Mexico. But what was happening in the country during that period?

Until 2007, abortion by choice was not permitted in any state in the country. The criminal codes had been practically unchanged since 1871, which was when the famous “Juarez Code” was drafted (later modified in 1929 and 1931).<sup>14</sup> Of course, since then, there were women advocates, such as Ofelia Domínguez Navarro,<sup>15</sup> who demanded that abortion be removed from the criminal codes.<sup>16</sup>

Between 1871 and 1931, the only major progress was allowing abortion when a pregnancy was the result of rape. However, even today, abortion is difficult to access, as demonstrated by the case of Paulina, in Baja California, who was 13 years old when she was impregnated as a result of rape and was denied an abortion by state authorities.<sup>17</sup>

Moreover, in 2000, the National Action Party (PAN, for its Spanish initials) won the country’s presidency for the first time in history. This was not good news for the pro-choice movement, because soon afterward, in 2002, the political party declared itself against the liberalization of

<sup>14</sup> If you want to know more about this process, you can refer to this book: Lucía Núñez, *El género en la ley penal* [Gender in Criminal Law], CIEG, Mexico, 2018, pp. 135–154.

<sup>15</sup> Ofelia Domínguez Navarro was a Cuban feminist, teacher, and lawyer who, after being exiled from Cuba, lived in Mexico. In 1936, during the Convention to Unify Penal Law, she presented her text “El aborto por causas sociales y económicas” [Abortion for social and economic causes].

<sup>16</sup> Marta Lamas, *La interrupción legal del embarazo. El caso de la Ciudad de México* [Legal Termination of Pregnancy. The Case of Mexico City], Fondo de Cultura Económica, Mexico, 2017, p. 12.

<sup>17</sup> If you want to know more about Paulina’s case, you can read: GIRE, *Paulina, justicia por la vía internacional* [Paulina, Justice through International Proceedings], México, 2008. Available at: [https://gire.org.mx/wp-content/uploads/2016/07/PaulinaJusticia\\_TD6.pdf](https://gire.org.mx/wp-content/uploads/2016/07/PaulinaJusticia_TD6.pdf)

abortion-related laws.<sup>18</sup> Meanwhile, in Mexico City—then called the Federal District—the Democratic Revolution Party (PRD, for its Spanish initials), which was in favor of abortion, was in power.

This context—in which the capital's government and the federal government held conflicting positions—encouraged several legislators in the Federal District to move forward with the abortion issue, since, in addition to being a strategy that allowed them to reaffirm that they were working in favor of women's human rights, it also set them apart from PAN, the conservative party.<sup>19</sup> Legislators did not decide to do this work overnight, but instead listened to the feminist movement, which had been demanding that the criminal code be changed to liberalize abortion laws for several years.

Accordingly, between 2000 and 2007, the Federal District's criminal code was modified several times.<sup>20</sup> Just as the Federal District reaffirmed its pro-choice position, the federal government wanted to put a halt to these advances in order to maintain its supposedly pro-life stance. And this led to the first two Supreme Court rulings on the abortion issue.

<sup>18</sup> You can find it in *Proyección de Principios de Doctrina del Partido Acción* [National Projection of the National Action Party's Doctrine Principles], approved at the xlv National Convention, 2002, here: <https://almacenamientopan.blob.core.windows.net/pdfs/documentos/toqfHtQI8xfmvAAi-JNc5U6xqTHiSO.pdf>

<sup>19</sup> Marta Lamas, "La batalla por el aborto" [The Battle for Abortion], in *Cuerpo, sexo y política* [Body, Sex, and Politics], Ed. Océano, Mexico, 2013, p. 110.

<sup>20</sup> On January 27, 2004, the local congress, which at that time was known as the Legislative Assembly of the Federal District, amended the first paragraph of Article 148 of the local criminal code, so that the grounds for non-punishability of the crime of abortion were now excluded from criminal liability; in other words, previously they were not punishable, but from then on, in addition, they were no longer considered a crime. Articles 16 bis 6 and 16 bis 7 were also added to the Federal District's Health Law, which established, on the one hand, the obligation of public health institutions to provide the service of legal termination of pregnancy in the circumstances contemplated by the criminal code and, on the other hand, the regulation of the conscientious objection of health personnel (very similar to how it is worded in the current legislation). GIRE, *El camino hacia la justicia reproductiva: Una década de avances y pendientes* [The Path to Reproductive Justice: A Decade of Progress and Pending Matters], 2021, p. 30. Available at: <https://unadecadajusticiareproductiva.gire.org.mx/>





### Action of Unconstitutionality 10/2000. “Robles Law”

On August 24, 2000, the Legislative Assembly of the Federal District (ALDF, for its Spanish initials) approved changes regarding abortion in the Federal District’s criminal code based on an initiative submitted by the head of government, Rosario Robles (which is why it’s known as the “Robles Law”).

The changes consisted of adding two new grounds<sup>21</sup> for allowing abortion: When the health of the pregnant woman is at risk and when the product of conception presents congenital or genetic alterations. The text, which some of the legislators did not agree with, was as follows:

Article 334. No sanction shall be applied: [...].

III. When, in the opinion of two medical specialists, there is sufficient reason to diagnose that the product presents genetic or congenital alterations that may result in physical or mental damage, to the point that it may endanger the survival of the product, provided that the pregnant woman’s consent is obtained.

[...]

In the cases contemplated in sections I, II, and III, doctors shall have the obligation to provide the pregnant woman with objective, truthful, sufficient, and timely information on the procedures, risks, consequences, and effects, as well as on the existing support and alternatives, so that the pregnant woman can make her decision in a free, informed, and responsible manner.

<sup>21</sup> What are grounds? You can find it in Chapter 1.

As discussed in the previous chapter, an action of unconstitutionality is a lawsuit that begins because an authority considers that a new or amended law is contrary to human rights. In this case, the action of unconstitutionality was brought by a group of 23 legislators—33 percent of the Legislative Assembly, i.e., the minimum required to file the lawsuit—who had not voted in favor of this change in the law. They argued that the right to life and, specifically, the right to life of “unborn children” was being violated.

To decide the case,<sup>22</sup> the Supreme Court reviewed our country’s Constitution to see what it said about the right to life. Curiously, it did not find any article stating that “all persons have the right to life” or anything similar. However, that does not mean we do not have this right.

The Court concluded that, although it is not expressly stated in the Constitution, we do have a right to life, which can be inferred from its Article 14, that says that:

No person may be deprived of life, liberty, property, possessions, or rights, except by means of a trial before the previously established courts, in which the essential formalities of the procedure are complied with and in accordance with the laws issued prior to the act.

Then, this Court recognized that the right allegedly being violated was that of “every manifestation of human life, regardless of the biological process it is in.” It also said that there is an obligation to protect the product of conception, as indicated, for example, in section xv of paragraph A of Article 123 of the Constitution:

<sup>22</sup> Do you want to read the ruling? It is available here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=37867>

xv. In accordance with the nature of their business, employers shall be obliged to observe the legal precepts on hygiene and safety in their establishment's facilities and to adopt adequate measures to prevent accidents in the use of machines, instruments, and work materials, as well as to organize the latter in such a way as to provide the greatest guarantee for the health and life of the workers, and of the product of conception, in the case of pregnant women. To this effect, the laws shall contain the appropriate sanctions in each case.

So, if there is a right to life and an obligation to protect the fetus, how could what had been approved be considered constitutional?

The Court's ruling explained that, with the changes in the Federal District's criminal code, the right to life was not being attacked, since it was not a license to have an abortion. In other words, the article was only going to regulate a very specific circumstance in which, if all the requirements were met, the person who aborted would not be punished. These requirements include: approval by two medical specialists; that the fetus has genetic alterations; that these alterations could result in physical or mental damage that could endanger the life of the fetus; that the pregnant woman has given her consent; and that the woman has been given all the information about risks, support, and alternatives.

Unfortunately, in this case, the Supreme Court said nothing about women's right to health or any other right that could be violated due to not allowing abortion, even though the ALDF did raise the issue when it argued the reasons for approving this change in the criminal code. In addition to the fact that the Court pronounced itself in favor of moving forward on abortion issues (at least slightly), the following recognition was also positive:

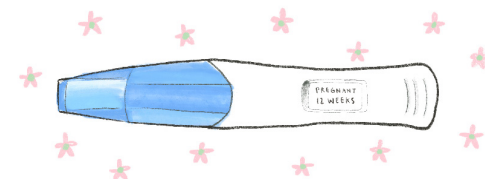
[...] it must be considered that the situation described by the precept places a pregnant woman in a situation involving a very difficult decision: that of heroically accepting to continue with the pregnancy and that of accepting the termination of the pregnancy, considering that it is a crime and the consequences that may follow.

The ruling was especially important because it was the first time that the issue of abortion was discussed and, even if it was not based on the most progressive arguments, it permitted non-punishability for the practice of abortion in two circumstances that are currently in force in many criminal codes. In order to annul the change in the law, it would have been necessary for at least eight of the eleven ministers to say that it was against the Constitution, but only four did so, and the other seven supported not punishing women who have abortions when the product shows genetic alterations.

This first decision also influenced the following ruling, in which the SCJN resumed the debate between life and abortion and took it even further.

### Action of Unconstitutionality 146/2007 and its joint proceedings 147/2007. Decriminalization in the Federal District

On April 26, 2007, an amendment to the abortion regulation was approved in the Federal District to permit women to have an abortion, as long as it occurs during the first twelve weeks of gestation. The following articles of the criminal code were changed:



ARTICLE 144. Abortion is the termination of pregnancy after the twelfth week of gestation. For the purposes of this code, pregnancy is the part of the human reproductive process that begins with the implantation of the embryo in the endometrium.

