

Women's Human Rights: the State, the Church and the Female Body

International Federation of University Women (IFUW)

Women's Human Rights: the State, the Church and the Female Body

Selected Papers from *Por la Descriminalización de las Mujeres en México* **(***Towards the Decriminalisation of the Women of Mexico***): Seminar held by the Mexican Federation of University Women (FEMU) at the University of Tabasco, Villahermosa, Mexico, November 2013.**

Translated by Jennifer Strauss, assisted by Alba Romano

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TRANSLATOR'S NOTE

These papers have been translated rather than edited. In translating them, the intention has been to produce a document as faithful as possible to the original text in manner as well as in argument, so that clarity has had priority over elegance in transforming them into English.

It has, however, not always been simple to find exact equivalents between the two languages. For instance neither 'parliament' nor 'congress' seemed exact as a name for the legislature of the State of Mexico. The term 'state' itself proved problematic, since English translates both 'Estado' and 'estatale' by the single term, whereas Spanish can distinguish the two by using the former for the nation State and the latter for its units. Barreda avoids any possible confusion by using the term 'federated entities' and I have preserved this rather stiff phrase in her paper, but generally resorted to reserving the capitalised 'State' for the State of Mexico and the lower case 'state/s' for the components of the federation and for the state in general as a political entity or abstraction. An exception has been made for direct quotations from documents such as CEDAW or the American Convention on Human Rights, where State may refer to each entity involved (the 'States party') or to the concept of the political state.

References to 'involuntary abortion' can be puzzling, seeming to apply not to forced abortions but to what in English would be 'miscarriage', something outside the province of the law. It appears however that in the Mexican states with draconian anti-abortion measures, a woman who suffers a miscarriage may indeed risk being accused of the crime of abortion.

One legal term in Barreda's paper presented particular difficulties: 'excluyentes de responsabilidad'. Even the expanded translation of 'exclusion from [criminal] responsibility' seemed to me to risk confusion with the English term of 'diminished responsibility', definable as an unbalanced mental state that is considered to make a person less answerable for a crime and is recognised as grounds to reduce the charge. Barreda sees the category of 'just cause' as sometimes placed within the ambit of 'excluyentes de responsabilidad' but seems to mean something wider by the latter, closer to the English category of 'no case to answer', at least when that is used in the sense of there being no demonstrable crime (rather than the secondary sense of insufficient evidence). Barreda's ultimate argument is indeed for 'no case to answer' in all cases of voluntary abortion – i.e. that any category of crime should be irrelevant to all voluntary abortions. I have therefore chosen to translate 'excluyentes de responsabilidad' as 'no case to answer' in her title and in many instances within her paper.

Similarly, in Moneta's paper, because the term 'Estado laico', which is used in Mexico to refer to the separation of Church and State, is better understood in current English usage as 'secular state' than as the more literal 'lay state', the former has been preferred in the translation.

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Introduction

The Mexican Federation of University Women (FEMU) conducts an annual national seminar, as well as a biannual international one, to promote research on women's human rights. To this day FEMU has published 22 books as a result of the papers presented in these seminars.

The most recent international seminar was held last November in the state of Tabasco, in southeastern Mexico, and was attended by the Vice President of the International Federation of University Women (IFUW), Jennifer Strauss, as well as by IFUW members from Argentina, Bolivia and Panama.

The topic of the seminar was *Towards the Decriminalisation of Women in Mexico*, and several texts were presented regarding the sexual and reproductive rights of women, under the premise that abortion is a public health and social justice dilemma.

We are very pleased that IFUW selected five of the texts presented in this seminar as the first of its proposed series of occasional publications on Human Rights. Twenty-four more articles are published by FEMU in Mexico.

The authors of the selected texts are Lourdes Enríquez and Ydalia Pérez Fernández Ceja, from FEMU; Pilar González Barreda, from the Law Faculty of the National Autonomous University of Mexico (UNAM); Fátima Moneta Arce, from Mexico's Catholics for Choice; and Rebeca Ramos Duarte, from the Information Group on Reproductive Choice (GIRE).

We thank Jennifer Strauss's initiative for the publication of the texts, and the support of Alba Romano in translating them into English.

Constitutional Violations of Women's Human Rights

BY YDALIA PÉREZ FERNÁNDEZ CEJA[i]

Introduction

To speak of the human rights of women is to speak of inequality, discrimination and violence, something that only just became acknowledged in the last years of the twentieth century.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was passed in 1979 and the American Convention to Prevent, Punish and Eradicate Violence against Women (Belém Do Pará) in 1994.

The delay in recognition of the rights of women is due to diverse factors that lead us into a labyrinth constituted by morality, machismo and above all the androcentrism which many times has snatched away what has already been gained, as is the case in Spain.[ii]

Mexico and other Latin American countries have retarded and impeded the progress of the rights of women by not allowing them in any circumstances to interrupt a pregnancy, under penalty of imprisonment for the crime of abortion or *homicidio dado la consaguineidad* (homicide as a blood relative) on the grounds that the 'product of conception' and the embryo are persons, recognised as if living.

In this situation, faced with a moral decree whereby a fertilised ovum has the status of a person whose development must be completed, even in opposition to the will of the pregnant woman, even when this places her life at risk,[iii] we must question the efficacy of a system of human rights that endorses discrimination against women on the basis of their sex.

1. Women's human rights: an unsettled historic debt

There are no reasonable arguments to justify the exclusion of the rights of women from the most important social movements of the modern epoch.

In 1791, Olympe de Gouges demonstrated that her participation in the French Revolution did not gain her the recognition of a place in government, and even less did it allow her to incorporate the needs of women in the *Declaration of the Rights of Men and Citizens*. Accordingly, she wrote the *Declaration of the Rights of Women and (Female) Citizens.*[iv] Olympe's document is a convincing demand for equality, the right to vote, the right to private property, etc. However, she could not prevail because 'the male pact' was consummate and so the *Declaration of the Rights of Men and Citizens* was unchanged.

In the same decade, Mary Ann Radcliffe wrote *The Female Advocate; or, An Attempt to Recover the Rights of Women from Male Usurpation* (1799),[iv] a denunciation of inequality in the work of men and women.

In similar vein, one must highlight the work of Mary Wollstonecraft's *A Vindication of the Rights of Women*,[vi] because it is one of the most critical and profound manifestos against the artificial construction of femininity, a topic that Simone de Beauvoir would later take up. The *Vindication of the Rights of Women* (1792) denounced a system that had deprived women of their rights. At the same time, it demonstrated that cultural constructs had degraded women with no justifiable reason and it called, moreover, for a new Constitution.[vii]

To speak of an egalitarian Constitution in the eighteenth century was a proposition that could not succeed, and although there have been other women who gained recognition of some rights in the nineteenth and twentieth centuries,[viii] it is certain that the culture of gender-based discrimination and violence still persists in constitutional systems that give precedence to moral concepts over women's health and life itself.

2. The partial development of a system of human rights

In 1945, after World War Two, members of the international community recognised a catalogue of human rights that categorised the 'person' as subject to international rights, having the capacity to denounce states that violated those rights.

The Declaration of Human Rights, which had an androcentric schema, even though it had counted so much on the participation of women like Eleanor Roosevelt, was incapable of seeing the problem of excluding and disadvantaging the female sex.

This was, however, made apparent in the preamble to CEDAW, which after 1979 recognised the feminisation of poverty as an obstacle in the real developmental progress of millions of women.[ix]

Although there had been previous treaties and conventions concerning women, CEDAW is the definitive first time that the States joined together in the United Nations accepted the persistence of a general discrimination against women, with multiple manifestations affecting their diet, health, education, training, employment and other opportunities.

The Inter-American Congress, for its part, approved the American Convention on Human Rights, which considered the most significant regional regulation of this matter and emphasised that, in Article 4, it recognised the right to life as protected *in general* from the time of conception.

In the same Latin American region there was passed, in 1994, the *Convention of Belém do Pará* which denounced specific cases of generalised violence against women in Latin-America. This review demonstrated the persistence of violence and discrimination at both universal and local levels. It also brought into question the effectiveness of a judicial system which still questioned whether sexual and reproductive rights were universal human rights, inalienable, indivisible and progressive.

3. The sexual health of women is a human right

The situation whereby national constitutions recognise the 'product of conception' and the embryo as deemed to be persons similar to newborns, rather than *tutored judicial entities,* as in better-considered legislation, impacts on women's human rights and is at the same time a negation of the secular state. It differs from the guidance of the right to life from conception that gained the approval of the Inter-American Convention on Human Rights in that the latter does not classify this right under the category of the rights of the living person, nor does being "in general" apply as an absolute.

