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Opportunities and Decisions: A Comparative Analysis of the Legal Treatment of Abortion

Karina Ansolabehere¹

This work approaches the judicialization of the dispute over sexual and reproductive rights from the perspective of the social sciences. The article will focus its analysis on the characteristics of the process of **judicialization** of abortion in Mexico (from 2000 to 2002 and 2007 – 2008) and in Colombia (2005 – 2006) as they represent paradigmatic cases involving these rights.

When the question of abortion enters the legal sphere, whether the issue is legalizing or criminalizing it with all of the implications in terms of criminalization, public health policy in general and sexual and reproductive health in particular, there can be no doubt that the quarrel extends beyond what is legal or illegal and is tied to the way adequate social order, ownership of one's body, the relationship between public and private, faith and reason, state secularity, and above all sexuality, reproduction, and death are all conceived (Klein, 2005). Nonetheless, it must be recognized that when the debate over abortion passes from moral arguments or discussions of how to design and implement public policies into the legal domain at the behest of parties who either support or fight against it, a fundamental delegation of the power to resolve this dispute into the judicial branch takes place. This branch will decide in favor or against a determined legislative measure on the basis of determined reasons.

Specifically, this is an analysis of the power of the courts and abortion, aborting being understood as a particular case of expansion (or restriction) of rights through the judicial channel.

¹ Profesora/ Investigadora FLACSO- México. Agradezco la generosidad de Marta Lamas para compartir literatura sobre el tema, asimismo agradezco la sesión de discusión mantenida con la delegación México del SELA la cuál contribuyó a revisar afirmaciones y complejizar el análisis de los casos.

As can be inferred from the previous paragraphs, the center of our attention will be the judicial branch. We will ask **how it entered** the conflicts over abortion in the cases analyzed and **how it resolved** them, or in other words, in what way the courts intervene to reach some determination.

The cases in Mexico and Colombia were chosen because the effects of the constitutional courts' decisions were *observationally equivalent*, that is, they were in the end favorable to the extension of reproductive rights for women. The contrasting models offered by the courts, however, are a point of interest. The Mexican court can be characterized as prudent, organized more for politicians than for citizens, while the Colombian court can be called activist, much more open to the direct claims of citizens (Ansolabehere, 2008; Palacio, 2006, Wilson, 2007). An effort will be made to understand the trials corresponding to those decisions and determine the similarities and differences between the different courts' decisions.

The first step will consist of synthetically structuring the analytical coordinates of the cases, with special attention on the literature of the judicialization of rights in general. Secondly the cases themselves will be analyzed, and thirdly, the conclusions will be presented.

2. The Power of the Courts and Abortion

The starting points for this work are the changes that occurred in Latin America in consonance with the processes of democratization, with the changes in the equilibrium between branches of government (for example, through the increase of importance in the legislative and judicial branches) (Sieder et. al, 2005; Domingo, 2005), and the relationship between state and society, where social movements and other non-institutionalized forms of political action acquired special importance (Peruzzotti, 1997; Peruzzotti and Smulovitz). The judicial branch is not the same today as it was 30 years ago (Inclán and Inclán, 2005). Without doubt it has gained

more power through its capacity of constitutional control and through the broadened scope of matters for judicial attention, including those regarding rights in which the spread of international human rights law and the constitutionalization of a broad range of rights has had significant impact (Ferejohn and Pasquino, 2008). The conflicts between legal decisions and the representative institutions are a sign of the times. The controversy has provoked fear in segments of the population at the marked progress of justice that are associated with notions such as a government of judges or juristocracy (Hirschl, 2003), or yet more skeptical ones regarding the capacity of the judiciary to effectively guarantee rights (Rosemberg, 2008). It has also, however, given rise to studies to analyses that examine the conditions and situations that enabled the judicial branch to become an actor that contributes to the extension of rights or an option for social change (Gargarella et al, 2004; McCann, 1991; Epp, 1998; Keck, 2008).

In this context, a few attempts have been made to explain the judicialization of rights (Epp, 1998; Sikkink, 2005; Wilson, 2008; Hilbink and Couso, 2009; Smulovitz, 2008). This literature emphasizes different factors of varying types: institutional design, the ideology of the courts, or the structures for social and political opportunities, the structure of legal opportunity, and the platforms for legal aid available to the actors promoting rights.² It is important to stress that for analytical reasons, although it is not always obvious, the process of judicialization includes two dimensions: **how** the courts **enter** the conflict, that is, the delegation to the judicial

² According to Smulovitz (2008: 290-292) different levels of factors related to judicialization can be identified: 1) structural factors: a) increasing complexity of societal conformation with the rise in number of identitarian groups that put into question the notion of political representation (which tends to homogenize across such groups), which makes the possibility of making specific demands through other means such as through the judicial branch an excellent option; b) problems of horizontal accountability for governments in the face of weakened parliaments, which lead to appeals to the judicial branch to perform their function; 2) Factors that explain judicialization on the basis of “changes in the conditions for [collective] action”. The author identifies three approaches in this category: a) the cultural approach – which associates the changes in judicialization with changes in the social value given law; b) the approach involving structures of legal and social opportunities, which maintains that the changes in judicialization are related to the crisis of the welfare state and the social reaction against relinquishing its accomplishments, and finally c) legal “support platforms”, that relate judicialization to the rise of organizations that litigate for rights and that enable people to file and pursue their claims.

branch the capacity to resolve the dispute, in our case, abortion; and secondly **how** the conflict is **resolved**, or the form in which the judicial branch intervenes and makes a determination in this conflict.