ARTICLE 145. Three to six months imprisonment or 100 to 300 days of community service shall be imposed on a woman who voluntarily performs an abortion or consents to another person causing her to have an abortion after twelve weeks of pregnancy. In this case, the crime of abortion will only be punished when it has been consummated. Whoever causes a woman to have an abortion, with her consent, shall be sentenced to one to three years imprisonment.

ARTICLE 146. Forced abortion is the termination of a pregnancy, at any time, without the consent of the pregnant woman. For the purposes of this article, anyone who causes a woman to have an abortion by any means without her consent shall be sentenced to five to eight years' imprisonment. If physical or moral violence is involved, a prison term of eight to ten years shall be imposed.

ARTICLE 147. If the abortion or forced abortion is caused by a surgeon, midwife, nurse, or practitioner—in addition to the penalties applicable under this chapter—they shall be suspended from the exercise of their profession or trade for a period equal to the term of imprisonment imposed.

However, as previously mentioned, many people—in the federal government, for example—did not agree with the changes. Therefore, the former Attorney General's Office (PGR, for its Spanish initials) and the National Human Rights Commission (CNDH, for its Spanish initials) filed actions

of unconstitutionality against them.<sup>23</sup> Because they were filed as separate lawsuits, the Court assigned them numbers 146 and 147; however, they were resolved together, as indicated by the title of this section.

The arguments of both authorities on their stance against the decriminalization of voluntary abortion during the first twelve weeks of gestation were as follows:

- ✿ It affects the right to life of the fetus.
- ✿ It affects the right to equal treatment and non-discrimination of men in relation to procreation and paternity; and of adolescents and girls who have abortions.
- ✿ There is an encroachment of powers, because it is not up to the Federal District's legislators to regulate a health issue or to define when pregnancy begins; these are federal matters.
- ✿ The amended text does not comply with some of the criminal law principles.

Solving this issue was not an easy task for the members of the Supreme Court. This case in 2008 was the first time in the whole Latin American region that the highest judicial authority of a country was required to decide whether abortion should no longer be considered a crime during the first twelve weeks of gestation.

For this reason, the Court had to resort to numerous information sources. It requested data on abortions and related maternal deaths from the federal and local health secretariats and the National

<sup>23</sup> At that time, the PGR was part of the executive branch, i.e., it depended on the federal government with the PAN party in power (headed by Eduardo Medina Mora). In 2018, it became an autonomous institution—not a part of any of the three branches of government—and changed its name to Fiscalía General de la República (Attorney General of the Republic). Meanwhile, the CNDH was already an autonomous institution, headed by José Luis Soberanes. Some of the people who were part of the CNDH's Consultative Council expressed that they did not agree with the actions of José Luis Soberanes when questioning the decriminalization of abortion in the Federal District.

Population Council. It requested information from the public prosecutor's offices and the judiciaries on cases in which women were being prosecuted or tried for having had an abortion; and it also requested further reports on the subject from experts. In addition, the Court convened six public hearings to listen to stakeholders' opinions, including authorities, activists, and politicians, both for and against the issue.<sup>24</sup>

Finally, after all these consultations, the Court decided that the decriminalization of abortion in the first twelve weeks of gestation was not contrary to the Constitution.<sup>25</sup> These were the arguments that allowed it to reach this conclusion:

#### ✧ On the right to life of the fetus

Once again, the Supreme Court reviewed what the Constitution said about the right to life, but this time it also reviewed international human rights treaties. Thus, it determined that decriminalizing abortion in Mexico City during the first twelve weeks of pregnancy did not go against the human right to life.

First, it noted that life is not an absolute human right. Unlike what it had ruled in 2000, this time, it did not say there was a right to life that was independent of its current stage. Moreover, it warned that there was not a definition of when life begins in the Constitution or in any international treaty, not even in any interpretation of those documents, and much less a recognition that life had to be protected from the moment of conception.

<sup>24</sup> You can learn more about this process at GIRE, *Constitucionalidad de la ley sobre aborto en la Ciudad de México* [Constitutionality of the Law on Abortion in Mexico City], 2009. Available in Spanish at: [https://gire.org.mx/wp-content/uploads/2014/07/ConstAbortoCiudad\\_TD8.pdf](https://gire.org.mx/wp-content/uploads/2014/07/ConstAbortoCiudad_TD8.pdf)

<sup>25</sup> Do you want to read this sentence directly in Spanish? It's available here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=91638>

The only document that might have led to doubt in arriving at that conclusion was the American Convention on Human Rights, which states the following in its Article 4.1:

Every person has the right to have their life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of their life.

However, when a country chooses to sign an international treaty, it may opt to say that there is something it does not agree with and, consequently, does not commit to abide by. This is called a reservation or an interpretative declaration. In this case, when Mexican authorities decided to be part of the American Convention, they made an interpretative declaration stating that our country was not committed to protecting life from the moment of conception and that the words “in general”—included in Article 4.1—allowed them to set limits on the right to life, for example, by authorizing abortion in some cases. Therefore, the Court established that the legislators of each state in the country were free to decide how to rule on this right.

Moreover, it acknowledged that one of the principles of criminal law is that other ways of solving a public problem—such as maternal deaths caused by clandestine abortions—should be sought before creating new crimes or increasing their punishments; in Latin this principle is called *ultima ratio*. Even when abortion was a crime, women continued to resort to it in conditions that were not always safe and healthy. Thus, if the outright prohibition of abortion had not served to protect prenatal life or the gestation process up to that point, it was valid for legislators to decide not to use criminal law as the

first option to eradicate the potential risks faced by women with unwanted pregnancies.

The ministers ruled that, while there was no obligation to decriminalize abortion, decriminalizing it was a valid option. While there is a right to life, it does not have to be from conception, and while unborn life must be protected in some way, criminal law is not the only way to do so.

✧ **On the right to equal treatment and non-discrimination of men in relation to procreation and paternity and of adolescents and girls who have abortions**

How many times have we heard people raise the question: “Where do the father’s rights stand in a case of abortion?” This was one of the issues addressed by the Court in this ruling. It pointed out that, when it comes to pregnancy, it is not possible to speak of discrimination against men because of their sex, as reproduction is not experienced in all bodies in the same way. Carrying an unwanted pregnancy to term has permanent and profound consequences for women and, for this reason, it should be up to them to decide.

The authorities who were against the decriminalization of abortion also said that it was a mistake not to create specific rules for girls and adolescents who seek abortions. Yet, the Court answered that the rules on informed consent are the same for adults as for those under 18 years of age and that this was already covered by both the Criminal Code for the Federal District and the Federal District’s Health Law.

✧ **On the alleged encroachment of powers**

Those who promoted this action of unconstitutionality also said that all matters related to health must be regulated at the

federal level, that is, by the Congress of the Union and the Federal Secretariat of Health—not by the ALDF or the entity’s Secretariat of Health. However, the Supreme Court proved otherwise. The General Health Law itself states that matters related to reproductive health—such as abortion—must be dealt with by both federal and local authorities. Therefore, the ALDF had not acted unconstitutionally.

They also argued that the criminal code could not include a definition of pregnancy contrary to the one that already existed in the General Health Law Regulations on Health Research. The Court answered that no prohibition was in place regarding the definition of abortion in a law that did not deal with health matters and that, as its name suggests, the definition of pregnancy in these regulations only applied to research. Likewise, the definition of pregnancy in the Federal District’s criminal code applied only to the crime of abortion.

✧ **On the claim that the amended text did not comply with some criminal law principles**

In the case of abortion in the Federal District, the authorities that brought the action of unconstitutionality claimed there was a failure to comply with the principle of legal certainty<sup>26</sup> because the text did not establish how to count the twelve weeks of gestation, and there was no way of knowing the exact number of weeks of a pregnancy intended to be terminated. The Court answered that by including the definition of pregnancy, this certainty was achieved and that, if there was any doubt, it should be resolved by those in charge of prosecuting crimes and judging cases.

<sup>26</sup> Do you want to know what the principle of legal certainty is in the context of criminal law? You can read about it in Chapter 1.

Finally, the CNDH said that the reform violated the principle of proportional punishment, arguing that punishing a woman who performs an abortion or allows another person to perform an abortion for her with three to six months in prison was not enough. According to this principle, there must be a logical relationship between the conduct that is considered a crime and its punishment, so the more serious it is, the greater the punishment should be. However, the Supreme Court ruled that the existing punishment was logical and proportional.

### What were the effects of these rulings in Mexico?

From a legal point of view, the main impact of the rulings in the Federal District was that they shielded the decriminalization of abortion as well as the grounds regarding health risks for the pregnant person and congenital or genetic alterations in the product. By stating that these changes were valid and constitutional, a message was sent to all the legislators in the country so that, if they decided, they could change their criminal codes to reflect those of the Federal District, knowing there would be no legal strategy aimed at reversing this modification.

Moreover, the second ruling also had an international impact. The arguments developed by the Court in Article 4.1 of the American Convention on Human Rights were taken up by the Inter-American Court of Human Rights to resolve another case<sup>27</sup> in which the Costa Rican authorities claimed that an embryo has the same right to life as a person. The Inter-American Court's ruling, in turn, has been particularly important for other countries' authorities to move forward in favor of abortion.

<sup>27</sup> The case is known as “In vitro fertilization” or “Artavia Murillo and others vs. Costa Rica”. We will talk about this case in the coming chapters.