In the case of 'Beatriz Against El Salvador' it could be shown that those States that prohibit termination of pregnancy even when the woman risks losing her life discriminate and legitimise violence against women on behalf of an interpretation of the right to life based on moral and ideological premises.[x]

In this particular case, the Inter-American Court found that it was necessary to save the life of Beatriz because the protection of life 'from conception' should be understood to apply in general.[xi]

The moral and ideological interpretation of an absolute right to life restricts diverse rights of women and discriminates on sexual grounds in that it allows unequal treatment which enforces maternity and includes imprisonment for those pregnant women who terminate their pregnancy intentionally or spontaneously. In this way, it fails to fulfil the objective of universal and equal human rights, because, according to the CEDAW Committee, States cannot set limitations on the health of a woman and her competence to exercise other rights because of the physical state of pregnancy, since to do so is direct discrimination and violation.[xii]

An example of the above can be found in Mexico, a federated State in which some constituent members have decided to recognise life as protected from conception and added that the fertilised egg and the embryo are persons deemed to be as if born alive.[xiii]

Consequently, violence and discrimination against women are fomented, in that their liability to criminalisation is increased: already in some cases women have been accused of homicide for having deliberate or spontaneous abortions. Because of this, moreover, there is an increase in the number of women forced not to terminate their pregnancy.[xiv]

To affirm that an embryo or the product of conception is a living person has an impact beyond the moral because it makes it legitimate for the state to discriminate directly against the rights of women, since it makes her health, even her right to life, subject to the penal code.

Protection of life from the moment of gestation ought not to be absolute. Even though it deals with a legally protected thing that is good in itself, that which is protected is not independent of the body of the pregnant woman and therefore cannot be considered as a living independent being.

Thus, there can be no meaningful equality while it is not acknowledged that sexual rights are women's human rights and therefore a woman cannot be penalised for terminating her pregnancy.

Conclusions

1. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the American Convention to Prevent, Punish and Eradicate Violence against Women (*Belém Do Parâ*) signify the recognition by the United Nations and the Organization of American States of universal and regional violence and discrimination against women.

2. There is an historical and legal delay in providing equality to women and girls and it is urgent that human rights inherent to the female, such as sexual and reproductive rights, be established.

3. Criminalisation of women for termination of pregnancy is a matter of morality, not of human rights. Yet in the Americas there are countries that prohibit abortion absolutely, even for rape and danger to the life of the pregnant women.

4. Women in Latin America are being made victims of violence in that their sexual and reproductive rights are not recognised, while the product of conception is given personhood.

[i] Lawyer, Mexican Association of University Women, FEMU.

[ii] In Spain a block vote in Parliament removed the right of women to a free and voluntary termination. See http://sociedad.elpaid.com/sociedad/2014/28/actualidad/1393590036_404088.html

[iii] In the case of Ana Maria Acevedo, she died after she was denied treatment because she was in the fifth month of pregnancy.

[iv] See http://clio.rediris.es/n31/derechosmujer.pdf

[v] Taillefer de Haya, Lidia, *Origenes del feminismo*, Narcea, Espaňa, 2008, pp.153-168.

[vi] Cf. Wollstonecraft, Mary, *Vindicación de los derechos de la mujer*, Debate, Madrid, 1998.

[vii] Ibid, p.15.

[viii] Cf. Beatriz Gamba, Susana, (coord.), *Diccionario de estudios de género y feminism*, Voz, Feminismo (history and commentary), Susana Beatriz Gamba, Biblos, Argentina, 2007, pp.142-149.

[ix] In the struggle against poverty, it is always very important that we are aware of external factors at play in the equal involvement of men and women, not only for reasons of equity and human rights, but also for reasons of effectiveness. *Politics for the Empowerment of Women as a Strategy in the Struggle against Poverty*, the document prepared by Sonia Montaňo, Head of the Women and Development Unit of ECLAC (United Nations Commission for Latin America and the Caribbean), gives a convincing account of the impact of bringing women into the reduction of poverty in poor households and the impact of educating women in reducing maternal mortality and infant malnutrition.

[x] Beatriz was a woman of twenty-two who suffered discoid lupus erythematosus with severe nephritis. In the middle of April she was in the twelfth week of her second pregnancy. Three ultrasounds showed that the foetus was encephalitic (without brain), an anomaly incompatible with extra-uterine life, She wanted to terminate her pregnancy in order to continue treatment (for her existing condition) and her country denied her this right because it prohibited abortion in any circumstances.

[xi] Inter-American Court of Human Rights, Case of Artavia Murillo and others (In Vitro Fertilization) vs. Costa Rica. *Preliminary Objections, Merits, Reparations and Costs*. Judgement of 28 November 2012, Series Cm, no. 257, paras 172 and 179.

[xii] CEDAW, General Recommendation 24. Article 12 of the Convention for the Elimination of All Forms of Discrimination Against Women – Women and Health

[xiii] See https://www.gire.org.mx/index.php?option+com_content&view=article&id=563%Areformas

[xiv] See https://www.elmundo.es/america/2014/01/23/52e06f4c268e3efa708b4581.html

Penalisation of Abortion: A Form of Discrimination Against the Women of Mexico

BY REBECA RAMOS DUARTE

1. Introduction

In Mexico, abortion is a matter regulated within the criminal code (with the exception of the Federal District, which decriminalised termination of pregnancy up to the twelfth week of gestation through reform of the local Penal Code and the Health Law in April 2007). Consequently, the rules concerning penalties and cases where abortion is permitted depend on the system of each federated entity, something that results in women having more or fewer rights depending on their place of residence.

This absence of consistency in the system contradicts those obligations of the state with regard to non-discrimination that are contained in the framework of human rights in the Constitution and in the international treaties to which Mexico is a party, for instance the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as the recommendations received from international organisations.

2. Constitutional framework

In 2001, Article 1 of the Constitution was revised in order to establish the principle of non-discrimination, with gender being one of the grounds expressly indicated. In addition to this constitutional obligation, in 1981 CEDAW came into force in the country. Among its Articles, numbers 1 and 12 require the State to guarantee protection to the health of all women and, moreover, General Recommendation 24 of CEDAW established that denial of health services needed uniquely by women constituted discrimination[i].

It followed that the Mexican State as a whole had an obligation to guarantee women's effective access to services of reproductive health. In this respect, the reforms made by the Federal District to the Penal Code and the Health Law in the matter of legal termination of pregnancy complied with the said obligation.

On 10 June 2011, the Federal Gazette published the reforms made to Article 1 of the Constitution in the matter of human rights. These reforms marked a new paradigm in the protection of human rights in that: 1) they incorporated into the Political Constitution of the Mexican Federation the framework of human rights contained in the international treaties to which Mexico was party; 2) they established the obligation of all authorities to promote, respect, protect and guarantee human rights, in conformity with the principles of universality, interdependence, indivisibility and progressiveness; and 3) they established, as criteria for the implementation of human rights standards, principles concerning treatment of individuals and consistency of interpretation.

It should be pointed out that all the rules that affect the enjoyment and exercise of human rights, including Federal laws and administrative orders, must be interpreted and implemented in conformity with the Constitution and the international treaties to which Mexico is a party.

Given the above, it should be noted that in July of 2012, the Committee of CEDAW sent the Mexican State several recommendations directed towards compliance with CEDAW.[ii] These recommendations were the first made by an international organisation after the reforms of 10 June 2011. They set out explicitly what was required of the legislative bodies of the states in the matter of abortion in order to implement their national Constitution and that of CEDAW.

Access to health services, including those of legal and safe abortion, is an integral part of the recognition, protection and guarantee of reproductive rights, rights that are recognised in Article 4 of the Constitution and in diverse international treaties, such as the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights (ECOSOC) and CEDAW.

3. Reproductive rights

Reproductive rights are human rights: note the definition given by the Program for Action of the International Conference on Population and Development:

> Reproductive rights mean the recognition of the basic right of all couples and individuals to decide freely and responsibly on the number of their children and the spacing of their births, also to possess the information and means to do so; similarly, to attain the highest level of sexual and reproductive health. Also included is the right to make decisions related to reproduction without discrimination, coercion or violence, in conformity with what is established in the official documents concerning human rights.[iii]

While entitlement to reproductive rights extends to all persons, the biological differences between women and men require differentiation in the recognition and implementation of some of these rights, an example being services for legal and safe abortion.

> Women's rights to voluntary maternity and autonomy over their own bodies pertain exclusively to them, precisely because, in the matter of gestation, men are not equal to women, and it is only the devaluing of women as persons and the reduction of them to instruments of procreation that has enabled the limiting of their sovereign right over their own bodies.[iv]

Reproductive rights have two aspects: the right to attention to reproductive health and the right to reproductive self-determination.[v]

The right to attention to reproductive health involves the obligation of the state to ensure the availability of health services and to remove legal barriers to such services. As to the right to reproductive autonomy, it is fundamental to various human rights, among them personal liberty and integrity, privacy, health and the benefits of scientific progress, freedom of thought and conscience and access to information and education. Every individual has the right to decide on reproduction related questions such as whether or not to have children or to use contraception or techniques of assisted reproduction.

Access to legal and safe abortion and services of reproductive health is part of the implementation of reproductive rights and services for those who hold them – women. Such access is fundamental to the rights to life; to health, including reproductive health; to physical integrity; to privacy; to non-discrimination and to women's reproductive autonomy.

