FEDERAL LEGISLATION TO PROTECT SAFE AND LEGAL ACCESS TO ABORTION IN MEXICO

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INTRODUCTION

Mexico is a country where access to abortion is strictly regulated. Its capital, Mexico City, is the only city in the country that has decriminalized the voluntary interruption of pregnancy in its first trimester. In the rest of the thirty-one Mexican states, abortion is considered a crime with some limited exceptions. Despite the risk of prosecution, women still access illegal abortions in Mexico. In 2009, over one million abortions were performed in Mexico. Unfortunately, many are performed in unsafe and clandestine conditions, causing harm to women’s health and even death. To this day, unsafe abortions remain a leading cause of maternal mortality in Mexico.

The high mortality rates from unsafe and illegal abortions have caught the attention of the international community and Mexico’s legislative body. In 2012, the Committee on the Elimination of Discrimination against Women (CEDAW) urged the Mexican state to harmonize its federal and state legislation, and extend access to legal abortion in all states. The Mexican Congress has also advised local congresses to eliminate the obstacles to accessing legalized abortions.

Nevertheless, after Mexico City’s 2008 reforms that decriminalized voluntary abortion within the first trimester, among other dispositions, no other state has made any legal progress. This article proposes a legislative approach to the issue: the creation of a federal law in Mexico (hereinafter, federal law proposal) to regulate safe and legal voluntary interruption of pregnancy through harmonization with international human rights norms.
The federal law proposal envisions a legal tool for addressing the discrepancies surrounding abortion access among the thirty-one states. The federal law proposal does not intend to cover all other areas that intersect with abortion access. However, the proposal aims to provide a legal model for activists and policymakers who aim to advance reproductive rights in Mexico. In order to support this proposal, Section II explores the international and domestic legal frameworks of sexual and reproductive rights in Mexico, focusing on the right to health and to decide on family planning. Section III delves into the legal analysis that supports the need to have a federal law to regulate access to voluntary abortion, and Section IV recommends a list of provisions that the federal law should include.

BACKGROUND ON MEXICO'S LEGAL OBLIGATIONS CONCERNING SEXUAL AND REPRODUCTIVE RIGHTS UNDER INTERNATIONAL AND DOMESTIC LAW

At the international level, Mexico has signed and ratified numerous international human rights instruments that protect sexual and reproductive rights. For instance, the International Covenant on Economic, Social and Cultural Rights; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); and the Convention on the Rights of the Child all provide for the right to the highest attainable standard of health. Further, the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW) provides women the right
to decide the number and spacing of children. Both the Fourth World Conference on Women’s Platform of Action, Beijing, and the International Conference on Population and Development reinforce the importance of the protection of reproductive rights and reproductive health. Also, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (The Convention of Belem Do Pará) recognizes the right of each woman to have her physical, mental and moral integrity respected. Further, Article 133 of the Mexican Constitution provides that international treaties constitute a source of law.

Mexico is a federal republic with three levels of government instituted in the Political Constitution: (1) federal, (2) state, and (3) municipal. In its hierarchical legal structure, the Constitution is regarded as supreme law. All federal and general laws and regulations, State constitutions, and codes emanate from the Constitution. The aforementioned Article 133 recognizes international treaties as below the Constitution, but above all the other laws. Consequently, international treaties on human rights are Mexican law, and should be observed throughout the Mexican territory unless conflicting with the Constitution.

The Constitution recognizes sexual and reproductive rights in the “Right to Choose Clause” in Article 4. The Clause establishes the right to decide on family planning and the right to health. Further, Article 1 of the Constitution guarantees that all persons shall enjoy human rights emanating from the Constitution and international treaties, calling upon Mexican authorities to respect, promote and defend such rights.

The Mexican Congress recently reformed Article 1 to better protect human rights. These reforms raised two main constitutional debates concerning: (1) the hierarchy between international human rights treaties and the Constitution; and (2) the value of the Inter-American Court of Human Rights’ Jurisprudence surrounding Mexican law. On the first issue, the Mexican Supreme Court resolved the controversy by establishing that international human rights treaties maintain their supremacy to all laws besides the Constitution. Thus, if the Constitution explicitly restricts a particular human right, the Constitution prevails. As such, international treaties that recognize women’s rights, including sexual and reproductive rights, may be understood to have a higher status in the legal hierarchy than federal laws and local constitutions, as long as the federal Constitution does not include a restriction on them. On the second controversy, the Supreme Court decided that the Inter-American Court of Human Rights jurisprudence is binding on Mexican courts.