The rulings also triggered backlash. Many states amended their constitutions to provide for the protection of life from the moment of conception. Since the Supreme Court had said that each state could freely legislate on the right to life and abortion, many conservatives pushed for changes in their local laws to include the protection of life from the moment of conception and thus prevent the liberalization of abortion in their states. Although these local-level changes did not legally prevent the reform of criminal codes to liberalize abortion, and they did not prevent abortions under the existing grounds, they did create a great deal of confusion.

Furthermore, these rulings did not say much about women's reproductive rights. In fact, at that time, people who are not women but who do have the capacity to become pregnant were not even considered. But let's remember that this was back in 2000 and 2007! Resolving the validity of decriminalizing abortion in the first twelve weeks of gestation was of great historical importance. Now, more than a decade after these discussions, there is no denying that they were crucial for a total of 247,410 safe abortions<sup>28</sup> to be performed between April 2007 and March 31, 2022, and for abortion to be legal in ten states as of 2022.



<sup>28</sup> This figure was reported by Mexico City's Legal Termination of Pregnancy Program, available here: [http://ile.salud.cdmx.gob.mx/wp-content/uploads/WEB\\_11042022.pdf](http://ile.salud.cdmx.gob.mx/wp-content/uploads/WEB_11042022.pdf)



## Chapter 3.

# The First Supreme Court Rulings on Cases of Women Who Were Denied an Abortion

### Political and Social Context

After the first rulings on abortion, it was not until 2018 and 2019 that progress was made again at the Supreme Court. Although abortion on the grounds of rape had been permitted across the country since 1931, in practice, it was still difficult to access the service. Paulina's case—which we mentioned in the previous chapter—put abortion on the public agenda and, after pushing for change for some time, brought the pro-choice movement to the forefront.

At the time of Paulina's case, there was an official Mexican regulation (NOM) in place called NOM 90-SSA1-1999 that regulated medical care in cases of domestic violence. It established rules for the country's health personnel so they would know what to do when attending to victims of this type of violence. As a consequence of this case, the regulation was replaced by NOM 046-SSA2-2005 regarding the criteria for the prevention and care of sexual and family violence and violence against women (NOM 046). This new regulation—also addressed to health personnel—considered how to act in the face of violence and confirmed that rape-related pregnancies could be terminated in public hospitals. This required authorization from a competent authority and, in the case of minors under 18 years of age, the consent of their parents or guardians.

Although NOM 046 was a step forward, these requirements still prevented women, adolescents, and girls from having an abortion in health facilities. Very often, health personnel denied services and created obstacles to performing abortions; in addition, they required permission from a judge or prosecutor.<sup>29</sup>

<sup>29</sup> For these cases, you can refer to GIRE's report *Violencia sin interrupción* [Uninterrupted Violence], 2017, here: [https://gire.org.mx/wp-content/uploads/2019/11/violencia\\_sin\\_interrupcion.pdf](https://gire.org.mx/wp-content/uploads/2019/11/violencia_sin_interrupcion.pdf)

Some local criminal codes limited the practice of abortion in rape-related cases to the first trimester of pregnancy (some still do today), further restricting access. Meanwhile, both the public prosecutor's office and the judges were slow in granting permission, making it increasingly difficult for girls, adolescents, women, and people with the capacity to gestate to have abortions.



In 2013, the General Law on Victims was created, which establishes the rights of persons who have been victims of crimes (i.e., of behaviors defined as such in the criminal codes) or of human rights violations on the national level, as well as the authorities' obligations when dealing with them. In case of pregnancy, this law specifies that victims of sexual violence have the right to an abortion and that, furthermore, they must be trusted without any suspicion that they are lying.

So, if both the Federal Criminal Code and the 32 local criminal codes already allowed abortion in the case of rape, and there was also a General Law on Victims that obliged all authorities in the country to do the same, why did NOM 046 continue to include the same requirements? This lack of consistency was reported by several international human rights organizations to inform the Mexican State that, considering its human rights commitments, this regulation needed to be changed. The Committee on the Rights of the Child was among these organizations; it told our government that, from a human rights perspective, no authorization from a judge or prosecutor was necessary to access abortion in cases of rape and, therefore, this requirement should be removed.<sup>30</sup>

Thanks to the work carried out by feminists from civil society and allies in government offices, in 2016, these requirements were removed from NOM 046. Currently, it is only necessary to submit a written statement to a health institution stating, under oath,<sup>31</sup> that the pregnancy is the result of rape and that the person wishes to have an abortion. Even so, taking what is on paper and putting it into practice still presents many challenges, and three of the cases that will be discussed in this chapter illustrate this.

<sup>30</sup> Given that Mexico is a signatory to the Convention on the Rights of the Child, the Committee on the Rights of the Child could make suggestions to the Mexican State regarding adjustments that were necessary to ensure that its laws respect the human rights of children and adolescents. The rest of the recommendations made by the Committee to Mexico on that occasion (2015) can be found here: [https://hchr.org.mx/wp/wp-content/themes/hchr/images/doc\\_pub/CRC\\_C\\_MEX\\_CO\\_4-5.pdf](https://hchr.org.mx/wp/wp-content/themes/hchr/images/doc_pub/CRC_C_MEX_CO_4-5.pdf)

<sup>31</sup> "Under oath" means that the person writing the document pledges that they are not lying.

Even when a pregnancy put the woman's health at risk, abortion was not very accessible. The case of a woman pursuing justice had to reach the Supreme Court before abortion was finally expressly recognized as a health service in Mexico.

The cases we refer to in this chapter—Fernanda, Marimar, Marisa, Jessica, and Carlota<sup>32</sup>—were taken to the Supreme Court by GIRE as part of a comprehensive strategy including legal support, communication strategies, public policy advocacy, and research, with the goal of achieving reproductive justice in Mexico for women and people with the capacity to gestate.

### The Cases of Marimar and Fernanda

In 2016, Marimar, who was still a teenager, was impregnated as a result of sexual violence. She lived in Morelos, where abortion in cases of rape was already permitted, like in the rest of the country. In addition, the embryo she was carrying had serious congenital alterations, which in the state's criminal code was also considered legal grounds for abortion.

Marimar and her parents went to the “José G. Parrés” General Hospital of Cuernavaca to request an abortion. The case was sent to the Bioethics Committee of the same hospital for resolution. Without considering the provisions included in the laws of both Morelos and Mexico, this committee ordered the hospital not to perform the abortion because, in their view, the pregnancy did not put her life at risk.

<sup>32</sup> Pseudonyms were used to protect the identity of the individuals involved. While these are the first cases resolved by the Supreme Court on refusals to provide abortions, they are not the only ones. In 2022, the Court resolved the case of Carlota, who was denied an abortion in Hidalgo in 2015 because the state's criminal code had unnecessary requirements to access abortion on the grounds of rape. Do you want to read the ruling? You can access it here: <https://www2.scjn.gob.mx/consultatematica/paginaspub/DetallePub.aspx?AsuntoID=229672>

In the same year, but in the state of Oaxaca, Fernanda was also impregnated as a result of sexual violence. When she requested an abortion, the public health authorities told her to go to the “Dr. Aurelio



Valdivieso” General Hospital. However, she was denied the service because the institution’s staff was on strike and, as the authorities had explained to her, they could only attend to emergencies, and her abortion was not considered an emergency.



The cases of Marimar and Fernanda reached GIRE, where both were given support and accompaniment so they could receive abortions from a private health service and achieve justice. An *amparo*<sup>33</sup> was filed for each of them as a legal strategy.

In the *amparos*, it was argued that their state health authorities had violated their human rights by denying them abortions—specifically their right not to be subjected to cruel, inhuman, and degrading treatment—and, therefore, they had to be recognized as victims and guaranteed comprehensive reparation.<sup>34</sup> In the first instance,<sup>35</sup> the judges did not rule in favor of Marimar or Fernanda. They said that since they had finally had abortions, there was nothing left to resolve. It was at this point that the Supreme Court of Justice was asked to intervene.

In order for the Court to accept an *amparo* case, whoever is providing legal support for the case must explain how the matter is relevant for the country—unlike actions of unconstitutionality, which are always attended by the Court. In the cases of Marimar and Fernanda, the SCJN recognized both their importance and significance. It was the first time it had the opportunity to decide whether the denial of an abortion on the grounds of rape was contrary to human rights. Both cases were decided by the Second Chamber of the Supreme Court.

<sup>33</sup> Do you want to know more about what it means to file an *amparo*? You can find more information in Chapter 1.

<sup>34</sup> Do you want to know what “Comprehensive reparation for harm” means? You can read about it in Chapter 1.

<sup>35</sup> In the first instance means that a court’s decision can be reviewed by a higher court.

The Court stated the following for both cases:

- ✧ Denying an abortion when the pregnancy is the result of rape is contrary to human rights, specifically, to the right to not be subjected to cruel, inhuman, and degrading treatment.<sup>36</sup>
- ✧ Having an abortion is a right of victims of sexual violence.
- ✧ An abortion is an emergency care service; therefore, denying this service is a serious human rights' violation and leads to the continuation of the effects of the rape.
- ✧ Health authorities should not hinder those who want to terminate a rape-related pregnancy from doing so; this means that health personnel should be aware of NOM 046 as well as of its state's grounds for abortion. In Fernanda's case, the Court pointed out that the hospital's strike was not a valid reason for denying her access to an abortion, and that health institutions have the obligation to accept abortion requests and ensure that they are carried out.
- ✧ The fact that those who were denied the right to an abortion were able to do so by their own means is irrelevant; likewise, they are entitled to comprehensive reparation.

<sup>36</sup> This right is found in Article 5 of the American Convention on Human Rights, which states: "Right to Personal Integrity. Every person has the right to have their physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. [...]"