Legal and practical obstacles to abortion services represent a violation of women's reproductive rights, in that they have a negative effect on the exercise of their human rights and on their opportunities in life.

4. Regulation of abortion in Mexico

Although access to legal and safe abortion is closely related to the implementation of women's human rights, abortion is viewed in Mexico from a criminal perspective. It is treated as a crime within local competency, i.e. each federated entity can busy itself with classifying actions considered to make abortion criminal rather than a matter of public health, even though it is the cause of a considerable percentage of maternal deaths.[vi]

However, on 26 April 2007, the Federal District published legal reforms in virtue of which abortion during the first twelve weeks of gestation was decriminalised. From that date to 31 May 2013, 101,372 women have attended the public services of the Federal District,[vii] of whom 82.9% have agreed to use some contraceptive method and only 2.09% of women involved had a second termination.

The legal reforms of the Federal District accorded with the comparable human rights trend to decriminalise abortion[viii] and with the trend in international organisations such as the CEDAW Committee, which considered it as an advance in the protection of women's human rights.[ix] Nonetheless, since 2008, the year in which the National Supreme Court of Justice declared these reforms constitutional, sixteen states of the Republic have modified their constitutions with the intent of protecting life from the moment of conception and/or fertilisation.[x] The consequences have been to impede accede to legal abortion services[xi] instead of providing proper maternal health services such as prenatal medical care for pregnant women, free and adequate provision of folic acid and other dietary supplements during pregnancy and the first years of life, as well as reducing to a minimum the rate of maternal morbidity.[xii]

These regulatory differences mean that the recognition of women's reproductive rights depends on their place of residence and not on a consistent system in conformity with the standards of human rights contained in the Constitution and in the international treaties to which Mexico is a party. In particular, they have meant that there is no application of the principles of universality, non-discrimination and substantive equality established in Article 1 of the Constitution and in international instruments such as CEDAW.

The following table gives the grounds for legal abortion recognised in Mexico and shows those entities that accept them:

Grounds	Federated entity
Rape **(Is legal in all states)**	Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán y Zacatecas.
Careless or blameworthy **(29 entities)**	Aguascalientes, Baja California, Baja California Sur, Campeche, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, Tlaxcala, Veracruz, Yucatán y Zacatecas.
Danger of death **(25 entities)**	Aguascalientes, Baja California, Baja California Sur, Chiapas, Coahuila, Colima, Durango, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán y Zacatecas.
Serious threat to health **(12 entities)**	Baja California Sur, Campeche, Chihuahua, Colima, Distrito Federal, Hidalgo, Jalisco, Michoacán, Nayarit, Nuevo León, Tamaulipas y Zacatecas.
Serious genetic or congenital defects in the foetus **(15 entities)**	Baja California Sur, Chiapas, Coahuila, Colima, Distrito Federal, Guerrero, Hidalgo, México, Morelos, Oaxaca, Puebla, Quintana Roo, Tlaxcala, Veracruz y Yucatán.
Involuntary artificial insemination **(12 entities)**	Baja California, Baja California Sur, Chihuahua, Colima, Distrito Federal, Guerrero, Hidalgo, Morelos, San Luis Potosí, Tabasco, Tlaxcala y Veracruz.
Serious and justifiable reasons, provided that the woman already has at least three children **(1 entity)**	Yucatán.
The wish of the woman in the first twelve weeks of pregnancy **(1 entity)**	Federal District.

Punishments imposed on women [for illegal abortion] vary, ranging from imprisonment to medical or psychological treatment or community work:

Punishment	Federated
Imprisonment **(30 entities)**	Federal District: **three to six months.** Jalisco: **four months to a year.** Aguascalientes y Nuevo León: **six months to a year.** Baja California Sur: **two months to two years.** Campeche y Quintana Roo: **six months to two years.** Zacatecas: **eight months to two years.** Chihuahua, Guanajuato, Sinaloa y Tabasco: **six months to three years.** Coahuila, Colima, Durango, Guerrero, Hidalgo, México, Michoacán, Nayarit, Querétaro, Tlaxcala y San Luis Potosí: **one to three years.** Baja California, Morelos, Oaxaca, Puebla, Tamaulipas y Yucatán: **one to five years**. Sonora: **one to six years.**
Community work **(2 entities)**	Campeche and Federal District.
Fine **(12 entities)**	Aguascalientes, Baja California Sur, Coahuila, Colima, Guanajuato, Hidalgo, Michoacán, Morelos, Nayarit, San Luis Potosí, Sonora y Tlaxcala.
Medical and/or psychological treatment **(6 entities)**	Chiapas, Jalisco, Morelos, Tamaulipas, Veracruz y Yucatán.

As these tables show, regulation of abortion is very inconsistent, with the result that women who seek a safe legal abortion encounter judicial discrimination, since availability of these services depends on the federated entity in which she finds herself and, in each case, the educational and economic resources at her disposal for moving to the Federal District or abroad.

The third paragraph of Article 1 of the Constitution establishes the obligation of all authorities to promote, respect, protect and guarantee human rights according to the principles of universality, interdependence, indivisibility and progressiveness.

This constitutional requirement establishes two kinds of obligations for all state authorities (federal, local and municipal): general obligations which consist in the promotion, respect, protection and guarantee of human rights and others which indicate the principles to which the conduct of the said authorities must conform, namely universality, interdependence, indivisibility and progressiveness.

The general obligations of respect, promotion, protection and guarantee of human rights are to be found in Articles 1.1 and 2.1 of the American Convention on Human Rights.[xiii]

The obligation to respect is defined as the duty of the state to neither interfere with, obstruct or impede access to human rights; the obligation to protect lies in the duty of all institutions of the state – legislative, administrative and judicial – to adopt, to the extent of their competency, the necessary means to prevent violations of human rights, while the obligation to guarantee means the duty to ensure that people are able enjoy their rights by taking the actions necessary to allow their access to such rights.[xiv]

From what has just been said, one can conclude that adoption of enabling legislation constitutes part of the obligation to protect. The laws of a democratic state must guarantee the enjoyment and exercise of human rights.

From the obligation to protect, it follows that the legislative institutions of the federated entities have constitutional and treaty obligations to bring about legal consistency so as to protect women's reproductive rights and not to regress in any way from achieved standards of protection and guarantee. Sadly, they have not met these standards, since, despite the constitutional reform of Article 1 and the recommendations made to Mexico by the CEDAW Committee in this respect, they have not carried out in local law codes the reforms that would decriminalise abortion.

The failure to make local laws consistent in the matter of access to safe legal abortion services involves inequitable, unjustifiable and disproportionate treatment of women, through which their rights to non-discrimination and equality are violated.

On this matter, the Inter-American Court of Human Rights indicated in Consultative Opinion 4/84 that 'as a function of recognition of equality before the law, all discriminatory treatment of legal origin is prohibited' and moreover this requirement '[. . .] extends to the internal rights of State parties, in such a way that one can conclude that [. . .] in not introducing into their judicial regime anti-discrimination regulations referring to protection before the law, they are compromised by virtue of the Convention.'[xv]

The rights to equality and non-discrimination are achieved in conjunction with the exercise of other human rights. In the matter of the right to health, the CEDAW Committee ruled that the fulfilment of Article 12 consisted in the State's obligation to 'adopt all appropriate measures to eliminate discrimination against women in the sphere of medical attention, so as to ensure access to medical services under conditions of equality between men and women.'[xv] It follows that the measures for eliminating discrimination against women cannot be considered appropriate when a system of medical care lacks services to prevent, detect and treat infirmities specific to women. Failure of a State to foresee the need to provide legalised services dedicated to women's reproductive health results in discrimination. For example, if those charged with delivery of health services refuse to do so for reasons of conscience, they must adopt measures to send the woman to another provider of such services.[xvii]

Consequently, lack of access to reproductive health services, including access to safe legal abortion, has been considered by various international human rights organisations to be a violation of the right of women to equality and non-discrimination on grounds of sex,[xviii] as women run risks to life and health for lack of services of maternal health and attention to the obstetric emergencies that they alone experience.

In similar manner, the UN Committee on Economic, Social and Cultural Rights (CESCR) has declared that non-discrimination is an essential component of the right to health, especially with reference to the accessibility of medical goods and services, arguing that such services 'must be accessible, in practice and of right, to the most vulnerable and marginalised sectors of the population, without discrimination and regardless of motive.'[xix]

In the context of these ideas, the Supreme Court of Justice of the Nation (SCJN) has ruled that the principle of equality 'not only confers on individuals a guarantee of equality before the law in their capacity as recipients of the law and users of the system of administration of justice, but also within the law (in relation to its content). The principle of equality must be understood as the constitutional requirement to treat equals in the same way and those unequal differently, so that on some occasions it will be forbidden to make distinctions, while on others it will be permitted or even constitutionally required.'[xx]

Therefore, when dealing with a case where there are distinctions between individuals, the action of national authorities should be based on the following criteria: 1) if the difference rests on objective and constitutionally valid grounds, then the legislator is forbidden to introduce in an arbitrary manner treatment that is unequal in law; 2) whether the method implemented by the legislator is reasonable on the assumption that there is an instrumental relationship between the category established and the intended result; 3) the proportionality of the rule, in that one must investigate whether the legislative distinction will not have an unnecessary or excessive effect on other constitutionally protected benefits and rights.[xxi]

The former does not suggest that legislative bodies should be prevented absolutely from establishing legal categories or classifications, provided that the legal configuration pays attention to the principles of equality and non-discrimination established in the Constitution. In this, there will be matters where the legislation is more broad and judicial analysis too lax, as happens with economic and tax regulations,[xxii] and in other cases where there are implications for the enjoyment and exercise of human rights. Or there may be 'suspect classifications' in which liberty is over-restricted by the legislation, as is the case with the legislation covering access to safe legal abortion.