Now, as our principal interest is the process of judicialization of the criminalization/decriminalization of abortion in two distinct cases, it must not be ignored that historically the protagonist on the side of decriminalization in the struggle, in the region in general and in the two case studies in particular, has been the women's movement in opposition to the Catholic Church along with the groups referred to as "pro life" on the side of criminalization (CLADEM, 1993; Lamas, 2008). It is a dispute whose progressive side is occupied by the women's movement seeking an extension of sexual and reproductive rights, while the conservative faction has been led by the hierarchy of the Catholic Church. These movements and actors are present in different ways in the processes of judicialization.³

Since we are seeking similarities and differences in the processes that enable us to identify why different courts arrive at similar decisions, there is no avoiding the central roles in the two cases studied of the women's movement and the "pro life" movement (González Vélez, 2006; Gire, 2008). Accordingly, in carrying out the proposed analysis, reference must be made to a body of literature that examines the relationship between judicialization and social movements, that is, the literature that, to use the terms of Smulovitz (2008), associates judicialization with changes in the conditions for collective action.

³ The use of the denomination feminist and women's movement is intentional, in that reference is sought to the notion of a social movement, as it possesses the constitutive trait of heterogeneity, of functioning through informal networks, and the existence of shared beliefs that are mobilized around conflicting questions (Della Porta and Diani; Jelin 1986). This definition seeks to capture the sense that the feminist and women's movement is organized informally and is comprised of diverse groups and actors who have a plurality of perspectives and agendas.

Regarding the characteristics of the cases, the basis for the analysis of the first aspect of the conflict will be the concept of *legal and political opportunity structure* proposed by Kathryn Sikkink (2008). Sikkink uses this scheme in relation to this concept to analyze the actions of human rights movements in response to the rights violations of the recent past during the military dictatorships in Argentina, Chile, and Uruguay, in which special attention is paid to the combination of internal and international opportunities used to bring this type of violation before justice. The notion of political and legal opportunities is a depositary for the concept of political opportunity structure that was coined in the literature surrounding social movements (Tarrow, 1994; McAdam, 1996; McAdam et. Al 2001), and refers to “the dimensions of the political environment that create incentives and restrictions for people undertaking collective action, affection their expectations for success or failure” (Sikkink, 2008:317).

Clearly the differences between the dispute over abortion and the cases of transitional justice that Sikkink refers to cannot be ignored. In the measure, nonetheless, that our subject is the legal opportunities for criminalizing or decriminalizing behaviors related to the protection of rights, with the right adjustments this conceptual framework can be applied in a comparative approach to the analysis of the judicialization of abortion.

The structures of legal opportunities are understood (in a sense that is analogous to the definition of the structures of political opportunities already outlined) as: *the dimensions of the legal environment that establish incentives and restrictions in order for social movements to undertake collective action aimed at protecting rights and that affect their chances for success or failure.*

As can be seen, the definition refers to dimensions of the legal environment, two of which we consider fundamental for our case:

- a) The degree to which representative institutions are open or closed to claims for the criminalization or decriminalization of abortion, meaning the characteristics of the legislative majorities and the position of the executive powers (local and federal) with regards the topic.
- b) What Charles Epp (1998) referred to as the *support platforms for legal mobilization*, that is, whether movements are able to count on the assistance of lawyers capable of bringing forth new cases with innovative arguments. The degree of consolidation of legal support structures will be examined.
- c) What Sikkink (2008) *called the openness or closure of legal institutions to the participation of NGOs*, or in other words, the degree of access of these organizations. It is considered that openness, in our case synonymous with the degree of citizen access to the jurisdiction of the highest constitutional courts in each country, can be categorized as **open jurisdiction** (when citizens can litigate directly before a constitutional court), as **closed jurisdiction** (when access to the jurisdiction of this court can only be achieved by means of a case's attraction or because of specific alliances with actors with the competence for gaining access).