The SCJN acknowledged that both Fernanda<sup>37</sup> and Marimar<sup>38</sup> (and their parents) were victims of human rights violations and ordered that they be guaranteed comprehensive reparation for the harm they suffered.

Despite the fact that several regulations already allowed for abortion when it was the result of rape, for a long time this right was not guaranteed by certain authorities, which is unfortunately a situation that persists today. As an example of how widespread this problem is in Mexico, GIRE recorded only 487 rape-related abortions in the country over a ten-year period,<sup>39</sup> while between January and June 2022 alone, 41,950 investigation files were opened for crimes against sexual freedom.<sup>40</sup>

Although no arguments related to reproductive rights or the right to health were raised in the cases of Marimar and Fernanda, they were still very relevant, because it was the first time the Supreme Court ruled on the issue of abortion in specific cases in which women's lives were affected.

<sup>37</sup> Do you want to read the ruling? You can access the Amparo in Review 1170/2017 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=225783>

<sup>38</sup> Do you want to read the ruling? You can access the Amparo in Review 601/2017 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=218421>

<sup>39</sup> GIRE, *El camino hacia la justicia reproductiva: una década de avances y pendientes 2010-2021* [The Path Toward Reproductive Justice: A Decade of Progress and Pending Matters], Mexico, 2021, p. 47. Available at: [https://gire.org.mx/wp-content/uploads/2021/11/GIRE\\_INFORME\\_2021.pdf](https://gire.org.mx/wp-content/uploads/2021/11/GIRE_INFORME_2021.pdf)

<sup>40</sup> According to data from the Executive Secretariat of the National Public Security System. You can find it here: [https://drive.google.com/file/d/1QQQuqLMbXOB7z5EXY2DC8nU2\\_ElwAkB/view](https://drive.google.com/file/d/1QQQuqLMbXOB7z5EXY2DC8nU2_ElwAkB/view)

### The Case of Marisa

In 2013, Marisa was living in Mexico City and was 40 years old when she became pregnant. Months earlier she had undergone surgery to reduce her stomach's size, as she had grade III obesity. Therefore, in addition to having had more than one threatened miscarriage, she was at greater risk of suffering complications during her pregnancy, such as preeclampsia, diabetes, thromboembolism, malnutrition, and bowel obstruction.



Seeing her health threatened, Marisa requested an abortion at the Social Security and Services Institute for State Workers (ISSSTE, for its Spanish initials) where she was insured and received prenatal care. However, even though her health was at risk, the institution's authorities refused to perform an abortion. They argued that there was no provision in the General Health Law stating that ISSSTE members were entitled to the service of abortion.

As in previous cases, and with GIRE's support, Marisa filed an *amparo*. The lawsuit claimed that denying her an abortion had been contrary to her human rights. It also argued the unconstitutionality of the article regulating abortion in the Federal Criminal Code since it did not contemplate cases in which the pregnancy endangered the pregnant woman's health as grounds for abortion.

The first judge who ruled on Marisa's case did not agree with her. He said that there was no point in ruling on the *amparo*, since Marisa had already had an abortion by her own means. Furthermore, he explained that he could not analyze whether or not the Federal Criminal Code's regulation regarding abortion was constitutional, because that would require an act of enforcement. This means it would have been necessary for Marisa to have been denied the service on the grounds that the Federal Criminal Code established or for her to have been suspected and investigated for having committed the crime of abortion.

But, as with the cases of Marimar and Fernanda, a request for review was filed for his sentence, and the Supreme Court was asked to take on the case.<sup>41</sup> It was the First Chamber's turn to decide. While it agreed with the first judge in that it was not possible to analyze the constitutionality of abortion as regulated in the Federal Criminal Code because that specific article had not been enforced, it disputed the reasoning that the case could not be analyzed because Marisa had already had an abortion.

<sup>41</sup> Do you want to read the ruling? You can access the Amparo in Review 1388/2015 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=190811>



It stated that what should be analyzed was whether or not denying Marisa an abortion was constitutional based on the following arguments:

- ✧ In the *amparo*, Marisa had not requested an abortion because she had already received one. She was only requesting recognition of the fact that being denied an abortion had violated her human rights and for the Court to rule on the necessary reparations.
- ✧ The Court said that, in this case, in which continuing the pregnancy would have put Marisa's health at risk, the abortion was only the beginning of her recovery.
- ✧ In cases involving a request for abortion, judging in a way that is gender sensitive allows for flexibility when it comes to the rule that states that a decision should not be made on an act that has already occurred. Applying this rule without exceptions would force women to decide whether to have an abortion by their own means (thus safeguarding their life project) or not to have an abortion and to wait for the resolution of an *amparo* that could come too late in the pregnancy or even after childbirth.

In order to determine whether abortion should be considered a health service, the Court decided to analyze which aspects were part of the right to health. To do so, it referred to the Constitution and international human rights treaties. It noted that the right to health can be found, for example, in:

- ✧ Article 4 of the Constitution<sup>42</sup>
- ✧ Article 12 of the International Covenant on Economic, Social and Cultural Rights<sup>43</sup>
- ✧ Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)<sup>44</sup>
- ✧ Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>45</sup>

In addition to these documents, the Court reviewed other cases in which the right to health had been analyzed and concluded that this right:

- ✧ should be understood as essential for the exercise of other human rights and not only as the right to health;

<sup>42</sup> "Every person has a right to receive medical treatment when deemed necessary. The law shall not only define the guiding criteria regulating access to health services but also establish concurrent activities to be carried out by the federation and the states in organizing public health services under Article 73, paragraph xvi of this Constitution."

<sup>43</sup> "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; b) The improvement of all aspects of environmental and industrial hygiene; c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

<sup>44</sup> "1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being."

<sup>45</sup> "1. States Parties shall 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. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

- ✧ includes the right to the services and conditions necessary to attain the highest level of health;
- ✧ is related to the right to life, since health is essential for a dignified life;
- ✧ requires maternity services to be guaranteed, and
- ✧ is the highest enjoyment of physical, mental, and social well-being.

After specifically analyzing what happens when the health of the pregnant woman or person is jeopardized by a pregnancy, the First Chamber decided that:

- ✧ In order to fulfill the right to the highest attainable standard of health, each person's parameters of well-being must be respected. In the case of pregnancy, those who are pregnant have the right to define what they consider well-being to be.
- ✧ Denying services that are only required by women—such as the termination of pregnancy for health reasons—as well as placing barriers that limit their access to them are acts of discrimination and a violation of the right to equality before the law.
- ✧ Abortion for health reasons includes all cases in which a pregnancy is incompatible with the pregnant person's life plan, thus affecting her wellbeing, not only those cases in which her physical health is at risk or in which her life is at risk.
- ✧ When a person's health—in its physical, mental, or social dimension—is affected by pregnancy, the possibility of opting for its termination means exercising one's right to freedom, autonomy, and the free development of personality.
- ✧ Given that abortion is a health service, Mexican authorities must guarantee that women are aware of the risks posed by pregnancy and that they have access to abortion when it threatens their well-being.

As for Marisa's rights, the Court said that:

- ✧ The authorities had breached her right to privacy, to health, and to equality and non-discrimination.
- ✧ The authorities should not have quoted the General Health Law in denying Marisa an abortion because, although this law does not expressly state that abortion is a health service, it does recognize—along with the Constitution and a number of international treaties—the full scope of the right to health and the obligation to provide maternal health services as a priority issue.

Unlike the cases of Marimar and Fernanda, in Marisa's case, the Court said nothing about her right to comprehensive reparation for harm. However, at the end of the ruling, it ordered that she must be given access to all necessary treatment to assess whether denying her the abortion had affected her health and whether she required further medical care. In addition to having a positive impact on Marisa's life, this ruling was the first in Mexico to resolve the abortion issue from the perspective of the right to health and the right to equality and non-discrimination.

It was also the first time that a government authority said that pregnancy constitutes a reproductive process experienced by women and also by people who do not identify themselves as such. In a footnote, the Court stated:

We use the term women because it is the language used by the complainant and because international instruments use it to refer to a common experience of oppression. However, we are aware that pregnancy can also be experienced by transgender men.

This does not mean that trans and non-binary people with the capacity to gestate did not have the same rights as cisgender women before this ruling, but rather that, after this ruling, other authorities could not ignore

it. This was the first time that trans men were recognized by the Supreme Court as persons with all the rights related to pregnancy, including abortion. Although it did so more conclusively in subsequent rulings, its inclusion in Marisa's case set an important precedent.

### The Case of Jessica

In 2018, Jessica was 17 years old when she was raped. Jessica was born with infantile cerebral palsy and also had seizures. The precarious economic situation in which she and her mom lived—along with Mexico's lack of infrastructure to support people with disabilities—did not allow Jessica to communicate on her own, so she relied on the care of her mom and grandmother to perform basic activities such as eating.

One day in October 2018, when Jessica had another seizure and her grandmother and mother took her to the General Hospital in Tapachula, Chiapas, they found out that she was five months pregnant (167 days). They notified the authorities that Jessica had been a victim of rape in order to start an investigation and perform an abortion.



However, the head of Tapachula's General Hospital told Jessica and her family that the hospital could not perform an abortion because Article 181 of Chiapas's criminal code<sup>46</sup> only allows abortion in cases of rape within the first ninety days of pregnancy, and her pregnancy was more advanced. Therefore, they had to find the way to get Jessica an abortion on their own.