The restrictions on access to legal and safe abortion involve a violation of the rights to non-discrimination and equality in women's exercise of the right to health. In that Articles 4 of the Constitution, 12 of the International Convention on Economic, Social and Cultural Rights[xxiii] and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women[xxiv] recognise a right to health that consists in the right of every person to enjoy the highest possible level of physical, mental and social wellbeing.

In an interpretation of Article 12 of the International Convention on Economic, Social and Cultural Rights, the Committee outlined the scope of the right to health thus in General Observation No. 14:

> 8. The right to health should not be understood merely as a right to be of sound body. The right to health involves freedoms and rights. Among the freedoms, there figure the right to control one's health and body, including sexual and genetic liberty, and the right to be free of interference therein, along with the right not to be put to torture or non-consensual medical treatments or experiments. On the other hand, relationship to a system of protection of health that offers people equal opportunities to enjoy the highest possible level of health also figures among the rights.
>
> 30. [. . .] The States have an immediate duty to respect the right to health, likewise the guarantee that this right will be exercised without any discrimination (paragraph 2, clause 2) and the obligation to adopt measures (paragraph 1 of clause 2) towards the full realisation of Article 12. Such measures must be well-considered and practical and directed towards the full realisation of the right to health.
>
> 33. [. . .] Finally, the duty to comply requires that States adopt appropriate legislative, administrative, budgetary, judicial and other measures to give full effect to the right to health.

The CESCR Committee has been very clear in declaring the adoption of legislative measures directed towards the full exercise of the right to health to be part of the obligations of the state. In addition, it has specifically recognised that the right to health includes reproductive health. On this point, with respect to the rights to reproductive health and non-discrimination against women, the Court has ruled that:

> 'the right to health entails liberties and rights. Among the former are the relationship between liberty in controlling health (including sexual and genetic health) and in controlling the body and the right to be free of interference, torture, and non- consensual medical treatments and experiments. Among the rights is participation in a system of protection of health that offers people equal opportunities to enjoy the highest possible level of health. Furthermore, the protection of the right to health includes, among other things, obligations to adopt laws and other measures to ensure equal access for all to medical attention and related services.[xxv]

In particular one must note that, in August 2011, the same tribunal declared the following in respect of realisation of the right to health:

> Now, on the other hand, it is part of the premise that, even in a constitutional and democratic state, members of Parliament and the governmental and administrative authorities are allowed considerable latitude in giving shape to their view of the Constitution, in particular through deploying in one direction or another the public policies and regulations that must embody an effective guarantee of rights, the Constitutional Court is able to compare their work with the standards contained in its own laws and in the treaties on human rights that form part of the system and can bind its conclusions on all state authorities.[xxvi]

Denial of services of reproductive health through the penalising of voluntary termination of a pregnancy before the twelfth week of gestation, has the effect that women turn to clandestine abortions in their legitimate desire to protect their health, risking their life and personal safety, with negative implications for public health.

For its part, the CEDAW Committee, in its last review of Mexico's compliance with the Convention, welcomed both the reform of Article 1 of the Constitution as a very positive action by the State of Mexico, and also the Federal District's decriminalisation of abortion during the first twelve weeks of gestation.[xxvii]

At the same time, it recommended that the State, and especially the local legislative bodies, should make legislation on the matter of services for safe legal abortion consistent and in conformity with both the Constitutional reform of June 2011 and CEDAW:

> Bring into consistency the federal and state laws relating to abortion in order to eliminate the obstacles confronting women who wish to terminate a pregnancy legally and also increase access to legal abortion, taking into account the constitutional reforms on human rights and the Committee's General Recommendation 24 (1999).[xxvii]

In order to share in the June 2011 constitutional reforms on human rights, particularly women's reproductive rights, local legislative bodies have an obligation to bring their laws into conformity with the interpretative principles and state obligations contained in Article 1 of the Constitution so as to guarantee non-discrimination and equality to women in the exercise of their right to health through effective access to abortion services that are legal and safe.[42]

5. Conclusions

Except for the Federal District, abortion in Mexico is regulated within the penal system and not as a matter of human rights. The latter would impose an obligation to set up the conditions necessary for the exercise of those rights, especially the right to health, without discrimination.

The legislation of the states is discriminatory in that it does not allow women to have access to the reproductive health services that they alone need. On the basis of the constitutional regime current since the entry into effect of the 2011 reform of Article 1, this results in a violation of women's human rights.

In order to conform to the aforesaid set of rights that resulted from the constitutional reforms of human rights, local legislatures have a constitutional obligation to change their legislation on abortion in line with the decriminalisation achieved in the Federal District in April 2007 and in compliance with the obligation to protect imposed on all authorities by the third paragraph of Article 1 of the Constitution.

[i] CEDAW Committee, 20th Session (1999), General Recommendation24, Article 12(1) Women and Health, para. 11, Accessible at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24

[ii] CEDAW Committee, Final Observations: Mexico. 52nd Session (2012), [CEDAW/C/MEX/CO/7-8]. Accessible at http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MEX-CO-7-8.pdf

[iii] Programme of Action of the UN International Conference on Population and Development (1994). Accessible at https://www.unfpa.org/public/icpd

[iv] Ferrajoli, Luigi, 'La cuestión del embrión entre derecho y moral', in *Debata Feminista*, 17.34 (October 2006), p.45.

[v] Los derechos reproductivos a la vanguardia. Una herramienta para la reforma legal. Center for Reproductive Rights, New York, 2008, p.14.

[vi] In 2010 abortion was indicated in 9.3% of maternal deaths. See 'Observatorio de Mortalidad Materna en México', *Numeralia 2010*, México, 2011. Accessible at http://bit.ly/133wppf

[vii] Statistics on the legal termination of pregnancy in the Federal District of Mexico from April 2007 to 31 July 2013. Accessible at http://bit.ly/ZKn0jU

[viii] 'The World's Abortion Laws Map 2013', Center for Reproductive Rights, New York. Accessible at http://bit.ly/u83EMx; recently, on 22 October 2012 Uruguay promulgated a Law on Voluntary Termination of Pregnancy (Law no. 18.987), Accessible at http://bit.ly/TQOhNZ

[ix] CEDAW Committee, Final Observations: Mexico, Note 2, para. 32.

[x] Morelos, Baja California, Colima, Sonora, Quintana Roo, Guanajuato, Durango, Puebla, Nayarit, Jalisco, Yucatán, San Luis Potosi, Oaxaca, Querétaro, Chiapas and Tamaulipas.

[xi] Grupo de Información en Reproducción Elegida (Group for information on Reproduction by Choice) showed that, of the 26 cases documented and listed where access to abortion services has been obstructed and women criminalised, 17 had occurred exactly in those states that had reformed their constitutions on this matter. See *Omisión e Indiferencia. Derechos reproductivos en México*, Grupo de Información en Reproducción Elegida (GIRE), México, 2013, p.55.

[xii] Grupo de Información en Reproducción Elegida, *Derechos humanos de las mujeres y protección de la vida prenatal en México*, Mexico, GIRE, 2013.

[xiii] American Convention on Human Rights, **Article 1. Obligation to Respect Rights**. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
Article 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[xiv] See Abramovich, Victor y Courtis, Christian, *Los derechos sociales como derechos exigibles*, Madrid, Trotta, 2002, pp.29 ff.

[xv] Inter-American Court of Human Rights (ACHR), Consultative Opinion 4/84 of 19 January 1984, Series A, no. 4, para. 54 *(On the Proposed Modification of the Political Constitution of Costa Rica)*.

[xvi] CEDAW Article 12.1.

[xvii] As Note 1 above.

[xviii] ACHR, *Case of the Indigenous Community Xákmok Kásek vs Paraguay: Merits, Reparations and Costs*, Judgement of 24 August 2010, Series C, no. 214, paras. 232 and 233. Also CEDAW Committee, *Case of Alyne da Silva Pimentel vs Brazil*, Communication No. 17/2008 (2011), paras. 7.2, 7.3, 7.6 and 8.2ª. Also ACHR Commission, Access to maternal health services from the perspective of human rights, OEA/Series L/V/II, Doc. 69, 7 June 2010, paras 11,20,23, 27, 28, 32, and 53.