As for the second dimension of judicialization regarding the manner by which the high courts **deliver sentences** on the disputes, the intervention will be analyzed in terms of the court's consideration of the essential questions of the matter (the position it takes on the sexual and reproductive rights of women) or its avoidance of this discussion. Court interventions that

address the deep issues and clearly indicate the political decisions that must be made will thus be qualified as *maximalist*, and court interventions that do not will be considered minimalist; that is, when the decisions say little about the substantive matters of the issue.⁴

3. Structures of Legal Opportunities: Legal Differences, Political Similarities?

From a conceptual point of view the discussions and dimensions of the analysis regarding abortion are many.⁵ Without ignoring the importance of these discussions, analyzing abortion from the point of view of its judicialization implies understanding it as a dispute over extending or restricting reproductive rights that is put before a court's judgment. This qualification does not mean that when a court takes a decision on abortion that it is only acting on the question of rights; its decision has consequences in other areas as well: it also implies an idea of morality, a model of democracy, a model for the state, and a model of citizenship (Márquez Murrieta, 2007).

From the sociopolitical perspective, abortion is disputed territory between positions favorable to the decriminalization of abortion that find expression in determined moments as **pro sexual and reproductive rights** coalitions, generally comprised by the feminist movement and women in conjunction with other progressive actors (human rights movements, political parties, intellectuals, scientists, etc) and positions favorable to the criminalization of abortion that in determined moments find expression in **pro life coalitions** – as they refer to themselves – in general led by the most conservative Catholic sectors, the political parties closest to them,

⁴ There is discussion in the United States over the “desired” scope and depth of the Supreme Court's decisions. Cass Sunstein (1999), for example, makes an argument in defense of minimalism in court decisions as way to achieve agreement in controversial cases where there is a plurality of positions or when it is not certain what decision is correct in terms of the consequences it may have on future decisions and democratic process. Sunstein's defense presupposes, however, the condition of taking up substantive, fundamental question and so establishing minimal standards of interpretation.

⁵ In it many tensions can be seen: between the domains of the private and the public, between privacy and the intrusion of the state, between abortion as strictly a matter of individual choice and abortion as a public issue, between abortion as a legal question of rights and abortion as a question of each woman's unique experience (Salles, 2005; Klein, 2005; Lamas, 2006; Cook, 2003). Many contributions have been made from these perspectives.

intellectuals, and other government workers. The high level of conflict that the issue generates often results in its delegation to the judiciary for resolution.

Here it must not be forgotten that the defense of calls to legalizing abortion has been long and loudly vindicated by the feminist movement since the 60s and 70s (Lamas, 2008). It was considered a concrete example of slogans such as “what is personal is political,” or the free exercise of sexuality.

In Latin America, abortion is illegal – at least in some of its forms – in most of the countries, the only exceptions being Cuba, Puerto Rico, and Guyana (Lamas 2006). The configuration is such that the dispute over the issue has been, and continues to be, politically characterized by demands *for change*, for decriminalization, by the feminist movement and the pro sexual and reproductive rights coalitions on one side, and by the attempt to *maintain the status quo* on the part of pro life groups, generally headed by the most conservative sectors of the Catholic Church, on the other. In recent years, however, it should be remembered that there have been cases of regression with regard to the issue. El Salvador and Nicaragua are interesting examples in this sense. They are cases where the pro life coalition managed to change the status quo in a more restrictive sense of reproductive rights (Lamas, 2008).

The principal dispute over abortion in the region is thus relative to its legalization or more precisely its decriminalization. Despite this common denominator, however, the arguments that surround it are developed in many dimensions. One of them is that which opposes legalization to the clandestine abortions that are currently the common denominator. This is the equivalent of recognizing that abortions do occur, meaning that the dispute is between having them done legally or clandestinely, with the consequences that the latter has in terms of sexual

and reproductive health for women in particular and public health in general (Klein, 2005; Lamas, 2006; Cook et. al, 2003).

Now, with this regional context as a backdrop, what has transpired in the countries studied? In both of them, in the first years of the 21st century, the highest courts took up the question and the decisions of each were favorable to the total or partial decriminalization of interrupting pregnancy. Beyond the differences we will soon analyze, the intervention of the judiciary favored decriminalization. In Mexico, the Supreme Court handed down two decisions in less than 10 years on the decriminalization of abortion arising from legislative actions in Mexico City. In 2000 the heard for the first time in its history a case on the issue, it was its initiation into this type of conflicts; in 2007 it heard the second case.

In August 2000⁶ the Legislative Assembly of the Federal District [Mexico City] (henceforth the ALDF)⁷ approved a law⁸ that:

- 1) **Decriminalized** abortion in cases of: a) fetal deformations, b) non-consensual artificial insemination, c) danger for the mother's life; and
- 2) Included other relevant aspects for the development of effective **public policies** on the issue: a) it established a simple and fast procedure for processing pregnancy interruption, and b) forced the public health system to provide information and timely consultation.