With GIRE's support in their search for justice—as in the cases of Marisa, Marimar, and Fernanda—Jessica and her mother filed an *amparo* lawsuit. In it, they stated that Article 181 of Chiapas's criminal code was contrary to the Constitution because it limited the practice of rape-related abortion to the first ninety days of pregnancy. The rights infringed in this case were the right to equality, to health, to privacy, and to physical and mental integrity. In addition, they noted that victims with disabilities, such as Jessica, were particularly affected, as they might not be aware of their pregnancy until many weeks had passed.

Although a precedent already existed for the cases of Marimar and Fernanda, the first judge who heard Jessica's case ruled against her. He admitted that she was in a vulnerable position, but focused on the unborn child, saying that the State (i.e., authorities such as himself and the hospital) should see to it that the fetus was born. He also gave notice to the Public Prosecutor's Office to investigate Jessica and her mother, as it was likely that they had committed the crime of abortion.

<sup>46</sup> This article states: "Abortion is not punishable when the pregnancy is the result of rape, if it is verified within ninety days from conception or when the pregnant mother is in danger of death, or it can be determined that the product suffers genetic or congenital alterations that will result in it being born with serious physical or mental disorders, based on the opinion of the attending physician and hearing the opinion of other medical specialists, when possible and when delay does not pose a danger."

After this ruling, the Supreme Court was asked to review the case. Given its importance, the matter reached the First Chamber, as it was the first time it had the opportunity to analyze how the rights of women with disabilities are affected when they are impregnated as a result of rape.<sup>47</sup>

The First Chamber pointed out that the first judge had not ruled in a gender sensitive way and had not considered Jessica's rights as a woman with a disability who had suffered sexual violence while she was still a minor. It also noted that the head of Tapachula's General Hospital had breached Jessica's rights by denying her an abortion because, although the criminal code states that there is a maximum time limit to perform an abortion, it was the hospital's duty to safeguard her health, which was compromised by her pregnancy—as the First Chamber had already stated in Marisa's case. Given that there were other general laws that it ought to know and apply—such as the General Law on Victims and NOM 046—which do not establish any time limit for performing an abortion in circumstances such as Jessica's, the hospital should not have based its decision on the state's criminal code.

The Court declared that Article 181 of Chiapas's criminal code—which stated that an abortion could only be performed during the first ninety days of gestation when the pregnancy was the result of rape—was unconstitutional, as it went against the following rights:

- ✧ **The right to equality and non-discrimination**, understood as “any distinction, exclusion, or restriction based on sex that has the purpose or effect of impairing or nullifying women's recognition, enjoyment, or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, or civil sphere or any other, irrespective of their marital status

<sup>47</sup> Do you want to read the ruling? You can access the Amparo in Review 438/2020 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=275054>

and on the basis of equality between men and women.”<sup>48</sup> It is discriminatory to deny abortion after the first trimester—in a law or in an action, such as that of the hospital's director—because:

- Setting time limits on abortion contributes to the stereotypes of motherhood by giving more importance to the fetus than to the woman who is carrying it.
- It affects girls, adolescents, and women victims of sexual violence who, often, because of having experienced this traumatic experience, are afraid to mention it or report it.
- It affects girls, adolescents, and women who in some cases may be unaware of their pregnancies until after the first ninety days of gestation; for instance, because they live in vulnerable situations—such as lacking access to education—or because they have a severe disability or live in extreme poverty.

✧ **The right to a life free of violence.** Because when rape victims find out that they are pregnant, the suffering is aggravated. In this sense, limiting the time they have to terminate the pregnancy is a way of re-victimizing them.

✧ **The right to health.** Because a woman's mental health is harmed when she is forced to continue with a pregnancy that she wants to terminate and that is the result of sexual violence.

After all these arguments, the Supreme Court ordered that Jessica and her mother be granted comprehensive reparation for having been victims of human rights violations; however, it also recognized that it was impossible to completely restore all the injustice they had experienced. This

<sup>48</sup> This is defined in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

ruling has great importance in protecting those who have been raped and are denied an abortion on the grounds that it exceeds the first ninety days of gestation. In addition, it is also a call to the legislators in the states of Campeche, Chihuahua, Michoacán, and Quintana Roo to eliminate similar texts from their criminal codes that limit abortion in cases of rape to the first trimester of pregnancy.

### What Were the Effects of These Rulings in Mexico?

In a country respectful of human rights, rulings such as those in the cases of Fernanda, Marimar, Marisa, and Jessica should be enough to prevent similar cases from occurring; that is what these women hope for, along with GIRE in supporting them, and the Supreme Court in resolving their cases in the way it did. Unfortunately, the women in these stories had to overcome violations of their reproductive rights, endure first instance rulings in which they were re-victimized, and wait years to gain access to justice.

A few years after these rulings were issued, some important legal and public policy changes took place. Feminist movements advocated for various authorities to ensure that the Supreme Court's rulings were translated into other documents. For example, in June 2021 the Federal Secretariat of Health published its 2020–2024 Sexual and Reproductive Health Program,<sup>49</sup> in which safe abortion is a priority objective and abortion in cases of rape and for health reasons are recognized as medical services to which women in Mexico are entitled. This is the first time that a federal public health program includes safe abortion as a reproductive process. Moreover, the Secretariat of Health has justified it by making reference to these rulings. The program came together with the Technical

<sup>49</sup> You can find the program here: <https://is.gd/hjAYbL>

Guidelines for the Provision of Safe Abortion Care in Mexico,<sup>50</sup> which instructs medical personnel throughout the country on the steps to follow in order to provide safe abortion services according to the grounds permitted in each state.

Furthermore, the criminal codes of the states of Baja California, Baja California Sur, Colima, Guerrero, Hidalgo, Oaxaca, and Veracruz have been reformed in order to liberalize abortion. The amendments include removing the time limit on pregnancy for abortion in cases of rape and other requirements that were contrary to the General Law on Victims, NOM 046, and the Supreme Court's rulings in the cases discussed above.

The Supreme Court's rulings regarding abortion in cases of rape also set an important precedent for future decisions. In 2022, the Court resolved the case of Carlota<sup>51</sup> who, accompanied by GIRE, initiated an *amparo* lawsuit<sup>52</sup> for having been denied an abortion of a rape-related pregnancy in Hidalgo. In her case, in 2015—when she was a victim of rape at the age of 16—the criminal code required girls, adolescents, or women who wanted to terminate a pregnancy resulting from rape to have filed a complaint before they knew they were pregnant. In line with the cases of Marimar, Fernanda, and Jessica, the Court protected the right to an abortion when the pregnancy is the result of rape without any requirements other than a written request. In the same year, the Court also resolved two issues regarding NOM 046,<sup>53</sup> determining that its current text complies with the Constitution.

<sup>50</sup> You can find the guidelines here: [https://www.gob.mx/cms/uploads/attachment/file/646958/LINEAMIENTO\\_AB\\_CNEGSR\\_OPS.pdf](https://www.gob.mx/cms/uploads/attachment/file/646958/LINEAMIENTO_AB_CNEGSR_OPS.pdf)

<sup>51</sup> You can read more about this case in GIRE's article, *Carlota: un alto a los obstáculos para el aborto por violación* [Carlota: Ending the Obstacles for Abortion for Rape], *Animal político*, February 12, 2022, Available at: <https://www.animalpolitico.com/punto-gire/carlota-un-alto-a-los-obstaculos-para-acceder-al-aborto-por-violacion/>

<sup>52</sup> You can find the ruling here: <https://www2.scjn.gob.mx/consultamatica/paginaspub/DetallePub.aspx?AsuntoID=229672>

<sup>53</sup> They are Constitutional Controversies 45/2016 and 56/2016.

While there are still many laws to be changed and many steps to be taken, the feminist movement has gained strength and has become a great Green Tide that has succeeded in getting the Court to continue ruling in favor of our rights, as we will see in the next chapter.





## Chapter 4.

# The Green Tide Arrives at the Court

### Political and Social Context

In 2005, the National Campaign for the Right to Legal, Safe, and Free Abortion was created in Argentina, resulting in the decriminalization of abortion in December 2020.<sup>54</sup> This struggle, which has been spreading throughout Latin America since 2018,<sup>55</sup> has summoned thousands of people who have marched and demonstrated wearing a green bandana as the movement's symbol. The Green Tide also reached Mexico, where many feminists have taken over public spaces to demand legal, safe, and free abortion<sup>56</sup> and have seized opportunities for political advocacy.



<sup>54</sup> María Teresa Bosio, *Campaña por el Derecho al Aborto Legal, Seguro y Gratuito: su historia, sus transformaciones y nuestro aporte como Católicas por el Derecho a Decidir* [Campaign for the Right to Legal, Safe, and Free Abortion: Its History, Its Transformations, and Our Contribution as Catholics for the Right to Decide], xxvi International Colloquium on Gender Studies, cieq, unam, October 2019. Available at: <https://cieq.unam.mx/xxvi-coloquio/ponencias/Campania-por-Derecho-al-Aborto-Legal-Seguro-Gratuito.pdf>

<sup>55</sup> In June of that year, the campaign's bill was approved in the Chamber of Deputies with 129 votes in favor and 125 against, although in August, it did not get the necessary votes to pass in the Argentine Senate. Ana Cecilia Dinerstein, *La creciente Marea Verde: la lucha por la justicia reproductiva en Argentina* [The Growing Green Tide: The Struggle for Reproductive Justice in Argentina], clacso, Cuadernos del pensamiento crítico latinoamericano, no. 85, May 2021. Available at: <https://www.clacso.org/la-creciente-marea-verde-la-lucha-por-la-justicia-reproductiva-en-argentina/>

<sup>56</sup> For example, in this September 28, 2019 demonstration: <https://animal.mx/salud-y-estilo-de-vida/aborto-grito-global-legal-seguro-gratuito-cdmx/>

In July 2018, in an unprecedented electoral process, more than 3,400 public office holders were elected in our country.<sup>57</sup> The National Regeneration Movement (Morena, for its Spanish acronym) won not only the national presidency but also five of the nine governorships and the majority in the Congress of the Union. Several representatives of this political party had already declared their pro-choice stance—echoing the Green Tide movement’s demand—creating expectations about the progress that could be made in relation to this issue when they took office.