[xix] Committee of ECOSOC, General Observation 14: The right to the highest posible level of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 22nd session (2000), para 12, b, ii).

[xx] SCJN, *Igualdad. Criterios para determinar si el legislador respecta ese principio constitucional*, Tesis: 1a/J.55/2006, Novena Epoca, Seminario Judicial de la Federación y su Gaceta, septembre de 2006, p.75.

[xxi] *ibid.*

[xxii] SCJN, *Análisis Constitucional. Su intensidad a la luz de los principios democraticos y de division de poderes,* Controversia Constitucional, Primera Seminario Judicial de la Federación y su Gaceta, 9 época, tomo XX, diciembre de 2004, p.361.

[xxiii] International Covenant on Economic, Social and Cultural Rights, Article 12.1: The States Parties in the present Covenant recognise the right of every person to enjoy the highest attainable level of physical and mental health

[xxiv] CEDAW, Article 12: 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.

[xxv] SCJN, Amparo en revisión 173/2008, ministro ponente: José Ramón Cossío Díaz, 30 April 2008, Tomo XXVIII, p. 457.

[xxvi] SCJN, 'Derecho a la salud. Su naturaleza normativa', Tesis aislada, Pleno, *Semanario Judicial de la Federación y su Gaceta*, 9ª época, tomo XXXIV, agosto de 2011, p. 31.

[xxvii] CEDAW Committee, Final Observations: Mexico, note 2, paras 4 and 32.

[xxviii] CEDAW Committee, Final Observations: Mexico. note 2, para. 33.

Reproductive Rights and Femicidal Violence Against Mexican Women

BY LOURDES ENRÍQUEZ ROSAS

In the matter of reproductive rights, our nation has a long history of advances and retreats, the most recent of which, thanks to its irrational legal system, are those that have led to women being criminalised to the extent of their being pursued, accused and prosecuted, not only for the crime of abortion, but also through accusations of aggravated homicide as a relative, infanticide, and the fabricating of ridiculous crimes such as 'aggravated homicide of a product of gestation', all of which, on conviction, carry thirty years imprisonment.

It is this exercise of the sovereign power of the State of Mexico against marginalised, poor and vulnerable women that I will describe in this essay, with the object of making it visible and evident as 'necropolitics,'[i] the nature of which has been legally defined in the patterns of institutional femicidal violence described in the General Law of Women's Access to a Life Free from Violence, promulgated in 2007. The latter forms part of the regulatory framework which brings the fundamental rights of women affirmed by Mexico[ii] into consistency with international standards of protection. The obligation to implement these fully was made explicit in the constitutional reforms of June 2011.[iii]

To understand why cruel, degrading and inhuman legislation has recently been enacted against women and to be able to denounce what is involved as the starting point of necropolitical practices by the state against those who terminate a pregnancy willingly, even spontaneously, it is necessary to trace, as if genealogically, changes in legislation and public policy made over the recent years in matters of sexual and reproductive health.

In Mexico there has been a strong and persistent struggle for the decriminalisation of abortion since the beginning of the past century. Gradually, battles were won in which exemptions from criminal responsibility were gained in some federated entities. This depended on the ideology of those in power and the strength of civil society organisations concerned for the life and sexual and reproductive health of the most vulnerable women. There was no single law in Mexico on the matter of abortion, rather variations from state to state, and it is significant that it was only in five states that abortion was criminalised in penal legislation as a serious crime; consequently very few women went to prison before 2008, since by paying a fine, they were free to have an abortion.

In contrast to the moral and ideological norms, religious in character, that rule in the interior of the country, the Mexican urban population is for the most part progressive and more indifferent to metaphysical considerations. And, moreover, it is crucial that three powers rested with the capital, which had the constitutional responsibility to fulfil and cause to be fulfilled the international treaties it had ratified on human rights, including the prompt and responsible implementation of international recommendations received by the State of Mexico on questions of women's right to health.

In April 2007, with a local left-wing government and the political implications of broaching a controversial topic thoroughly assessed, the Legislative Assembly of the Federal District voted for the decriminalisation of voluntary abortion up to the twelfth week of gestation, passing reforms to both the penal code of the city of Mexico and the corresponding legislation on health.
The legislative strategy consisted of reformulating the legal definition of the crime of abortion as follows: 'abortion is the termination of pregnancy after the twelfth week of gestation'. In that termination of pregnancy could only be penalised from the thirteenth week of pregnancy, voluntary abortions procured within the first twelve weeks of pregnancy would be legal (Article 144CPDF).

It should be noted that an important advance achieved by the legislators was to define pregnancy as affected by criminal law thus: 'that part of the process of human reproduction that begins with the implantation of the embryo in the endometrium', a position that explicitly approved the legality of methods of post-coital contraception such as the emergency anti-contraceptive (Article 146 CPDF). They also reduced the penalties on women who did practise abortion after the twelfth week. Previously the penalty was one to three years imprisonment, but now they imposed three to six months in prison or a hundred to three hundred days of

community work on a woman who voluntarily practised abortion or consented to someone performing one for her after twelve weeks (Article 145 CPDF). To protect the free and voluntary maternity of women who were forced to abort, they established the category of forced abortion, which they defined as 'the termination of pregnancy, at any time, without the consent of the pregnant woman'. The penalty for anyone performing a forced abortion is five years in prison and if physical or psychological violence is involved, eight to ten years imprisonment will be imposed (Article 146 CPDF).

In the matter of health, the Health Law of the Federal District was reformed to indicate that sexual and reproductive health is a priority and that services in this matter have as their goal the prevention of unwanted pregnancies. It was established that the government would promote, permanently and intensively, comprehensive policies supporting sexual health, reproductive rights and paternal responsibilities. Further, counselling services (pre- and post-abortion) were to be offered with the giving of objective information to women who sought legal termination (Article 16, clause 8).

These legislative changes were published on 26 April, 2007, in the Official Gazette of the Federal District and came into force the day after publication, so that from that date, the hospitals of the Ministry of Health of the Federal District started giving legal terminations called 'health policies on ILE' (legal abortion service).

One month after the city government initiated the ILE, the reactionaries of the political clergy and conservative groups, who I am going to call anti-rights groups, began to organise their resources and behave in an extremely violent manner. The Federal Government, joined with some groups from the extreme right and acting through the head of the administration of justice and with the shameful complicity of the then head of the National Commission of Human Rights (CNDH), attempted to overthrow the legislative advances achieved in the city of Mexico, interposing, as a legal strategy, charges of unconstitutionality in the national Supreme Court. The central argument of this recourse to law was more ideological than legal and reflected total neglect of the commitments made at international level by the State of Mexico, in signing up to the treaties of human rights protecting women, to the Millennium Development Goals to decrease maternal deaths and to the fulfilment of the recommendations made to Mexico on several occasion by various international organisations with the intention of eliminating systems restrictive of human rights.

After a year and four months of waiting, in an atmosphere agitated by a polarisation of public opinion nurtured by the massive means of communication owned by the conservative oligarchy, the highest tribunal in the land set itself the task of analysing the legal arguments put forward and opened its precinct to public hearings for or against the constitutionality of the legislative changes made in the capital city in matters of law and health.

The initiative of the judges of the Supreme Court in listening to diverse arguments in relation to reproductive rights must be acknowledged as an historic achievement of the organisations of civil society: of the university, of the law, of professional experts and of public demand for transparency in the enforcement and administration of justice and the social need for public discussion of problems of social justice, human rights and public health.

In attendance at the meetings of the highest tribunal and submitting requests to be heard in the Supreme Court were relevant professional experts, networks of intellectuals from different disciplines and organisations from civil society and the political world who were in favour of decriminalisation of voluntary abortion. Needless to say, the anti-rights groups also fully exploited this opportunity, presenting metaphysical, doctrinaire and reactionary arguments and, after an appropriation of the language of human rights that could not hide its basis in a moral/religious ideology, they attempted to persuade the judges into an opinion invalidating the city of Mexico's changes to the law.

One must count the importance of the process as being in its production of a rational and pluralistic discussion of the concerns of society and the fact that it gave more depth to the defence of the secular state, education, access to information, empirical and historical knowledge and much else by the rigor and responsibility of arguments concerned with public health, bioethics, history and demography that were scientific, philosophical, legal and social. The pressure of organised civil society on such a sensitive matter obliged the judges of the tribunal to conduct a serious debate, in line with the high expectations generated in public opinion.

On the historic day of 28 August, 2008, eight out of eleven judges of the Supreme Court decided that the penal and health reforms enacted by the Legislative Assembly of the Federal District were constitutional. This decision represented a watershed political and legal event for the whole nation, since the actual right of women to decide was prioritised over the abstract right to life.

Decriminalisation of abortion up to the twelfth week of gestation and free reproductive health services placed Mexico City in the vanguard of Latin America. The theoretical development that took place in social and legal spheres would be an important referential source in future proceedings in the Latin American region since civil organisations and the university had documented it thoroughly. A point to emphasise is the comprehensiveness of the legislative reforms, in that in addition to the free service of the ILE, they proposed a plan for the prevention of unwanted pregnancies, sexual and family planning information and free services for sexual and reproductive health.