⁶ A un mes de las primeras elecciones presidenciales que marcaron la alternancia política en 70 años. Momento que para muchos autores, marca el fin de la transición democrática mexicana (Woldemberg, Salazar y Becerra, 2001)

⁷ No puede dejar de señalarse la incidencia fuerte del movimiento de mujeres en la iniciativa (GIRE,2008)

⁸ Conocida como Ley Robles, dado que Rosario Robles era la jefa de Gobierno de la Ciudad de México en ese momento y fue quién presentó la iniciativa poco tiempo después de haberse llevado a cabo las elecciones presidenciales del año 2000, en las que compitió, y perdió, su antecesor en la ciudad, El Ingeniero Cuauemec Cárdenas .

The National Action Party (PAN)⁹ and the Green Ecology Party (PVEM)¹⁰ filed an action before the Supreme Court contesting the law's constitutionality¹¹ (Gire, 2008). The increasing pluralization of political representation generates new challenges for the highest court.

In this instance it is evident that both the local executive branch and the legislature were open to the influence of the women's movement. The strategy of the movement concentrated its efforts on the representative institutions that offered an opportunity to advocate for a change in the normative framework: a left-leaning government headed by a woman, and a favorable majority in the legislature.

In November 2006, six years after the previous experience, and immediately following the closest presidential election in the country's history, a new decriminalization initiative was brought forth in the ALDF. At this moment, although the political environment was marked by a majority in the ALDF and control of the local executive branch, the confrontation between the two institutions was deep as the leaders of each belonged to different factions of the Democratic Revolutionary Party (PRD). In April 2007 the law decriminalizing abortions performed in the first 12 weeks of pregnancy and furthermore specifying criteria for health center was approved (Gire, 2008). Two actions contesting the bill's constitutionality were brought before the Court. This time they were not lodged by legislative minorities, but instead by the National Commission for Human Rights (CNDH) and the Solicitor General of the Republic (PGR). The primary institution for the protection of human rights in the country and the judicial arm of the Executive office were responsible for the Court's being asked to decide the issue. They were looking to

⁹ The party in federal government that, although part of the minority in Mexico, is the only one whose platform defends the concept of life beginning at conception.

¹⁰ The only ecologist party that maintains an antiabortion position.

¹¹ An appeal that can be brought to the Supreme Court if 33% of the legislature vote to have a law undergo judicial review. If the Court vote by majority of 8 votes in favor of the unconstitutionality of the norm, the law is annulled.

maintain the status quo, that is, to annul the legislation. For a second time the Court was obliged to make a determination in the dispute.

For its part, until 2006 Colombia was the only country in Latin America where there lacked any grounds whatsoever for legal abortion (González Vélez, 2006). Unlike in Mexico, judicialization was not initiated by the pro life coalition, but rather by the women's movement. It was a feminist lawyer, Mónica Roa, who in the framework of a high impact litigation project (LAICA), and supported by the Women's Link Worldwide in Colombia (González Vélez, 2006), coordinated the lawsuit asking that an article of the criminal code be declared unenforceable or that abortion be considered constitutionally permissible in specific situations: rape or nonconsensual artificial insemination, fetal deformation, danger to the mother's life. It was not the first time a lawsuit had been brought before the court, but it is interesting to note that the initiative came from the women's movement who chose to pursue the matter directly in the courts, probably in the hopes of propelling legislative changes.¹² The configuration of the political and legal opportunity structure favored the enterprise of broadening rights through the intervention of the Constitutional Court, whose jurisdiction is directly accessible to all citizens. Facing a conservative government with a majority in the legislature, an appeal was made for the court to intervene as a progressive arbiter in a key moment before changes could be made to the composition of the court that would render the initiative's goals more difficult to achieve.

As for the legal opportunity structures in a strict sense of the term, the existence of legal support structures can be seen, that groups of lawyers from the movement or sympathetic to it that participate in the processes. In the opinion of those who participated in the Mexican process,

¹² This is not strange given the characteristics of the Colombian Constitutional Court, which since its creation in 1991 has been characterized by its pro rights activism.

however, distinction should be made regarding the existence of support structures controlled by the movement and those that lent the movement assistance. While in Colombia the legal support structure was its own, in Mexico the structure was basically borrowed.¹³

In addition, it seems that the strategy chosen in both cases was incrementalist, that is, it started by requesting decriminalization for the least controversial aspects of abortion (and in the case of Mexico also establishing procedures to correctly orient public policies), to later broaden the efforts. In Colombia, the video produced as a testimony to the experience¹⁴ states that it is the first step and that the court's decision opens the door for new progress. Still another difference can be seen, as while in Mexico the strategy targeted representative institutions (the legislative assembly and government of Mexico City), in Colombia the strategy focused on the judiciary branch. Furthermore, in both cases the legal support structure includes collaboration between national and international organizations, especially evident in the case of Colombia, where the high impact litigation was part of a project by Women's Link Worldwide.

The greatest discrepancy, however, between the two cases is found in the possibilities regarding access to the jurisdiction of the respective constitutional tribunals. While the jurisdiction of the Colombian court is **open**, broadly accessible to citizens and groups for declarations on the constitutionality of norms, in this case, the criminal code; the Mexican one is **closed**, its exclusive jurisdiction is reserved for resolving political conflicts, it is more a court for politicians than for citizens (Ansolabehere, 2008; Magaloni and Saldívar, 2006).