For example, from the federal executive branch, the secretary of Health declared—even before taking office—that the conditions for decriminalizing abortion existed,<sup>58</sup> and the then secretary of the Interior expressed her position against the criminalization of women who have abortions.<sup>59</sup> Moreover, the president has repeatedly stated that, being such a controversial issue, it would be best to submit the abortion issue to a public consultation. The truth is that, although debate should always be possible, reproductive rights have been recognized in the Constitution since 1974; in this sense, submitting them to consultation would be a step backwards.<sup>60</sup>

A group of female legislators from Morena brought forward an initiative to reform the Federal Criminal Code and the General Health Law.<sup>61</sup> The fact that the most influential party in the country was so

<sup>57</sup> National Electoral Institute, Elections 2018. Available at: <https://www.ine.mx/voto-y-elecciones/elecciones-2018/>

<sup>58</sup> Jorge Alcocer Varela said this in an interview that you can read here: <https://www.excelsior.com.mx/nacional/jorge-alcocer-abre-posibilidad-a-legalizacion-del-aborto-en-todo-el-pais/1260768>

<sup>59</sup> Olga Sánchez Cordero said this in an interview that you can read here: [https://verne.elpais.com/verne/2018/10/16/mexico/1539656256\\_828449.html](https://verne.elpais.com/verne/2018/10/16/mexico/1539656256_828449.html)

<sup>60</sup> If you want to know more about how these processes are regulated in Mexico, you can refer to GIRE’s report *Ni un paso atrás. La garantía del acceso al aborto legal en México y las consultas populares* [Not One Step Back. Ensuring Access to Legal Abortion in Mexico and Popular Consultations], of 2021, at this link: <https://gire.org.mx/wp-content/uploads/2021/08/Ni-un-paso-atras-CC%81s-HD.pdf>

<sup>61</sup> *El Universal*, Morena busca despenalizar el aborto en todo el país [Morena Seeks to Decriminalize Abortion Across the Country], September 30, 2019. Available at: <https://www.elimparcial.com/mexico/Morena-busca-despenalizar-el-aborto-en-todo-el-Pais-20190930-0093.html>

interested in decriminalizing abortion was unprecedented in Mexico.

Although in many cases no concrete results were achieved, in others, such as in the states of Oaxaca, Veracruz, and Hidalgo, reforms were made to the local criminal codes so that abortion would no longer be a crime when performed during the first twelve weeks of gestation.

For its part, the judicial branch also responded to the Green Tide’s demand for the liberalization of abortion. At that time, the Supreme Court had several pending resolutions related to this issue and had the arguments and legal tools to resolve them in that way. Thus, it did not miss the opportunity to advance, from its trenches, towards guaranteeing our human and reproductive rights.

### The Crime of Abortion in Coahuila

On October 27, 2017, Coahuila’s new criminal code was published. Although abortion was still considered a crime, health grounds were added to the permitted circumstances. However, another part of the text stated the following:

Article 195. The crime of abortion is committed by anyone who causes the death of the product of conception at any time during the pregnancy.

Article 196. One to three years of imprisonment shall be imposed to the woman who voluntarily performs an abortion or to the person who causes her to have an abortion with her consent.

In November 2017, the then Attorney General’s Office of the Republic (PGR, for its Spanish initials) brought an action of unconstitutionality against those two articles.<sup>62</sup> This case marks an important change with

<sup>62</sup> See Chapter 1 to learn more about what an action of unconstitutionality is and who can file one.

respect to the position taken by institutions regarding abortion in Mexico. Remember that in 2007—when abortion was decriminalized for the first twelve weeks of gestation in the Federal District—the PGR argued that allowing abortion in early pregnancy was contrary to the Constitution. Ten years later, that same institution turned to the Supreme Court to state exactly the opposite: that not allowing abortion in an early stage of pregnancy was contrary to human rights. Its arguments in this action of unconstitutionality were the following:

- ✧ That the new criminal code of Coahuila should not consider the gestational stages of the product of conception to establish the crime of abortion, because establishing a general ban on abortion would go against the reproductive autonomy enshrined in Articles 1 and 4 of the Constitution;
- ✧ That Articles 1 and 4 of the Constitution also recognize the right to start a family and to decide whether or not to have children; therefore, considering abortion as a crime, without time limits, is contrary to this right;
- ✧ That, even if Coahuila's legislators had established the crime of abortion as such with the intention of protecting the right to life, this is not an absolute right;
- ✧ That considering abortion as a crime also implies discriminating against women, as it assumes that becoming a mother is every woman's destiny;
- ✧ That different international human rights bodies have pointed out the importance of liberalizing abortion laws in Mexico.

In its ruling,<sup>63</sup> the Supreme Court made a very important clarification in order to broaden the recognition of human rights. It explained that everything it had resolved included:

<sup>63</sup> Do you want to read the ruling? You can access the Action of Unconstitutionality 148/2017 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=227921>

both women and people with the capacity to gestate—a fundamental and inclusive concept that has the underlying purpose of recognizing and making visible those who, belonging to diverse gender identities different from the traditional concept of a woman, have the capacity to gestate (for example, transgender men and non-binary persons, among others).



Furthermore, it determined that there is a constitutional right to decide, which is granted to women and people with the capacity to gestate. This right derives from the interpretation of other principles and rights, contained in articles 1 and 4 of the Constitution:

- ✧ **Human dignity.** This is the principle that allows for recognizing the human rights of all people solely based on their humanity, so they can decide about their person, their body, and their destiny without any imposition;
- ✧ **Reproductive autonomy and free development of the personality.** Women and people with the capacity to gestate have the right—like everyone else—to choose who they want to be, and a pregnancy undoubtedly has a significant impact on that decision. Acknowledging this autonomy means **the authorities should not make decisions for them, because it would imply that they need to be protected from their own choices regarding their own sexual and reproductive lives.**
- ✧ **The secularity of the Mexican State.** In order to guarantee reproductive autonomy, the State must guarantee the free exercise of ethical convictions, conscience, and religion, as stated in Articles 24, 40, and 130 of the Constitution. This means that no church can be considered official by the State.
- ✧ **Legal equality.** This right implies the elimination of gender stereotypes<sup>64</sup> that are assigned to people based on the sexual organs they were born with, as in the case of women and people with the capacity to gestate, who are expected to become

<sup>64</sup> A stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group. Gender stereotypes are concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual and social functions. “Gender stereotype” is an overarching term that refers to a structured set of beliefs about the personal attributes of women and men. Rebecca Cook and Simone Cusack, *Gender stereotyping. Transnational Legal Perspectives*, University of Pennsylvania Press, 2010.

pregnant and be mothers. When criminal regulations target them exclusively—such as the regulation on abortion in Coahuila’s criminal code—they are likely to be creating or reinforcing a gender stereotype.

- ✧ **Reproductive health and freedom.** As the Court had stated in Marisa’s case, medical care related to pregnancy and abortion is part of the right to health. Moreover, these rights must not only be recognized on paper, but the infrastructure must also be in place to allow for decision-making regarding one’s own health.

The right to decide, as defined by the Court, consists of seven pillars:

1. Comprehensive sex education.
2. Access to information on family planning and contraception.
3. The right to decide whether to continue or terminate a pregnancy.
4. The guarantee of an informed decision regarding the continuation or termination of a pregnancy.
5. The protection of the decision to continue or terminate a pregnancy. That is, both those who wish to continue a pregnancy and those who choose to terminate it are entitled to all health services.
6. The right to terminate a pregnancy in public health institutions in an accessible, free, confidential, safe, unobstructed, and non-discriminatory manner.
7. The right to terminate a pregnancy of the pregnant woman’s free will. However, this right may only be exercised during a brief period, close to the beginning of the gestation process.

The Court—after assessing the right to decide and prenatal life rights—determined that human rights are recognized for all persons from the moment they are born alive, not before, since neither the Constitution nor international treaties protect the right to life from the moment of conception. However, it stated that there is a progressive obligation to protect the gestation process (i.e., that it increases as the pregnancy progresses), and it can only be ensured by protecting the rights of pregnant people through government policies that respect those seven pillars. It also mentioned that the first twelve weeks of gestation—which at the date of the ruling had already been considered in Mexico City, Oaxaca, Veracruz, and Hidalgo—was a reasonable time for allowing an abortion.

In its ruling, the Court concluded that when the criminal law affects other rights, then it is not the proper way to protect the gestation process. In this case, when Article 196 of Coahuila's criminal code punishes women who voluntarily abort, regardless of the stage of pregnancy they are in, it completely nullifies their rights. Furthermore, the legislators who approved this article disregarded the *ultima ratio* principle.<sup>65</sup> According to the Court: "strict prohibition (backed by criminal sanction) is tantamount to establishing an obligation for the woman who, once pregnant, must necessarily endure it and become a mother."

Thus, the Court ultimately invalidated Article 196 of Coahuila's criminal code, which punished anyone who had an abortion and anyone who performed or assisted in abortions. It also invalidated the part of Article 198 that punished health personnel who performed or assisted in abortions, and, in Article 199, it invalidated the time limit of twelve weeks of gestation for having a rape-related abortion.