Various federal laws regulate sexual and reproductive rights in Mexico. The General Law of Population establishes the government’s obligation to execute public policies on family planning. The General Law of Health imposes the state’s responsibility to execute all necessary measures to provide access to family planning, including health services, education, information, and access to birth control methods. The General Law of Health also sanctions forced sterilizations. The General Law for Victims provides measures of immediate medical attention for women who can interrupt a pregnancy permitted by law including access to emergency contraception. Another regulation is the Official Mexican Norms. These Norms are bylaws that
regulate health services across the country, including the obligation of health professions to provide services for the legal interruption of pregnancies when permitted. These aforementioned laws demonstrate that Mexico’s federal legislation already provides measures to protect sexual and reproductive rights across the states. The federal law proposal aims to strengthen existing federal laws that safeguard women’s reproductive rights, and enforce legal access to safe abortions.

Despite a Constitution that protects the right to choose, and the binding characteristics of international treaties on sexual and reproductive rights, Mexico’s states have not reflected this protection within their local legislation. States may legislate on local criminal law. As such, States have maintained the criminalization of abortion. Though States may legislate on criminal matters, States should also follow the constitutional principles protecting human rights. So long as local governments hinder the right to family planning and to reproductive health, they will continue to violate international human rights law. This federal law proposal aims to promote compliance with international human rights norms that are recognized in the Mexican Constitution. The proposal also aspires to standardize the numerous existing laws and regulations on abortion at the federal and local levels.

LEGAL ANALYSIS: A FEDERAL LAW PROPOSAL

Mexico has thirty-one states and one federal district, Mexico City. Voluntary abortion within the first trimester is legal in Mexico City. However, the remaining states criminalize abortion in their local codes. These codes punish women who seek abortions, and those who aid them with the abortion, with penalties that include prison. Although each criminal code provides some legal exceptions for obtaining an abortion, women still face several institutional obstacles to access the procedure. Furthermore, various states have approved reforms to their local constitutions to include “fetal rights” – protecting life from conception. To counteract these state obstacles, a federal law can standardize laws across the States by establishing the minimum requirements for State governments to protect the health and lives of women who decide to end a pregnancy.

The federal law proposal would establish a regulatory minimum for all states to provide access to safe and legal abortions within the first trimester. As mentioned in Section II, federal laws are inferior to the Constitution and international treaties. There are two types of federal laws: federal regulatory laws (Ley Reglamentaria) that regulate Constitutional dispositions; and general laws (Ley General), which distribute competencies and establish regulatory minimums on a concurrent subject among the three levels of
government. This means that States can expand on existing obligations and prohibitions contained in the general law, but cannot reduce them. Thus, a federal general law is binding upon the thirty-one States.

At the minimum, the federal law proposal should follow the same principles used in Mexico City’s reforms: decriminalization of voluntary abortion within the first twelve weeks of pregnancy, protection from forced abortions, harmonization of health regulations to ensure access to abortion and other sexual health services, and standardization of justice procurement proceedings to facilitate access to abortion. Additionally, the federal law proposal could reinforce other legal areas encompassing reproductive and sexual rights such as protection of vulnerable groups, civic participation, and access to information.

In Mexico, States criminalizing abortion consider women to be criminals rather than the subjects of reproductive rights. However, the criminalization of abortion has not deterred women from finding ways to access abortions. If criminalization has not prevented women from getting abortions, States should reconsider this criminal policy. Not only does criminalization contradict the government’s obligation to remove criminal and legal barriers to abortion services, but is also affects women who are risking their lives by resorting to unsafe and unregulated abortions. The CEDAW Committee has urged the Mexican State to harmonize its laws and to halt the discrimination that women experience in different parts of the country, and one first important step is to decriminalize abortion. A federal law can call states to reform their criminal codes and to apply the same dispositions as Mexico City that allow abortions during the first trimester of pregnancy.

