

DETAILS ABOUT THE LATEST DEBATE ON ABORTION AT THE MEXICAN SUPREME COURT.

By Diego Romero¹

Background

On September 24, 2013, a 41-year-old Mexican woman was treated at a Public Hospital. There she was informed that she was pregnant and that her pregnancy was considered a high risk because she had undergone surgery before, as well as because of her advanced age and weight. However, she overcame some medical complications and was 16 weeks pregnant when, on October 30, she received results from a genetic test of the unborn that indicated that the unborn had Klinefelter syndrome. This syndrome prevents the full development of the genitals at puberty but does not prevent the person from being self-sufficient.

After discovering this illness in the unborn and considering the supposed risk in her health, the woman twice asked the doctors of the hospital for an abortion. After several denials, she added to her third request the technical opinion of a doctor describing the reasons why her health was considered at risk, and the reasons why the doctor considered that performing an abortion was the best choice.

Since the authorities of the Hospital delayed their response, the woman went to a private institution to have the abortion performed. In a few days, the woman received a written response from the hospital authorities, denying her request again because the child could be self-sufficient despite the syndrome, and because her health could be preserved.

Constitutional claim.

Given this situation, the woman went to the federal court to claim the unconstitutionality of Articles 333 and 334 of the Federal Penal Code² because they only allow abortion in case of rape or when the life (not health) of women is at serious risk. According to her, these articles generate discriminatory

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²The articles establish the following (translation made by the author):

Article 333. Abortion is exempt of penalty when is the result simply of the negligence of the pregnant woman, or where the pregnancy is the result of a rape, the abortion is not punishable.

Article 334. No punishment will be applied where, according to the doctor assisting the woman, the pregnant woman or the product [fetus] would run the risk of dying unless the abortion were performed; as supported by the opinion of another doctor, wherever it would not be dangerous to wait [for such opinion].

treatment. She also accused to the authorities of the hospital of denying her the alleged right to abortion.

The district judge dismissed the request. He stated that to declare Articles 333 and 334 unconstitutional would require an act of a concrete application of the rules and that caused prejudice to the complainant. Thus, since the woman did not follow the procedure requiring her to make application to the Public Ministry to issue an order to the hospital, it can not be concluded that there was an act of application of articles 333 and 334 of the Federal Penal Code. Therefore, the factual platform necessary for declaring these laws unconstitutional is not present in this case.

Regarding the refusal of the hospital authorities to carry out the termination of the pregnancy, the Judge pointed out that declaring their actions unconstitutional would have not have any effect. This is because they would have to compel the responsible authorities to practice the denied abortion, which is impossible because when the woman filed the action she was not longer pregnant, since she had already obtained the abortion in a private institution.

Appeal before the Supreme Court.

The complainant filed an appeal against the ruling of the District. She argued that there had been an incorrect application of various articles of the Action of Protection Act, as well as a failure to study Article 2 of the American Convention on Human Rights.

Finally on November 30, 2015, the president of the Supreme Court assumed original competence to hear the appeal for review, which was filed in the First Chamber with file number 1388/2015. The file was given to Minister (judge)³ Arturo Zaldívar Lelo de Larrea to prepare the draft resolution, which would be put to a vote by the other members of the Chamber.

Provisional ruling

The provisional, or draft, ruling⁴ of Minister Arturo Zaldívar Lelo de Larrea, which was put to the consideration and vote of the other Ministers that make up the First Chamber of the Supreme Court, proposed that the protection action should be granted to the woman. This conclusion was based on several arguments that sought to circumvent certain procedural requirements in order to give rise to the protection action.

³ In México, the judges that compose the Supreme Court are called “Ministers of the Court” or “Ministers”.