¹³ GIRE, the primary Mexican organization for the promotion of sexual and reproductive rights only had one specialist lawyer on the issue on its staff. The rest of the professional participants were recruited by a strategy allying legal actors and academy.

¹⁴ http://www.womenslinkworldwide.org/prog_rr_laicia.html

The second important difference is the starting point. In Mexico, this was a change in the legal status quo regarding abortion. The delegation of the matter for resolution by the judiciary was due to a conservative lawsuit. In both cases, appeals to the judicial branch were made to negate the advances made in the area of sexual and reproductive rights for women. Legitimate actors favorable to the pro life coalition were the ones who brought the lawsuit questioning constitutionality in the attempt to annul the change. The delegation to the judiciary was a conservative initiative.

For its part, in Colombia the delegation of the conflict to the judiciary was a progressive initiative seeking a change in the legal status quo. The women's movement is what propelled it. A strategy was developed to take advantage of the particularities of the constitutional court then in existence. In the Mexican case the actors appealed to the court to maintain and restrict sexual and reproductive rights, in the Colombian one the appeal was to change and broaden those rights.

In both cases access, strictly speaking, to the court structure was complemented with consultation by interested third parties. In Colombia, part of the action plan of the organization that brought the appeal for unconstitutionality was to encourage the filing of amicus curiae supporting decriminalization. In 2008 in Mexico, given the high level of visibility of the court's decision over abortion (and given the discredit it had fallen into following a very controversial decision concerning the severe violation of the guarantees of individual freedom of a journalist who after exposing a child sex ring was detained with no regard for the rules of due process), the court institutionalized a technique that had been used in another controversial case (concerning discrimination against HIV-positive individuals in the military). Using its accord 2/2008 it

established guidelines¹⁵ for convoking public hearings when it considers them pertinent because of the case's nature. Public hearings were hence called for the conflict we are studying. Six hearings were carried out,¹⁶ in which more than 40 speakers (individuals and institutions) participated in accordance to the positions they registered regarding the constitutionality (or unconstitutionality) of the measures. Beyond the conservative judicialization in Mexico between 2002 and 2007 there was thus a period of learning. Although the jurisdiction remains closed, a change has occurred in that the court became less impermeable to society. Before an issue as disputed as abortion, the high court preferred hearing an exchange of arguments. The legal decision did not begin and end with the letter of the law; the legal decision, at least formally, was nourished with "*knowledge from other sources.*" These internal transformations can be seen as part of a process of increased publicizing for the court's decisions: with its ruling on transparency and access to public information of 2003 that makes public final sentences and more concretely since 2006 when the court channel was inaugurated on television and the debates of the plenary were made public.

In both of our cases, we find similarities: the intervention of support structures for legal mobilization linked to the women's movement or for sexual and reproductive rights. As for the differences, important ones exist, as the jurisdiction of the Colombian court is open to citizens, while the Mexican is not. In accordance with what we have noted thus far, together with the fact that the representative institutions were reticent to pay heed to the demands of the women's movement, a **progressive judicialization** resulted. In this first case it was the women's movement who called for judicialization. As for Mexico, where the strategy for change on the

¹⁵ No obstante estos lineamientos establecen el requisito de acuerdo del pleno para convocar a estas audiencias, esto es quedan supeditadas a la decisión discrecional de éstas, constituyen un cambio por lo menos simbólico en cuanto a la relación, entre la corte y diferentes actores sociales.

¹⁶ The hearings took place on April 11, 2008; April 25, 2008; May 23, 2008; May 30, 2008; June 13, 2008; and June 27, 2008.

part of the women's movement had its center in the representative institutions of Mexico City, and where we face a closed jurisdiction, a **conservative jurisdiction** is had. The representatives of the antiabortion coalition are the ones who force delegation to the judicial branch for resolution of the conflict, although the changes between the court of 2000 and that of 2007 are so great that it is with difficulty that we can use the same name for them, not only because of the changes in the court's composition, but also because of the changes in terms of the internal checks and balances internally adopted by the judiciary and the increase in public debate surrounding its decisions.

Therefore, with relation to the legal and political opportunity structure, what we have in the legal framework are differences in the openness of the representative institutions to the demands of the women's movement and legal differences, in the legal framework and in the access to legal institutions, yet a fundamental political similarity does exist, that of the protagonist role of the women's movement and the pro life movement in various stages of the process.

4. Intervention and decision. Different court, different decision?

Sociologically, legal decisions regarding abortion can be understood, in terms of the moral and political factors they activate, as a critical conjuncture. The level of conflict and exposure that are normally harnessed can generate institutional, legal, and symbolical changes that burst inertia. In terms of legal history, they can be considered tragic (Vázquez, 2008) in that they involve genuine legal and moral dilemmas. Politically speaking, if we accept that judges in particular and courts in general are strategic actors (Epstein and Knight, 2000), these cases imply costly legal decisions in which the evaluation of what is gained and what is lost will be

determinant inasmuch as what is given priority as beneficial will be determined at that decisive moment.