Likewise, the Court resolved that the effects would be retroactive in Coahuila, meaning that all persons to whom any of the invalidated articles had been applied since they were created in November 2017 could

benefit from it. From then on, any investigations against women or people with the capacity to gestate for the crime of abortion and against those who had assisted someone in having an abortion were to be closed. The same applied to anyone who had been sentenced or imprisoned for this crime, who from that moment on had the right to have their case reviewed in order to be released. In addition, as of the invalidation of this article, no one could be denounced, investigated, or convicted in the state of Coahuila for voluntarily aborting or assisting another person when having an abortion.

In the rest of the country, the ruling's effect was that no judge may issue a sentence for the crime of abortion when performed of the sole will of the pregnant person in an early stage of the pregnancy.

### Conscientious Objection

On May 11, 2018, the General Health Law (LGS, for its Spanish initials) was amended to include the figure of conscientious objection in its Article 10 Bis. It reads as follows:

Article 10 Bis. Medical and nursing personnel who are part of the National Health System may exercise conscientious objection and refuse to participate in the provision of services established by this law.

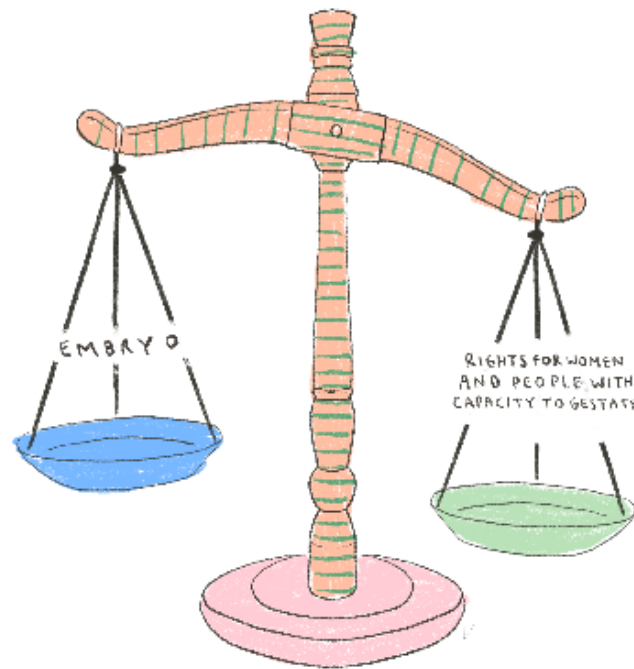
When the patient's life is at risk or it is a medical emergency, conscientious objection may not be invoked, otherwise professional liability will be incurred.

The exercise of conscientious objection will not derive in any type of workplace discrimination.

The National Human Rights Commission (CNDH, for its Spanish initials) filed an action of unconstitutionality against the addition of this article.

<sup>65</sup> The meaning of this term was explained in Chapter 2. In this case, for example, it means that before establishing the crime of abortion, public health policies should be put in place in order to address it.

Its argument was that it could lead to violations of the right to health by allowing certain medical procedures to be denied to the health institutions' users. This could happen because the wording of the article described conscientious objection in a very broad and deficient manner, without setting limits that ensured the exercise of the right to health.



Thus, the termination of pregnancy was one of the medical procedures that could be hindered by it. Allowing health personnel to refuse to perform legal abortions without an obligation to guarantee care for pregnant people by non-objecting personnel would imply tolerating discrimination.

To resolve the case, the Supreme Court first had to review whether conscientious objection already existed in the Mexican constitutional framework and what its scope was. Next, it had to address the right to health that was allegedly being breached and, finally, determine whether Article 10 Bis of the LGS violated this right.

In its ruling,<sup>66</sup> the SCJN notes that the Constitution establishes the secular nature of the Mexican Republic. This means there is no official religion in Mexico and that the government must be neutral regarding all religions, i.e., it must ensure that all people can exercise the creed of their preference without any coercion. In addition to guaranteeing religious freedom—which includes freedom of conscience—the government must intervene in cases where exercising this right may infringe on the rights of others in order to protect them.

Religious freedom and freedom of conscience take on two forms—one internal and the other external. The internal one refers to personal beliefs while the external one is the way those beliefs are manifested or expressed. The government cannot intervene in the internal aspect, but it can with regard to its external expression, when it violates other people's rights. According to the Court, conscientious objection is:

a way of realizing freedom of conscience and religion, and it occurs when the regulations or acts that generate an obligation or burden go against the person's most intimate convictions—whether religious or not. In this sense, when a legal regulation or an act entails an obligation or legal duty that opposes a person's convictions and they refuse to comply with this duty, a conscientious objection occurs: it is a confrontation between the objector's legal duty and personal convictions.

<sup>66</sup> Do you want to read the ruling? You can access the Action of Unconstitutionality 54/2018 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=238286>



If conscientious objection is a way of exercising the constitutional right to freedom of religion and conscience, how does this balance with other rights? The Supreme Court is very clear about this:

Conscientious objection does not constitute an absolute or unlimited right that can be invoked in any case and under any form. It is not a general right to disobey the law. On the contrary, conscientious objection is only valid when there is a true contradiction with the dictates of a respectable conscience in a constitutional and democratic context, so that it cannot be invoked to defend ideas contrary to the Constitution.

Regarding the right to health, the Court reintroduced what it had stated in its previous rulings and emphasized that it must be understood as the enjoyment of all the possibilities necessary to achieve a state of general well-being, which implies that:

- ✱ there are sufficient health care facilities;
- ✱ these facilities can be accessed by the general public, including marginalized groups; and
- ✱ the facilities are culturally acceptable and appropriate from a medical and scientific perspective.

As the CNDH pointed out in its lawsuit, abortion is one of the issues in which religious freedom may conflict with the right to health. The Supreme Court already had enough precedents to draw from—such as the cases of Marimar, Fernanda, Jessica, and Marisa as well as the one related to the crime of abortion in Coahuila—to confirm that the issue of abortion is linked to the right to health, which the State must guarantee. Thus, it pointed out that, as with other matters related to the right to health, in the case of abortion the State must adopt: “all possible measures to the maximum of its available resources to progressively achieve, by all appropriate means, the full realization of the right to the protection of health.”

When comparing Article 10 Bis of the LGS to the guidelines that the Court states are necessary for conscientious objection, it is clear that the wording of this article does not comply with them, which is why the Supreme Court declared it invalid.

In addition, the SCJN called upon the Congress of the Union to legislate in accordance with the requirements set forth in its ruling and made a concise list of the limits that it must observe:

- a. Conscientious objection is an individual matter, and medical personnel can only appeal to it to refuse to perform a health procedure they are required to perform when it is contrary to their beliefs.
- b. Institutions must have sufficient non-conscientious objector personnel to guarantee the right to health.
- c. Only the personnel directly involved in the procedure can conscientiously object, and with the limitation of doing so within a short time period.
- d. Whoever must decide whether a person’s objection will proceed shall do so within a short period of time; otherwise, it shall be understood that it does not proceed.
- e. Conscientious objection shall not be valid in the following cases: when it puts a patient’s life at risk, involves a medical emergency, involves a health risk, may cause a disability or aftereffects, prolongs suffering, or when there is no alternative to refer the user to.
- f. Objecting on discriminatory grounds is not permitted.
- g. The objection must not hinder or delay the provision of a service.
- h. Failure to comply may result in administrative, professional, or even criminal liability.

- i. Users should be provided with all the necessary information on the medical options available to them, including information on the objecting staff and the options available to them to receive care in such a case.
- j. Institutions should be clear about the steps to be taken in cases where they do not have sufficient non-objecting personnel.
- k. Those who wish to object should not judge users or attempt to dissuade them from the procedure they need.

These parameters that were set forth by the Supreme Court are highly relevant because it is uncommon for it to provide such conclusive indications of the limits that the legislative branch must take into account when doing its work in order to avoid violating the rights of individuals. Furthermore, in the specific case of abortion, these parameters add to all those found in previous rulings in the sense that they reinforce that denying an abortion is prohibited when the pregnancy is the result of rape and when the health of a pregnant person is at risk.

### Life from Conception

After abortion during the first trimester of pregnancy was decriminalized in the Federal District in 2007, and after the Supreme Court ruled that this decriminalization was constitutional, anti-choice advocates did not stand idly by. Soon afterwards, they began to lobby the congresses of several Mexican states to reform their local constitutions in order to include the obligation to protect life from the moment of conception.<sup>67</sup>

<sup>67</sup> For more information regarding this context, see: GIRE, *Derechos humanos de las mujeres y protección de la vida prenatal en México* [Women's Human Rights and the Protection of Prenatal Life in Mexico], 2012. Available at: [https://www.gire.org.mx/wp-content/uploads/2016/07/DH\\_mujeres\\_vidaprenatal.pdf](https://www.gire.org.mx/wp-content/uploads/2016/07/DH_mujeres_vidaprenatal.pdf)

The purpose of this strategy was to “shield” those states so that, at least in theory, abortion could not be decriminalized. This contributed to many people's perception that, by including this clause, it would be impossible to decriminalize abortion in those states, or even that its practice would be completely banned.<sup>68</sup>

On October 26, 2018, Sinaloa's constitution was reformed. The following was added in one of its articles: “From the moment an individual is conceived, he/she enters under the protection of the corresponding Law.”

The CNDH, along with a group of legislators from Sinaloa, filed an action of unconstitutionality against this addition. They explained that this statement was against the Federal Constitution, because:

- ✧ Local congresses lack the authority to define when life begins. In addition, it should be considered that the Inter-American Court of Human Rights has determined that the embryo is not a person with rights.<sup>69</sup>
- ✧ When considering the right to life from conception as a priority, women's right to reproductive autonomy is jeopardized. The absolute recognition of rights should not affect others.