⁴ Full text available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/9_180716.pdf

Regarding the viability of the action filed by the woman, the draft argues that despite the fact that these are criminal rules that need a concrete act of application by a competent authority and a resulting damage to be declared unconstitutional; the present case would be an exception since these rules hold a such high degree of discrimination that their mere existence *"generate a legally relevant prejudice to the complainant due to its potential stigmatizing content."*⁵ This is in addition to the fact that *"these standards implicitly supported the act that is claimed."*⁶ Pages later, the draft maintains that *"this First Chamber considers that to fight the norms that regulate the abortion, it is excessive and absurd to demand a concrete act of application."*⁷

Once the procedural issues were explained, the draft focused on substantive issues. It states *"it will be justified why, although the unborn has a very relevant and intrinsic value - which is incremental as the pregnancy progresses -, this value may decrease in certain circumstances, when it goes against the rights of the woman. Thus, the weighting of the constitutionally relevant values will determine the circumstances in which pregnancy is an unjustifiable burden for the woman."*⁸

The provisional ruling seeks to justify the above statement by explaining the content of the conflicting values, these being i) The legal protection of the child and ii) The rights of women, specifically: a. the right to freedom of personal development,⁹ b. the right to health, and c. the right to non-discrimination.

Subsequently, after affirming that the values mentioned above cannot be absolute, the ruling proceeded to make *"a balance between the values and rights that come into conflict"*¹⁰.

Through these arguments, the conclusion was reached that there are cases where women should be permitted access to an abortion, in the following cases: 1. When the pregnancy was caused without consent, 2. When the health of the mother is at risk (Therapeutic abortion), 3. When the fetus is not viable outside of the mother's womb, and 4. When the abortion is performed close to the time of conception (the provisional ruling does not specify a certain period of time in which abortion could be performed, leaving this to the legislator's consideration).¹¹

⁵ Provisional ruling made by Minister Zaldívar to be considered by the members of the First Chamber of the SCJN, p. 16

⁶ Idem.

⁷ Idem, p. 24

⁸ Ibid, p. 36

⁹ This right derives from an interpretation of the constitution made by the Supreme Court.

¹⁰ Ibid, p. 65

¹¹ Ibid, p. 67-84

Finally, the duties of the State are mentioned in the cases in which the alleged right to abortion would be protected.

Voting of the Provisional Ruling.

On June 28, 2016, the First Chamber of the SCJN analyzed the provisional ruling prepared by Minister Zaldívar. Below is a brief overview of the arguments put forward by each of the Ministers.

. Minister Cossío Díaz: Dissenting vote

He took into account that the criminal rules accused of unconstitutionality necessarily need a concrete act of application that harms the person so that it can proceed to action of protection. He stated "*I do not notice any explicit or implicit application of articles 333 and 334 of the Federal Penal Code by a competent authority.*"¹²

. Minister Piña Hernández: Dissenting vote

She argued that there was no act of application by competent authority to apply the criminal law, so it does not constitute the type of allegation that is required for the promotion of the protection action.

She also mentioned that the provisional ruling is erroneously pronounced about the declaration of unconstitutionality of article 332 of the Federal Penal Code because it was not claimed in the initial petition made by the woman and also because that rule is only addressed to the mother who performs an abortion and not to the doctors who practice abortion, who were the defendants in the initial action.

Regarding the discrimination suffered by the petitioner, Piña Hernandez stated that "*in this case, it cannot even be implied that these norms contained a discriminatory and stigmatizing value judgment against women.*"¹³

. Minister Gutiérrez Ortiz Mena (President of the Chamber): Dissenting vote

He said in his opinion, that the argument that was used to justify the unconstitutionality of the rules by calling them "*stigmatizing, prohibits any democratic discussion, because if they were this would be a serious cause of discrimination,*" which is not the case.¹⁴

¹² Shorthand Version of the Ordinary Public Session of the First Chamber of the Supreme Court, held on Wednesday, June 29, 2016, p. 6

¹³ Idem, p. 11

¹⁴ Idem, p. 15

. *Minister Zaldívar Lelo de Larrea (Author of the provisional ruling): Voted in favor*
He stated that he did not share the approach with which the matter was analyzed by the three members present, and maintained the draft in all its terms, without changing it in any matter.¹⁵

Formulation of a new Provisional Ruling.

Mexican legislation provides that, when a Provisional Ruling obtains a majority of negative votes, another Minister of the Court would be designated to formulate a new Provisional Ruling that must contain the considerations that were set out in the discussion of the previous Provisional Ruling. This time Minister Piña Hernández will be in charge of the drafting of the new Provisional Ruling. It remains to be seen what the new terms of this Ruling and the result of the voting will be.

¹⁵ Cf. *Idem*, p. 18