Some weeks after what was decided in 2008, the Supreme Court published the decision that validated the constitutional reforms in the Federal District. It should be noted that, in distinction to the plenary sessions' wealth of argument, which the decision had taken on board, the Court opted for a formal and excessively literal declaration that intentionally enfeebled it, in that it allowed to sneak in a perverse conservative strategy with obvious fundamentalist hues, designed by the sites of power in conspiracy with the politicised clergy. This has seriously endangered the life and health of many Mexican women, most of whom live in poverty.

The perverse stratagem of the conservatives, a flagrant assault on state secularity, was clearly intended to fortify the federal entities and prevent anyone legislating in favour of decriminalising abortion. In less than eighteen months after the publishing of the judicial decision, the local parliaments of sixteen states of the Mexican Republic voted for irregular and undemocratic modifications to their local constitutions with the intention to 'protect life from the moment of conception/ fertilisation until a natural death'.

The sixteen states of the Mexican Republic whose parliaments voted for this type of constitutional reform were: Baja California, Campeche, Chiapas, Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sonora y Yucatán. Chihuahua had already changed the first article of its Constitution in 1994 to: 'judicial protection is guaranteed to life from the moment of conception'.

Whatever may have motivated the analysis and thoughts of the representatives of all political forces in the aforementioned federated entities, they voted in favour of constitutional reforms to 'protect life from its conception', whether through ignorance of ideas of sexual and reproductive health, political ambition, pressure from parliamentary parties, fear of losing votes or simply for ideological reasons.

What is most serious is that they acted without any previous discussion, in opposition to public opinion and without studying or taking into account the judicial absurdities that must ensue, as well as without analysis of the grave consequences their decisions could create in women's lives and health.

For a long time, jurists and experts in the area of sexual and reproductive health have warned how the absence of certainty in these constitutional reforms would affect health service providers in matters concerning methods of family planning, emergency contraception, techniques of assisted reproduction and scientific advances. They have warned especially about this no less grave matter, that the judicial aberration of granting the status of 'person' to a fertilised egg was going to result in women who terminated a pregnancy being accused of the crime of murder, something that, sadly, has been happening in the last five years, after the way of necropolitics.

The constitutional reforms voted in behind the back of the public by legislators of all political parties involve destructive effects in the lives of women; among their many consequences the following stand out:

- They enslave women to a servile obligation to continue a pregnancy for the benefit of third parties by means of a punitive action and the over-valuing of an assumed but non-existent absolute right to life for the embryo.
- A judicial system that criminalises women who terminate pregnancy intentionally or even spontaneously produces a state of discrimination, inequality and repeated violence on grounds of sex, since this is the one crime that considers it just that women alone should lose their lives on account of matters of health inherent in their biological difference.
- The reforms oblige women to choose between only two alternatives, both negative: either to become mothers or to become criminals.
- They deny women the right to freedom of conscience.
- They impose on women a burden that could never be imposed on a man, which violates the principle of judicial equality of men and women before the law.
- Through a coercive and punitive act of the state, women are devalued as persons and reduced to being mere instruments of procreation or reproductive machines, which results in a constitutionally prohibited act of discrimination.
- The constitutional reforms have the end result of imposing forced maternity on pain of legal punishment.
- The absurd absolute 'protection of life from conception' obstructs legal access to those terminations of pregnancy provided for in the state penal codes by 'exclusions from criminal responsibility'.

- The reforms ignore the fact that the Federal Constitution recognises that there is no absolute right to life.
- They attack the secular and democratic state, in which it is not possible to impose a single point of view, whether it be theological, philosophical or ideological.
- They protect an absolute right to life, especially in favour of the life of the conceived but as yet unborn being, which is contrary to the Federal Constitution and to the international treaties that our nation has signed and is obliged to implement.
- They deny the pluralistic nature of Mexican society.
- They make it obvious that sexual inequality is not only an exercise of domination over the bodies of women, but also, which is even more serious, an extraordinary act of necropolitics that fails to distinguish between public and private space or between the individual and the citizen.

To all this, one might add that Mexico has not complied with the Millennium Development Goals, specifically the one referring to lowering the instances of maternal death. The official reports of non-governmental organisations reveal very high indicators of maternal death, which are not, for the most part, due to problems of pregnancy, parturition and post-parturition, but referrable to the death of mothers from poverty or unsafe and clandestine abortions.

Following these constitutional reforms, there appeared various activist organisations who brought about an increase in the climate of persecution against women who had experienced an induced or spontaneous abortion, with the majority of complaints to law enforcement agencies being made from hospitals.[iv] The defenders of human rights complained to international bodies[v] that, as an effect of the constitutional reforms, the Mexican judicial authorities had blurred the line between the crime of abortion and the crime of infanticide. And, adopting strategically the discourse of human rights, they argued that the State of Mexico was systematically violating women's rights to health, privacy, autonomy and personal dignity.

Members of the 'National Campaign for the Right to Choose' declared at the United Nations: 'If the punitive legislation violates the rights of women because of an alleged defence of life in the abstract, it is clear that it is not achieving its objective, given that women who do not wish to be mothers at a particular time of life or set of circumstances are going to terminate their pregnancy whatever the consequences may be'.[vi]

It was Mexico City that realised that most abortions were happening in secret and unsafe conditions, i.e. in unhygienic ways where the women risked their health, even their life and now, as a result of these retrograde laws, could also be deprived of their liberty and convicted of the crime of homicide aggravated by cognation (blood relationship).

The cases of women prosecuted and sentenced to different penitentiaries across the country for the crime of aggravated homicide as a relative have increased exponentially in the last five years. Organisations defending sexual and reproductive rights concluded that women who underwent induced or spontaneous abortion were denounced mainly by the providers of health services[vii] and that, in making use of necropolitical technologies and femicidal violence, the state was punishing them as an example to other women and to society as a whole.

What this essay intends to argue is that state violence against women is a matter of the *nomos* (law and custom) of the political space in which we live. This violence is, as has been said before, an exercise of sovereignty or power well beyond what is useful, that is, the criminalisation of women for taking decisions about their bodies, their sexuality and the protection of their lives is a mechanism of the power of oversight and control.

The aforementioned 'General Law of Women's Access to a Life Free of Violence' defines femicidal violence as '. . . the extreme form of sexual violence against women, a product of the violation of their human rights in both public and private spheres, shaped by the conjunction of misogynist conduct, which is allowed to exist with social impunity, and the state, which is able to bring it to culmination in murder and other forms of violent killing of women'.

The violent killing of women, most of them young and healthy, driven by punitive legal systems to practise unsafe abortions in secrecy is femicidal violence on the part of state institutions.

The concept of femicidal violence appears to possess an incalculable energy, resistant to semantic appropriations and limitations in both legal and academic situations, especially when it is employed to render visible a type of violence practised in our society with necropolitical effects, namely murder.[viii]

The philosopher Ana María Martínez de la Escalera argues that: '. . . domination and practices of sexual subjection, including the very special case of femicidal violence, do not necessarily have as their aim or function the domestication of women and reproduction, but rather the realisation of a sovereign power that entails the taking over from another person the ultimate decision, to give or to take life. This exercise of sovereignty fails to recognise the techno-legal boundaries between private and public, between nations, languages, ethnicities and cultures, even indeed between the biological and the sociological'.[xiv]

It is a cause for celebration that FEMU is organising public debates to highlight the criminalisation of Mexican women as a result of these retrogressive laws on sexual and reproductive health. They are promoting fruitful interdisciplinary debates with activists in gender politics, an interchange of ideas and projects for the future of the humanities within the universities in order to attend to the urgent necessity to reflect, from a critical perspective, on *how we should behave,* to explain, describe and deplore the stigmatising and persecution of those women who make their own decisions about their bodies and to ask *what are the consequences* resulting from these practices. By these means, we have a public approach to this serious communal problem.

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[i] A certain form of sovereignty exercised by the state over the life and death of women. Asymmetrical and hierarchical, this product of gender politics carries with it the sovereign right to say 'live' or 'die'.

[ii] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Mexico in 1981 and the American Convention to Prevent, Sanction and Eradicate Violence against Women, ratified by Mexico in 1998.

[iii] Reform of Article 1 of the Constitution: 'In the United States of Mexico every person shall enjoy the human rights recognised in the Constitution and in the International Treaties to which the State of Mexico is a party, and in like manner the guarantees of protection, the exercise of which cannot be restricted or suspended, except in the cases and under the conditions established by this Constitution. The laws relating to human rights are to be interpreted in conformity with this Constitution and the International Treaties on these matters, favouring at all times the most far-reaching protection to all persons.'

[iv] *Omisión e Indiferencia/ Derechos Reproductivos en Mèxico 2013*, Grupo de Información en Reproducción Elegida (GIRE), A.C. y Red de Abogadas por la Defensa de la Reproducción Elegida.