Taking these particularities of decisions on abortion into account, the way by which constitutional courts intervene, as well as the substance of their resolutions, are not minor factors, since, somehow, they establish a model of social and political order. Intervening to resolve this conflict, and the subsequent adjudication, is riddled with tension. Because of this, typifying the manner in which this function is carried out is considered important.

In this aspect of the analysis, the following dimensions are given priority: a) the conflicts to be resolved and b) the way in which they were resolved, that is, what the court's position regarding the conflicts was. In the latter case, an examination will be made of whether the courts intervened in **maximalist** fashion, tackling the essential questions of the debate over sexual and reproductive rights; or if on the contrary they opted for a **minimalist** intervention by supporting their decision with formal arguments.

Let us begin with the Mexican case. In consideration are two decisions, the Action Contesting Constitutionality 10/2000 and the Action Contesting Constitutionality 146/2007 with its corollary 147/2007.

The Mexican Supreme Court accepted the modifications of the criminal code of the federal district [Mexico City] regarding the decriminalization of eugenic abortion in the Action Contesting Constitutionality 10/2000, besides including guidelines for public policy on the topic (services to be available in public hospitals, access to information, and the possibility for conscientious objection by doctors) (Pou Jiménez, 2009), despite holding that the concept of life protected by the constitution began at conception. In this case there were two conflicts presented

to the court: one related to the constitutional right to life, and the other concerned the validity of allocating to public authorities the competence to approve interruptions of pregnancy.

Although the character of this decision of the court bestowed it with a high level of visibility, at the time there were no institutionalized means for representatives of the interested parties from society to participate in the trial. This does not mean that the work of the pro sexual and reproductive rights coalition and the pro life coalition, or better put pro and anti-decision, was without impact, but simply that participation was not regulated or public. Direct participants from the women's movement refer to the process this way: *"The trial was an experiment for the civil society organizations that backed the reform: the necessity to establish a dialogue with the highest instance of the Judiciary and, most difficult of all, with the intention of affecting the outcome. The task was not easy in the least, which is why the decision was made to limit ourselves to the sphere of information without putting pressure on civil society with demonstrations and sit-ins."* (Gire, 2008: 17). Beyond the questions abortions raises in terms of bioethics, medicine, and public health, that is, it appears that in this occasion, the conflict was entirely fought out in the legal arena. In the decision references to any other knowledge than legal are extremely scarce. Those who had been delegated the competence to resolve a complex conflict did not produce a complex response to it.

Lastly, closely related to what has just been said, the resolution of the principal conflicts regarding rights and criminal law share the common denominator of a failure to address the heart of the matter. On one hand, the court recognized that the Mexican constitution protects life from the moment of conception: *"it can be thus concluded that the protection of the life of the product of conception derives from the constitutional precepts, the international treaties, and the federal and local laws that have been referred to"* (AI10/2000:109). On the other, the court interpreted

that, as the change in the criminal code in question did not decriminalize abortion but instead concerned the sanction imposed and therefore did not mean that abortion was no longer a crime but rather that in certain scenarios it did not merit punishment, it was not denying protection to the unborn child: “[*The reformulated article*] does not hold that certain products of conception, because of their characteristics, may be deprived of life, which would be discriminatory, but rather that the substance of the section is that after an abortion is carried out . . . if the requirements listed in section III of Article 334, then the sanctions cannot be applied” (AI10/2000:112).¹⁷

Outside of the result, which was celebrated as a victory, the manner by which the court intervened in the conflict was clearly minimalist. In 2002, from a legal perspective, nothing in the arguments recognized rights sensitive to sex (Lamas, 2008) and the sexual and reproductive rights of women were not explicitly recognized. In its decision the court chose to avoid confrontation with the obligation to protect life from conception and with the criminal nature of abortion. Another aspect of this decision deserving attention is that it is not sustained by rigorous argumentation, either by any of the intervening parties or in the interpretative activity of the court itself. In 2007, however, every one of the intervening actors was seen making use of argumentation, the level of sophistication of which was much greater. In all appearance, the 5 years interceding between the two decisions were not innocuous in terms of litigation practices or the ways by which settlement for the conflict is sought.

In 2007, not only the scenario differs, but so does the court’s intervention. The political scenario is polarized, the divisions between the models for the country forwarded by the left and the right, to somehow define it, are very clear. Sexual and reproductive rights represented a new

¹⁷ For a meticulous legal analysis of the decision see Pou Giménez (2009)

opportunity for differentiation. For its part, the judicial context has also changed. The supreme court is aware that its decisions have unknown transcendence for Mexico, and are subject to the balance of negative and positive effects of public opinion. The decisions are no longer only of interest to lawyers, they are material for commentary in the media and by the citizens. A court may be loved¹⁸ or hated.¹⁹ In other words, the social context of exigency in the court has changed. Whether a cause or consequence of this is unimportant; the court has become more public – its decisions are available to the public and its sessions are broadcast on a television channel. Furthermore, the composition of the court itself has changed, as 4 of its 11 members have been replaced.