Not only is the decriminalization of voluntary abortion an issue that needs to be addressed at the federal level; the existence of a legal ambiguity between the right to exercise professional secrecy and the obligation of health professionals to denounce a crime also represents an obstacle for accessing legal abortions. On the one hand, federal legislation in Mexico establishes the obligation of health professionals to safeguard professional secrets and patients’ confidential health information. On the other hand, the criminal codes include the crime of concealment that applies if a medical professional does not inform to the appropriate authorities that a patient might have committed the crime of abortion. The federal law proposal could address this legal contradiction by eliminating the legal discrepancies that create confusion between the obligation of health professionals to denounce a crime and the ethical mandate to apply professional secrecy.

The federal law proposal should also address the persistent inconsistencies across the States about institutions providing access to legal abortions. The provisions can call on States to reform their criminal procedure codes to reinforce the obligation of the officials to emit the necessary orders to authorize abortion in case of rape and other legal exceptions, provisions that are not currently clear and consistent. This lack of regulation deprives women of their right to access a legal and safe abortion. Several international treaties recognize the right to the highest standard of health, such as the Universal Declaration of
Human Rights, the Covenant on Economic, Social and Cultural Rights, and CEDAW. In 1999, the United Nations General Assembly additionally declared that states’ health systems should ensure access to safe abortions. By ratifying international treaties that protect this right, the Mexican government accepted the obligation to provide these health and reproductive services. Mexico’s obligation to safeguard the right to abortion goes beyond decriminalization, and includes making abortion safe and accessible.

One of the main obstacles that women face when attempting to legally access an abortion is the conscientious objection of their doctors, typically based on the doctor’s personal religious beliefs. This practice is not exclusive to Mexico, and is one of the main concerns in the health field worldwide. Conscientious objection is a personal decision that an individual can exercise. However, neither health institutions nor administrative personnel may object. Even when conscientious objection is permitted, there is typically an obligation to properly refer the patient to someone who does not object to the service. In its 37th period of sessions, the CEDAW Committee expressed concern about the lacunas in health laws on conscientious objection and urged States to eliminate these provisions that create a barrier to access legal abortion.

In Mexico, several laws regulate conscientious objection to abortion. For instance, the Health Law of the Federal District provides that a doctor can exercise his or her conscientious objection provided that: (1) he or she will refer the patient to a non-objector doctor; and (2) that the woman’s health is not at serious risk. At the federal level, NOM 46 recognizes that doctors and nurses can apply conscientious objection when performing an abortion stemming from rape. However, this norm does not include the obligation to make a proper referral for the patient. Health professionals can exercise the objection, but these professionals should have the obligation to make a proper referral and cannot exercise it if the woman’s health is at serious risk. To prioritize the health of a woman who needs an abortion, it is necessary to standardize the application of conscientious objection at both the federal and state levels.

Abortion access for young women is an important element that the proposed federal law should include. Adolescents have several obstacles to enjoying their reproductive rights caused by the different legal and social status assigned to them, including lack of autonomy, prejudices against their sexuality, and unequal policies triggered by their age. Although adolescents should have the same protection of their reproductive rights, adolescents are usually denied these rights, making them more vulnerable when faced with an unwanted pregnancy. However, the Convention on the Rights of the Child, ratified by Mexico, has recognized the “evolving capacity” that adolescents have to make decisions that impact their lives, which establishes their right to “reproductive self-determination.”

Another important element is disabled women’s access to abortion, as these women often experience obstacles to exercising their reproductive rights. In this regard, the Convention of the Rights of Persons with Disabilities requires Mexico to ensure the right “to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education,” and the right to health on an equal basis.
with others, “including in the area of sexual and reproductive health and population-based public health programs.” The federal law proposal should include provisions to allow both minors and women with disabilities access to abortion services and account for the obstacles that these women face.

Under Article 6 of the Constitution and the Federal Law of Transparency and Access to Governmental Public Information, Mexico protects the right to access public information. The access information about public services is an essential part of monitoring and evaluating the performance of the law. In fact, several civil society organizations recommend including the obligation of the State to ensure the production of data on the services related to abortion. In order to evaluate, understand, and analyze the impact of legalizing and decriminalizing abortion, the federal law proposal should include provisions for collecting general data on the public services related to abortion, from those provided by health institutions to justice institutions.