[v] The CEDAW Committee reviewed Mexico in Session 52, July 2012. In opposition to the official information, various non-government organisations presented shadow and other reports that denounced the criminalisation of women who had undergone an induced or spontaneous abortion and their subjection to prosecutions with potential convictions for homicide aggravated by blood relationship.

[vi] Private hearing of the Committee of CEDAW, held at the seat of the United Nations in New York, 17 July 2012.

[vii] The Centre 'Free Women for the defence of sexual and reproductive rights,' located in the state of Guanajuato, reports statistics obtained by accessing public information. 'Revista con la A' of February 2014 showed that 76 women nation-wide were prosecuted for the crime of homicide aggravated by blood relationship in 2008, but by the end of 2013 there were 690 women accused of the same crime. In the absence of a review of each of the accused, the assumption is that the majority of these women who underwent and induced or spontaneous abortion were poor, indigenous or rural.

[viii] Martinez de la Escalera, Ana María, 2010, 'Feminicido: Actas de denuncia y controversía', Editado por el Porgrama Universitario de Estudios de Genèro, UNAM México. D.F.

[vix] Professor and researcher in aesthetics and political philosophy, coordinator of the Permanent Research Seminar 'Otherness and Exclusion: vocabulary for the social and political debate.'

Between 'Impunity' and 'No Case to Answer': Reflections on the Crime of Abortion

BY MARÍA DEL PILAR GONZÁLEZ BARREDA

1. Introduction

In Mexico there are thirty penal codes that criminalise abortion. Of these, only the Penal Code of the Federal District establishes that the offence of abortion is the termination of pregnancy after the twelfth week of gestation; which is to say that any termination carried out before that time is not an offence and that there is a space in which a woman may decide whether or not to become a mother.

As against what happens in the Federal District, the penal codes of thirty-one federated entities, as well as the Federal Penal Code, consider termination of pregnancy a crime. Despite the obvious diversity of the codes, one can name four common cases where abortion does not incur punishment. We can speak of wrongful abortion or we can speak of abortion as something that happens through carelessness or through provocation when a pregnancy results from rape (also called ethical abortion) or there is risk to the life of the mother (called therapeutic abortion) or the foetus has serious abnormalities (also called eugenic abortion).

However, if there are these four well-understood grounds on which a woman should not be punished with any of the penalties provided in the penal codes, whether they be deprivation of freedom, a fine, compulsory medical treatment or community work, the question this paper raises is this: Does termination of pregnancy constitute a crime when it arises from any of the four circumstances already mentioned? Criminal law makes a distinction between impunity and no case to answer. To which situation does wrongful abortion apply – the ethical, the therapeutic or the eugenic? Perhaps one might ask whether these two judicial categories can be effectively distinguished in the various operations of the law.

It is because of this that I aim to establish in the following pages a theoretical distinction between no case to answer and impunity. I intend to conclude with a discussion as to how these two categories are entangled in the mind of society.

With respect to protection of life from the moment of conception, practising doctors and members of the judiciary, confronted with legal technicalities, may well be confused as to what criterion might cause any of the four situations laid down in the penal codes to be inapplicable, something that could result in women who present with any trace of abortion being accused to a greater extent on account of the enforcement in seventeen federated entities of protection of life from its conception.

Finally, after dealing with theoretical concepts, I wish to present a reformulation of 'free motherhood' that abandons the categories offered by penal doctrines.

2. Theoretical Approaches

It is important, in beginning this theoretical approach, to say what is meant by crime. From Latin *delinquere,* the Spanish 'delito' means to depart from the path of virtue, to move away from the direction indicated by the law.[i] Crime is an infraction of the law promulgated by the state to protect the security of citizens, an infraction resulting from a human act, positive or negative, that is morally reprehensible and damaging to the body politic. In essence, a crime is considered to be human action that is against the law, criminal, wrongful and, at times, punishable.[ii]

Fernando Castellanos considers the essential elements of crime to be conduct, criminality,[iii] illegality and culpability, with a logical sequence between them:

> One proceeds first to note if there is *behaviour*; then to verify its conformity to legal crime:[iv] *criminality*; next to check whether or not the said criminal behaviour is protected by some justification and, if not, to reach the conclusion that there is illegality; and then to investigate whether there is intellectual and volitional capacity in

the actor: *impunity* and, finally, to ascertain whether the conduct of the attributed criminal and illegal conduct behaved in a culpable manner: *culpability.*[v]

These elements are considered *positive*, since there is already presupposition of the existence of a crime. However, just as there are positive elements of a crime, so there exist correlative *negative* elements of the same crime.

Elements of crime	
Positive	Negative
Activity/conduct	Lack of action
Criminality	Absence or lack of crime
Illegality	Justification
Accountability	Unaccountability
Culpability	Lack of culpability
Liability to Punishment	Impunity

In arguing for a negative aspect to a crime, it is not necessary to deal with the remaining positive elements, nor need one give other negative factors for that crime. For example, when there is no action, we have a negative factor, the non-existence of action and consequently we have no crime.

In the case of absence or lack of crime, the behaviour occurs but with neither criminality nor the other positive elements of crime. With the hypothesis of justifiable cause (the negative factor to illegality), the conduct is consistent with criminality but not with illegality, nor with the other essential elements of crime. In a case of unaccountability, criminality and illegality apply to the conduct, but accountability is lacking, with the following essential elements of crime, culpability and liability to punishment. In the face of a situation of lack of culpability (the negative aspect of culpability), criminality, illegality and accountability apply to the conduct, but not culpability nor liability to punishment. When we are dealing with impunity (the negative aspect of liability to punishment), criminality, illegality, accountability and culpability apply to the act, but not liability to punishment.[vi]

Turning to the category of justification, we find the following negative elements of crime: absence of action, lack of criminality, justifiable cause, reasons for lack of accountability[vii] and immunity to punishment. It is impossible to align crime with absence of responsibility, so that from this perspective, when one encounters absence of responsibility, crime does not exist.

For the purposes of this discussion, my interest centres on 'no case to answer' (comprising justifiable causes), as against the negating factor of the liability to punishment, i.e. impunity ('absolving excuses').

3. Justifiable causes and impunity

There are reasons whereby a criminal act, i.e. one that corresponds to a legal crime, is not illegal. With these reasons, which are called grounds for justification, illegality has never existed, since the conduct has from the beginning been in accord with the law. Such is the case of legitimate self-defence, where the behaviour of the actor is always justified as that which has never been contrary to law is not illicit.[viii]

Justifiable grounds are conditions that, by their existence, have power to exclude illegality from a criminal act in that one of the essential elements of crime is lacking: illegality. The act committed, despite appearances, results in conformity to law.[ix] In addition to self-defence, there are other grounds for just cause:[x]

1. Self-defence
2. State of Necessity
3. Execution of a duty
4. Exercise of a right
5. Consent of the owner of the legal property affected.

A 'state of necessity' involves an actual or imminent threat to legitimate property or welfare that can only be avoided by means of harm to legitimate property or welfare of another person. Where there is no possibility of co-existence, the State must decide between one or the other. For Castellanos, a collision of legitimate interests constitutes a state of necessity:[xi]

The following factors constitute a state of necessity;[xii]

a) real, actual or imminent danger;
b) that this danger has not been intentionally caused by the person acting;
c) that the threat relates to some legitimate property or wellbeing;

d) an attack on the person finding themselves in a state of necessity;
e) that there is no other means both practicable and less prejudicial available to the person acting.

Castellanos refers directly to therapeutic abortion, i.e. the situation where a pregnancy puts the life of the mother at risk, as a specific instance of the state of necessity:

> The very wording of the provisions has taken into account some special cases involving valid impunity, i.e. when an offence exists but there is no punishment, since the legislation uses the phrase 'punishment shall not apply'. However, it seems the clause is superfluous, since its intent is covered by the generic formula of a state of necessity, which, we must conclude constitutes cause of justification rather than simple impunity.[xiii]

From interpretation of the paragraph above, one concludes that when there are reasons for impunity, the offence exists but the punishment does not apply, but that in the case of what is called therapeutic abortion, a 'state of necessity' is present and therefore one is dealing with just cause, i.e. with 'no case to answer' and not impunity. We see that there is a distinction between to two terms, i.e. between grounds for just cause and impunity.