The institutionalization of public hearings, to which reference has already been made, and the calls to participate in them represent the first significant change with respect to the 2002 decision. On one hand, the task of examining impact was made explicit and an effort was made to sustain it during the debate. On the other hand, the diversity of participating actors in the hearings, where besides the organizations tied to the defense of sexual and reproductive rights there were health professionals, specialists in bioethics, etc., together with the requests for statistical data from various federal entities handling questions related to public health,²⁰ make it possible to infer that a change was made in the way the problem was tackled. Its being a difficult problem, complex responses are required. Assembling an adequate response to the problem can not only rely on legal knowledge, it requires other expertise.

In this case the court was assigned a conflict articulated in three tracks: a) that of rights (the right to life from conception – the right to health and to life of women), b) that of the

¹⁸ As in the case of the law Televisa

¹⁹ As in the case of Lidia Cacho.

²⁰ AI 146/2007 and its corollary 147/2007

jurisdiction between the federal government and the federal district, that is, there was a dimension where conflict over the competences of the federal government and states was arbitrated, and c) the court finally addressed the conflict tied to the characteristics of the criminal law. Regarding the court's intervention, the first thing that can be said is the only true decision in the strict sense of the term was that the Mexico City legislation was constitutional. It is possible to speak of a concurrence so thin that it is only possible to issue a decision on whether the contested legislation was constitutional or not, but not on the reasons to sustain it. A majority of 8 votes were favorable to the constitutionality of the norm, and seven concurred with the decision elaborated by the judge appointed to write the opinion of the court (José Ramón Cossío).

As regards the first conflict, two arguments were put forward in the decision. The first is that the Mexican constitution does not explicitly recognize the right to life, and that even if it were recognized it clearly is not an absolute right with preeminence over all other rights, for example equality and freedom: *“If the right to life was found to be expressly recognized in the constitution, by any manner this would be as a relative right, and in consequence would have to be harmonized with another collection of rights”* (AI 146/2007 and 147/2007:156). The second argument involves the recognition of the differences entailed by sex in the exercise of sexual and reproductive rights following the admission of the differing implications pregnancy has for the mother and for the father. The law recognizes sex, at least in one paragraph: *“This tribunal considers that the means employed by the legislator is in the end suitable for protecting the rights of women, as the non-prosecution of pregnancy interruption has as counterpart the freedom of women to make decisions regarding their bodies, their physical and mental health, and even their lives”* (AI 146/2007 and 147/2007:181). In some way this interpretation represents a change from the way the court decided in 2002, in that women appear as subjects.

The second conflict was of jurisdiction, and the court's decision was a resounding affirmation regarding the competence of the Legislative Assembly of Mexico City to pass legislation on health issues.

The third conflict regarded the legislation on punishment for abortion, and here the court showed deference to a position, which would be the primary reason for the decision (Pou Giménez, 2009) and an important difference from the 2002 decision, in which punitive action is deemed the last recourse for use by the state, and even more rightly so when it restricts freedom: *“Thus having found no specific constitutional mandate for the punishment for all of these behaviors, no legal reason appears to exist . . . indicating to us that there lacks sufficient legal authority to decriminalize those behaviors that in the judgment of a democratic legislator are no longer socially reproachable”* (AI 146/2007 and 147/2007:180). In the end the measure, in the court's judgment, is constitutional because the democratic legislature has the necessary authorization to pass it.

In 2007, we have a court that beyond the differences with the 2002 decision, opted for a minimalist strategy.²¹ In the end the primary foundation of the resolution is the lack of any obstacle to prevent a democratic legislator from deciding whether to criminalize or stop criminalizing abortion. There are nonetheless differences with regards the 2002 court; the first is that women are present, although in the background they are still present. The second difference is that expertise from other areas was sought, for example from that of medicine, during the process of the decision's construction. The third is the greater effort made in argumentation. In light of these characteristics we might define the court's intervention as minimalist, but sensitive to sex, more informed and more rigorously argued. There is room to believe that the Mexican

²¹ Pou Giménez (2009) concurs with this characterization of the court's decision.

court, with its higher degree of visibility and presence in the public debates, has become more susceptible to political and social influence and consequently to the social and political costs its decisions entail, than to an exhaustive legal debate.