Once again, the Supreme Court reviewed the rights of pregnant people to confirm that, in a secular State such as Mexico, decisions about their own bodies are protected by the human rights recognized in the Constitution, such as: autonomy, health, life project, and the right to a

<sup>68</sup> The Court had already analyzed this problem in previous cases and had proposed to invalidate these constitutional articles but had never obtained the eight votes necessary to do so. Those cases are: Action of Unconstitutionality 11/2009, Action of Unconstitutionality 62/2009, Constitutional Controversy 104/2009, Constitutional Controversy 62/2009, and Constitutional Controversy 89/2009.

<sup>69</sup> This was stated by the Inter-American Court in the case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*. Available at: [https://www.corteidh.or.cr/cf/Jurisprudencia2/ficha\\_tecnica.cfm?nId\\_Ficha=235](https://www.corteidh.or.cr/cf/Jurisprudencia2/ficha_tecnica.cfm?nId_Ficha=235)

dignified life.<sup>70</sup> These rights, seen under the principle of non-discrimination, imply that:

health services must guarantee the conditions for pregnant people to effectively meet their health needs and for services that are only required by women, such as the termination of a pregnancy, to be provided in safe environments in order to avoid the risks associated with pregnancies and abortions that are performed in precarious conditions.

Regarding the right to life, the Supreme Court noted that it was not within its jurisdiction, nor that of the local congresses or the federal congress, to define the point at which life begins, because there is not even a scientific consensus on the matter. However, the Court must make it clear that the Constitution does not protect a fetus in the same way as a born person, and that the protection of an embryo or fetus cannot override the rights of the person who carries it.

Thus, it determined that the contested article was contrary to the Constitution in that it sought to give more rights to an embryo than to a born person—women and people with the capacity to gestate. In addition, it contributed to stigmatizing abortion and confusing health personnel. In the words of the Supreme Court:

It alters the cultural and social meaning of rights and contributes to building a social imaginary that is adverse to the exercise of the human rights of pregnant women and people with the capacity to gestate, since it fosters the belief of the ethical wrongness of abortion and other reproductive options; it increases the stigma for those who seek these health care services based on stereotypical and discriminatory notions

<sup>70</sup> Do you want to read the ruling? You can consult the Action of Unconstitutionality 106/2018 and its joint proceedings 107/2018 here: <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=247133>

and conceptions; it generates a false fear in health personnel, even when criminal legislations do not criminalize abortion under certain circumstances; it causes inequality in the provision of health services among women and forces women and people with the capacity to gestate to put their lives and health at risk in clandestine and poorly performed abortions, given the confusion regarding the real legal scope of these clauses (a confusion that is greater among highly marginalized women); among other constitutionally unacceptable consequences.

Although this ruling only annuls the clause in Sinaloa's constitution, this does not mean that authorities may deny legal abortions or that legislators will be unable to decriminalize this practice in the other states whose constitutions include similar clauses. Moreover, the Court points out that the ruling must serve to guarantee a dignified life, with all the rights this entails, including the right to health and to abortion. In fact, in 2022, the Supreme Court's Plenary analyzed the articles in the constitutions of the states of Nuevo León and Veracruz—which also sought to protect life from the moment of conception—and took that ruling into account at the time of voting.<sup>71</sup>

### What Were the Effects of These Rulings in Mexico?

With these three rulings, which were resolved in 2021, the Supreme Court of Justice reinforced what had been said in previous rulings and made progress in fulfilling many of the recommendations that international

<sup>71</sup> The final rulings have not yet been published. The draft rulings were not made public, but you can find the shorthand versions of what the ministers discussed in these unconstitutionality actions here. Nuevo León: 41/2019 <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2022-06-02/26%20de%20mayo%20de%202022%20-%20Versi%C3%B3n%20definitiva.pdf> and Veracruz: 85/2016, <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2022-06-02/30%20de%20mayo%20de%202022%20-%20Versi%C3%B3n%20definitiva.pdf>

human rights organizations had been making for several years with the aim of guaranteeing safe abortion. In addition, they set a new parameter so that all states in the country may decide to liberalize abortion laws.



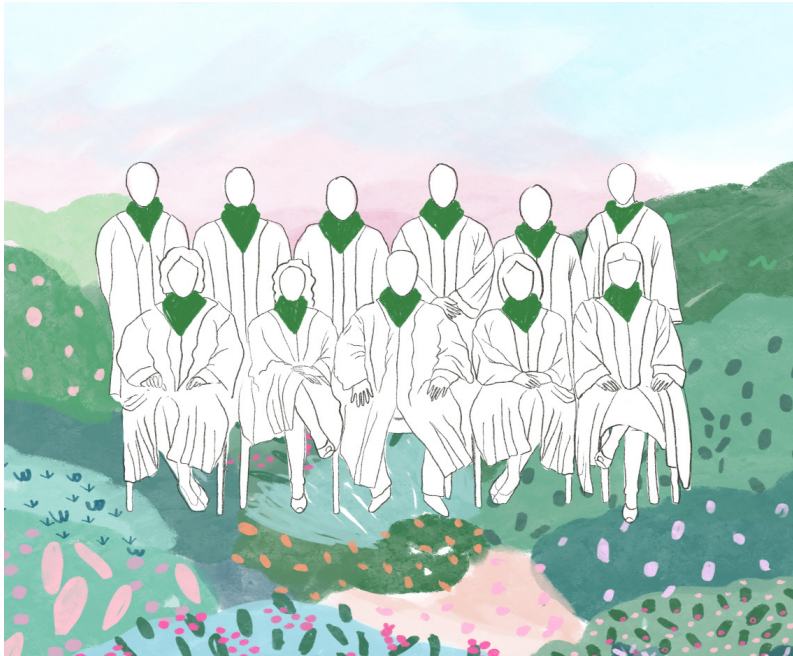
One year after these rulings were made, four more states have reformed their criminal codes to allow voluntary abortion during the first twelve weeks of gestation: Colima, Baja California, Guerrero, and Baja California Sur. As of March 2022, voluntary abortion is permitted at up to thirteen weeks of gestation in Sinaloa. In addition, Guerrero's criminal code was reformed to allow voluntary abortion at any time during pregnancy without it being considered a crime, although anyone who assists an abortion in pregnancies of more than twelve weeks gestation can still be prosecuted.

At the regional level—shortly after these achievements were made in Mexico and as a result of the struggle of the Causa Justa (Fair Cause) Movement—Colombia's Constitutional Court made its own ruling, allowing abortion at up to twenty-four weeks of gestation.<sup>72</sup> However, nine months after these celebrations took place in Latin America, a threat that had long been monitored by the safe abortion movement became a reality in the United States: the Supreme Court handed down a resolution that reversed the *Roe vs. Wade* ruling. Since the early 1970s, this case had been a benchmark for the entire region, as it allowed thousands of women in the United States to have access to safe and legal abortions. The court's recent judgment paved the way for criminalizing abortion in states that make this decision.<sup>73</sup>

In this new context, sharing the experience of movements such as the Green Tide is extremely valuable. Regardless of borders, their strategies of litigation, advocacy, and accompaniment of abortion cases have allowed Mexico and other countries in the region to reach this historic moment.

<sup>72</sup> You can learn more about this process on the movement's webpage: <https://causajustaporelaborto.org/>

<sup>73</sup> For more information on this issue see: GIRE, *El fin de Roe vs. Wade* [The End of Roe vs. Wade], Animal Político, September 10, 2022. Available at: <https://www.animalpolitico.com/punto-gire/el-fin-de-ro-vs-wade/>



The Supreme Court of Justice of the Nation has played a key role in the defense of reproductive rights in Mexico. It has been in favor of the liberalization of abortion since its first ruling on the matter in 2002—albeit in only a very limited way, initially. Over these twenty years, it has built the arguments that currently protect the right of all pregnant people to decide to terminate a pregnancy—at least during the first weeks of gestation—when the pregnancy is the result of rape or puts their health at risk.

Over these two decades, the Court began by referring only to women and protecting the grounds for abortion as something extraordinary, leaving it up to the states to decriminalize it. However, over time, it has also recognized other identities that can also become pregnant and decide to have an abortion (people with the capacity to gestate) and established that, in certain cases, abortion is a necessary health service, such as when the pregnancy puts the person's health at risk or is the result of rape. It also ruled its outright criminalization in laws as unconstitutional. Moreover, it stated that any protection of prenatal life can only be done through the body of the person who is carrying it and, finally, it declared the importance of guaranteeing the freedom of conscience of all persons but without this implying the denial of health services such as abortion.

The rulings discussed in this document are the product of years of struggle from grassroots activism carried out in the streets, schools, universities, congresses and, of course, the courts. Separately, they are tiny drops, but, accumulating over the years and through joint and shared work, they have formed an unstoppable Green Tide.

The Constitution already protects safe abortion and there is a national public policy to the same effect. In addition, ten local criminal codes already allow for voluntary abortion during the first few weeks of pregnancy.

Although the process has already been begun in the Supreme Court, there is still a long way to go to make sure that voluntary abortion is no longer considered a crime in all criminal codes. Its social de-stigmatization is also pending, as well as making access to free, universal, and quality abortion services a reality.

What matters most is that the path of social mobilization to advocate, litigate, and accompany thousands of people who want to see the reproductive rights of pregnant people in Mexico become a reality has already been mapped out. Many of the keys for walking this path can be found in the rulings that the Supreme Court has issued to date. Taking advantage of the content of this GIRE publication can be a further step in that direction.



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