By creating legal norms, the State is constructing a legal truth. The federal law proposal could serve as an opportunity to reflect the need for improved access to reproductive rights. While some studies suggest that laws do not necessarily improve a condition, the example of Mexico City’s abortion law demonstrates how the law may serve as a tool to promote change. In fact, the State should assume its role of providing solutions based on the principles of deliberative democracy that involve public participation to truly serve the interests of society.

In order to make the federal law proposal work, public participation needs to be an integral part of the legislative process. In Mexico, several mechanisms of civic participation are enshrined in the Constitution. Among these tools, citizens have the right to initiate a law and to vote in popular consultations. Activists, civil society organizations, and other interested citizens should elicit active public participation to express their support of the law. The federal law proposal could be used as a mechanism to demonstrate that Mexican women and men are interested in advancing reproductive rights because reproductive health is not only a personal interest, but also a public interest. Overall, civil society involvement would encourage broader constituent participation.

The scope provided above can set the basis for a federal law proposal. These provisions and areas are not exhaustive and certainly do not include all the areas that intersect with the right to a voluntary maternity and reproductive rights. Nevertheless the federal law proposal intends to prove that Mexico can harmonize its domestic legislation with international human rights law in order to grant and recognize a woman’s right to family planning, to a voluntary maternity, and to health.
It is important to recognize that the federal law proposal may face opposition. One opposing factor is the persistent influence of the Catholic Church. One of the most recurrent challenges that the reproductive rights movement faces is polarizing the moral and religious argument that the conservative opposition uses against abortion. Opponents of legalized abortion have been using legal strategies to advance their agenda, such as constitutional reforms for fetal rights. Various efforts in Mexico aimed to provide access to reproductive health services have been faced with recurrent opposition from religious groups without governments challenging them. However, the success in Mexico City demonstrated that despite the country’s Catholic presence, advancement for sexual and reproductive rights could be accomplished. In fact, the reforms of Mexico City revealed the real position of Catholic women, showing that religion does not intercept their personal decisions on reproductive issues. In this regard, the church’s influence has been changing, and this is a favorable factor for creating a federal law for regulating access to safe and legal abortions.

The agenda of the political parties is another important factor that will influence the federal law proposal. Liberal political parties tend to support the liberalization of abortion laws. In the case of Mexico City, the presence of a supportive party proved essential to show political willingness in approving the reforms presented in the Legislative Assembly of Mexico City. Then again, each of the 31 States has a different ruling party with a different agenda. Notably, one of the three major ruling parties follows a conservative agenda based on religious influences that has hampered the liberalization of abortion in the States where it governs.

Also, public opinion has revealed important information on the decriminalization of abortion. Surveys in some states show that Mexicans believe abortion should be legal in certain circumstances, but support for voluntary abortion is low. Nevertheless, surveys from residents of Mexico City and surroundings areas have shown high approval rates of the reforms to access voluntary abortions, and consider that abortion reform should be extended to the rest of Mexico. The survey also concluded that legalizing the act made abortion more socially acceptable. Following this logic, reforms in the rest of Mexico’s States could alter the taboo culture surrounding access to abortion.

The proposed federal law can serve as a mechanism to guarantee equal access to abortion for all women throughout Mexico. Undoubtedly, all new laws face difficult obstacles, but this is a way for the Mexican Government to respond to an alarming reality in which women risk their lives for deciding to interrupt a pregnancy, a decision that should not be considered a crime.

CONCLUSION

Despite the challenges to reproductive justice for women and girls, there have also been significant achievements. Mexico has a social Constitution par excellence that supports
human rights, and fully recognizes the international legal protections of sexual and reproductive rights.\textsuperscript{lxviii} Without a doubt, this is an opportune moment to demand that the State harmonize its legislation to comply with international law. Women represent more than the half of the population, and their voices should prevail as shown in Mexico City.\textsuperscript{lxix} The federal law proposal could provide a legislative solution for Mexico’s government to comply with its Constitution’s human rights principles and the international human rights law in order to guarantee and protect sexual and reproductive rights across its territory.
Federal Legislation to Protect Safe and Legal Access to Abortion in Mexico

...health professionals have the obligation to provide access to this service).
Federal Legislation to Protect Safe and Legal Access to Abortion in Mexico

See GRUPO DE INFORMACIÓN EN REPRODUCCION ELEGIDA [GIRE], ABORTO LEGAL Y SEGURO – NIÑAS Y MUJERES SIN JUSTICIA, DERECHOS REPRODUCTIVOS EN MEXICO 98 (2015) (describing how prison penalties can be from fifteen days to six years depending on the state’s criminal code).