In the case of Colombia, whose court is held as a model of pro rights activism in the region (Uprimy, 2005; Ansolabehere, 2008), it is not surprising that the intervention was maximalist. The background of its decision included consultation with various types of organizations, ranging from organizations defending and promoting the sexual and reproductive rights of women to the Colombian Episcopalian conference, as well as scientists and government workers, both for and against the decriminalization of abortion. As for the decision itself, both the petition²² and the text of the decision rested not only on legal arguments but also made reference to health statistics and recommendations by committees monitoring the implementation of treaties covering the human rights of women.²³

The primary conflict in Colombia is related to the decriminalization of abortion in specific cases: therapeutic, eugenic, or following rape or nonconsensual artificial insemination. Nonetheless, both the lawsuit brought over the conflict as well as the intervention of the court are worded in terms of women's rights. The lawsuit brought forward by the women's movement maintains that Article 122 of the Criminal Code of that country is unconstitutional for infringement of the following rights of women: 1) the right to equality and the obligation of respecting the guidelines in international law for human rights; 2) women's right to life, health, and safety; 3) the right to equality and to be free of discrimination; 4) the principle of human

²² On page 24, for example, of the petition of unconstitutionality of Art. 122 of Law 599 of 2000 of the Criminal Code filed by Mónica Roa.

²³ Pages 233 and 234 of the C-355, for example.

dignity and the right to reproductive autonomy and individual self-realization. Unlike the case in Mexico, women were present at all times.

In its decision, the court revises the constitutional protection of the various rights mentioned in the lawsuit and reaffirms the intimacy and limitations on state intervention in these areas stemming from the liberal nature of the 1991 constitution, stating: “. . . *the State is at the service of man, the man is not at the service of the State. Under this new perspective, individual autonomy – understood as vital sphere of questions that only concern the individual – takes on the character of constitutional principle joining the public authorities to those who are forbidden from interfering in this protected area*” (C-355:247).

Although the court affirms the state’s responsibility to protect the unborn child, it considers that “*criminal regulations that punish abortion in any circumstance corresponds to a revocation of the basic rights of women, and inasmuch implies a complete disregard for their dignity, reducing women to the status of mere receptacles for the life in gestation, lacking rights or relevant interests which warrant protection*” (C-355:271).

In addition, it is important to emphasize that the Colombian court finishes by making reference to the competence of the democratic legislator to further broaden the range of cases for decriminalization, which opens the door for greater amplification of sexual and reproductive rights.

The differences of manner in the interventions we have studied are obvious, beyond the differences between 2002 and 2007, the Mexican court remained marked by a minimalist approach. The Colombian court, however, accordingly with its well-known actions in other conflicts regarding rights, maintained its maximalist stamp on this issue.

Final Observations

We have seen that in Mexico as well as Colombia, the conflict surrounding the decriminalization of abortion reached the constitutional courts. And we have seen that in both cases, beyond the differences in the profile of each court, the decriminalization of abortion was upheld, and that the content of the decisions and their reach can be traced back to the differences in the profile of each court.

For strictly analytical reasons, we reconstructed these processes of decriminalization in two phases, how they were remitted to the court system, and the nature of the court's intervention in resolving the conflict. The first important conclusion, however, is that the latter phase cannot be understood without considering the former. In any case, it is the particularity of the first moment that enables us to understand the particularity of the second. In our case this is because two very different courts reached opinions favorable to the decriminalization of abortion, yet the decisions were significantly different in content and reach.

Regarding the first process, we found fundamental differences in the structure of political and legal opportunities, so much so that we can justifiably speak of a court open to citizens in Colombia and a closed one in Mexico – and of representative institutions open to the demands for the decriminalization of abortion in Mexico and closed to them in Colombia.

The results give cause to believe that the legal opportunity structure cannot be dissociated from the political opportunity structure of not only the movements but also of the courts themselves. The timing, the level of access, the publicity strategy devised for the problem and the political mobilization implemented by the women's movement, and that of the Catholic Church and the pro life groups, as well as the possibilities to form coalitions, are important.

Still, the profiles of the courts are also important, regardless the strategies of the parties in conflict, in both a strict and broad sense, as these are expressed in the content and reach of their decisions. The Colombian court intervened in maximalist fashion by issuing an opinion that addressed the core principles of the issue in a clear recognition of sexual and reproductive rights as well as the autonomy of women. The Mexican court, putting aside the differences that separate the 2002 court from the 2007 one, is characterized by a minimalist intervention that resolves the conflict without confronting the deeper issues, although there is improvement. It seems that in this second case, the greater degree of visibility and public debate over its decisions, as well as the exigency in the social context, pressured for maintaining the contested norms, though not with sufficient force to change the terms of the legal debate. On this point there may be room for the idea that the degree of openness of legal institutions to the citizenry is important, and that it is important because of the decisions it entails. A lawsuit challenging constitutionality, as in the Mexican case, that can only be brought forward by political minorities or political institutions, transforms the decision regarding rights into an strictly political conflict in which the court must intervene to arbitrate. In Colombia, however, the direct access to jurisdiction for citizens appears to have contributed to the fact that a decision over rights fundamentally represented an event for their protection and the commitment of the court to this process.

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