See id., 76 (noting that even when abortion is legal in the case of rape, obstacles including the requirement to obtain judicial authorization persist, thus adding increased difficulty for women attempting to access abortion services).

See id., 95.

Please note that the author developed this period of time for the legalization of voluntary abortion based on Mexico City’s abortion laws.

See id.

Marta Lamas, La despenalización del aborto en México, 220 NUEVA SOCIEDAD 154, 167-168 (2009).

GIRE, supra note 27, at 103-104.

GUTTMACHER INSTITUTE, supra note 1.


Concluding Observations, supra note 5.


See id. at 50-51 (detailing how evidence shows that health professionals opt to denounce the possibility of a crime when a woman seeks medical attention after having an abortion without investigating the cause).

GIRE, supra note 28.

Fact Sheet, Ipas, Not Yet Rain: Abortion is a Human Rights Issue (May 1, 2014) (on file with author).


Patty Skuster, WHEN A HEALTH PROFESSIONAL REFUSES: LEGAL AND REGULATORY LIMITS ON CONSCIENTIOUS OBJECTION TO PROVISION OF ABORTION CARE 1 (2012).

GIRE, supra note 37, at 49.

See id.


Ley de Salud para el Distrito Federal [Health Law for the Federal District], art. 59, DO, 15 de Enero de 1987 (Mex.).

Norma Oficial Mexicana 046 [NOM-046-SSA2-2005] [Mexican Official Norm 046], DO, 16 de Abril de 2009 (Mex.).


See id.

See id.


Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [LFTAIPG] [Federal Law of Transparency and Access to Public Governmental Information], DO, 6 de Agosto de 2012 (Mex.).

GIRE, supra note 27, at 115.

See Jack M. Balkin, The Proliferation of Legal Truth, 26 HARV. J. L. & PUB. POL’Y 5, 7 (2003) (stating that “[l]aw has power because it can make things true or false in ways that matter to us; conversely, law can make things true or false in ways that matter to us because it has power over us”).

See Luisa Cabal, MAS ALLÁ DEL DERECHO: JUSTICIA Y GÉNERO EN AMÉRICA LATINA 10 (Siglo de Hombres eds., 2006).

See id. at 327.


See id.

See Juliet L. Ripolli, LAICIDAD Y RESISTENCIA: MOVILIZACIÓN CATÓLICA CONTRA LOS DERECHOS SEXUALES Y REPRODUCTIVOS EN AMÉRICA LATINA 2 (Instituto de Investigaciones Jurídicas, Universidad Autónoma de México 2013).

DECODING GENDER 197 (Chenaut Baitemann & Anne Varley, Eds., 2007) (describing how “a gentleman’s agreement between church and state has shaped abortion politics in contemporary Mexico).

See id., at 66 (noting that women are not influenced by the church when it comes to reproductive and sexual health, citing Gloria Gonzales-Lopez: “Mexican women in particular are neither submissive nor passive, but are active individuals who mediate Catholic teachings on sexuality morality based on their personal subjectivities”).


See Lamas, supra note 32, at 155 (referring to the Partido Revolución Democrática (PRD) Party).

See, Edgar Gonzalez Ruiz, Aborto: el clero, la derecha y la Corte, CONTRALÍNEA (Oct.23,
Federal Legislation to Protect Safe and Legal Access to Abortion in Mexico


See Kate S. Wilson et al., Public Opinion on Abortion in Mexico City after the Landmark Reform, 42 STUD. FAM. PLAN. 175, 182 (2011) (according to a survey made before and after the Mexico City’s reforms, only the 38% of pre-reform participants in 2007 were in favor of the law, however after the reforms in 2009, the percentage for participants in favor of the reforms to access abortion increased to 74%).

See id.

See CENTER FOR REPRODUCTIVE RIGHTS, BODIES ON TRIAL: REPRODUCTIVE RIGHTS IN LATIN AMERICA 76 (2003).