For his part, Cuello Calón has declared, in speaking of therapeutic abortion:

> . . . In therapeutic abortion there exists a valid state of necessity, a *conflict* between good things of unequal value: between a greater good, the life of the mother, an outcome already accomplished, a being with conscious life, a life with a profound effect on other lives and a lesser good, a life unconscious, purely physiological, a not animated as is that of a human being properly so-called, but only a hope thereof. The judicial solution of the conflict should be the sacrifice of the lesser good . . .[xiv]

As has been said before, grounds for impunity are a negative aspect of punishment. They are grounds that retain the criminal character of the action but prevent the application of a penalty; when impunity is claimed, the essential elements of crime (behaviour, criminality, illegality and culpability) remain unaltered, only the possibility of punishment is excluded, i.e. in excluding the possibility of actually imposing a penalty,[xv] impunity becomes a legal pardon.[xvi]

Castellanos considers that abortions caused carelessly or when the pregnancy is the result of rape (wrongful and ethical abortion) are covered by impunity.[xvii]

With respect to abortion through carelessness, González de la Vega says that the grounds for impunity are that the woman is the first victim of the carelessness in being cheated of her hopes for maternity, for which it would be absurd to reprimand her.[xviii]

Eugenio Cuello Calón, with reference to abortion performed when the pregnancy results from rape, says that the impunity has psychological grounds, since nothing can justify imposing on a woman a hateful motherhood, the giving birth to a being who will always remind her of the horrible episode of violence she suffered.[xix]

Thus, while the voluntary termination of pregnancy performed when the life of the pregnant woman is at risk is considered by legal doctrine to be justifiable, i.e. a situation of no case to answer, it is the principal situation that does not fall within the scope of criminal abortion: termination that originates in carelessness on the part of the pregnant woman, and that performed when the pregnancy is the result of rape, as previously signalled, are considered to be situations of impunity, where the quality of criminality remains, but the law foregoes punishment.

4. Analysis of cases of criminal rape

From this reflection on theory, we can conclude that the therapeutic abortion, the termination of a pregnancy when the woman's life is in danger, corresponds to a state of necessity, a situation of no case to answer in which there is no illegality, which cannot be counted as criminal abortion. As for ethical abortion, i.e. when the pregnancy is a result of rape and wrongful abortion, these are cases of impunity, i.e. cases that do not incur punishment, but retain the characteristics of crime.

The distinction between grounds for impunity and no case to answer is of no small importance, as Castellanos argues. While the former only eliminates punishment, the criminality of the act remains, and, moreover, these cases are individualised, favourable only to those found within the relevant category. Situations of no case to answer (where we are dealing with just cause) are *erga omnes* (universally applicable), objective and impersonal.[xx]

There is a distinction within penal theory with regard to the interpretation of these three terms. This is not a negligible matter. Although one may think that there is merely indistinct usage of the words in the penal codes, nothing is fortuitous in the creation of juridical regulations; there is a reason for the language to be there, and although the effect is that four categories are considered as permissible in certain federated entities, it is clear that the penal codes of the federated entities use the terms 'impunity' and 'no case to answer' without apparent differentiation.

This would not be worthy of attention, were it not that we know that when one speaks of impunity the crime is considered to be committed, but the application of the penalty is 'pardoned', whereas in no case to answer, there has never been a crime.

From the evidence of the regulations in the nation's penal codes, these situations continue to be described as criminal abortion (we have added 'unwanted insemination' since in some federated entities it is considered in the category of ethical abortion).

	Wrongful	Ethical	Unwanted insemination	Therapeutic	Eugenic
Not punishable					
Aguascalientes	•				
Baja California	•	•	•	•	
Chiapas		•		•	•
Guanajuato	•	•			
Guerrero	•	•	•		•
Hidalgo	•	•	•	•	•
Jalisco	•	•		•	
Estado de México	•	•		•	•
Michoacán	•	•			
Morelos	•	•	•	•	•
Nayarit	•	•			
Oaxaca	•	•		•	•
Querétaro	•	•			
Quintana Roo	•	•		•	•
San Luis Potosí	•	•	•	•	
Sonora	•	•			
Tabasco		•	•	•	
Veracruz	•	•	•	•	•
Zacatecas	•	•			
Código Penal Federal	•	•			

Not to be punished					
Coahuila	•	•		•	•
Michoacán				•	
Nayarit				•	
Nuevo León		•		•	
Puebla	•	•		•	•
Sinaloa	•	•		•	
Sonora				•	
Tamaulipas	•	•		•	
Yucatán [xxi]	•	•		•	•
Zacatecas				•	
Código Penal Federal				•	
No penalty (classed as justifiable cause)					
Baja California Sur	•	•	•	•	•
Grounds for exclusion of responsibility					
Aguascalientes		•		•	
Tlaxcala	•	•	•	•	•
Excluded from responsibility					
Campeche	•	•		•	
Chihuahua	•	•		•	
Distrito Federal	•	•	•	•	•
Durango	•	•		•	
Grounds for legality					
Colima	•	•	•	•	•

The situations identified as grounds for impunity are identified by the phrases 'will not be punishable' and 'not to be punished'; while the grounds for no case to answer occur under the words 'causes for exclusion', 'exclusions from responsibility', 'grounds for legality' and, in the case of Baja California Sur's 'no penalty will be applied', since the legal text determines that these are cases of just cause.

The differences that apply in a single entity can determine whether an act is a crime or not. For example, the penal code of Aguascalientes established that ethical and therapeutic abortion constitute no case to answer, while with respect to wrongful abortion, it lays down that it is not to be punished. This is to say that for this penal code there is a difference between no case to answer (called grounds for exclusion in the code) and impunity (set down in the aforesaid code as in 'will not be punishable').

Across the nation, uniformity is lacking in much of the regulation of abortion, since in each state code there is a lack of discrimination in the use of terms (impunity and no case to answer) for the cases stipulated, just as there is in the penalties to be imposed.[xxii]

Bringing consistency to the Mexican legislation was one of the recommendations of the Committee on the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). In 2012, the Committee published its final recommendations on the information supplied by the Mexican State and what needed to be changed for the fulfilment of the provisions of CEDAW.

The Committee made clear, among other things, its concern with respect to the differing levels of authority and competence within the federal structure of the State, in part as a result of the inequitable application of the law, and invited the Mexican State to take the necessary actions to eliminate incongruities in the legal framework of the federal, state and municipal levels. The Committee emphasised the need to rationalise the federal and state laws relating to abortion, so as to remove the existing

obstacles that confront women who seek a legal abortion, and, moreover, to increase access to legal abortion on the basis on which it was established in the 2011 constitutional reforms concerning human rights.[xxiii] It also showed its concern over local constitutional changes that protected human life from the moment of conception and supported the grounds for abortion already established in local laws, urging the State of Mexico to increase access to legal abortion.[xxiv]

Nonetheless, it cannot be denied that since the decriminalisation of abortion in the Federal District, sixteen local constitutions[xxv] have introduced the protection of life from the moment of conception into legislation. Civil organisations say that persecution of women who have terminated a pregnancy has grown as a result of such legislation. According to Grupo de Información en Reproducción Elegida (Association for Information on Reproduction by Choice) nationwide accusations of and convictions for the crime of abortion have increased following the approval of the ruling that life is protected from the moment of conception.

An investigation of the National Supreme Court of Justice, revealed that, during the period 1992-2007, the number of proceedings and preliminary investigations relating to the crime of abortion was less than a thousand, i.e. an annual average of 62.5 women accused and/or prosecuted for this crime; however, during 2009-11, there were seven hundred and seventy-nine preliminary investigations and/or proceedings, which results in an annual average of 226.3 women accused and/or convicted. [xxvi] These figures show that accusations against women who present as having an abortion have grown considerably and one explanation for this is the entry into force of the rules that protect life from the moment of conception.

On the other hand, Mexico has an annual *conviction* rate of thirty-three induced abortions per thousand women between the ages of 15 and 44;[xxvii] it follows, given the data above, that the women who are accused and subsequently convicted for the crime of abortion are in the minority, compared to those who are submitted to the process. One must conclude that the criminalising of abortion is not an effective regulation[xxviii] since it is not applied in reality, constituting only an instrument of class oppression based on economic status and race, since penal abortion falls into the lowest type of discrimination, marginalisation and domination, in that the women prosecuted and convicted for the crime of abortion are women in a precarious economic state who cannot attend the private clinics that perform terminations in a safe and secure manner.

5. Deconstructing the crime of abortion

If abortion is an historic act that has been with human beings from their habitation of the planet, one might ask what it is that influences, what is the major factor in, the introduction and enforcement of involuntary protection of life on a woman who does not wish to be a mother. This is not the place to be profound on the matter, rather it is an opportunity to declare that this is an compulsory obligation imposed on human beings of the female sex, the most heavy oppression produced by a patriarchal society, resulting from an assimilation of 'woman' to 'mother', so that the attributes appropriate to the maternal are imposed on all women. Legal standards on criminal abortion reflect the idea that women must be converted to mothers, without taking into account whether they have a will of their own.

In addition to this, and to the national diversity in the regulation of the crime of abortion, the judicial terms used demonstrate that the woman who terminates a pregnancy on those grounds provided for in her federated entity commits a crime, and she commits it if the legal regulations determine that the specified ground on which the termination is performed is a ground for impunity, i.e. despite the set terms 'not punishable' and 'does not carry punishment', the law 'pardons' her from punishment.

Only when it is specified that the situation is one of no case to answer, or else that it is 'a cause for exclusion' or a 'legal cause' does the woman's conduct not correspond to a crime, since, as we have seen, when there is no illegality, no crime exists.

In this situation, the criminal law theories of Raúl Carrancá y Trujillo and Raúl Carrancá y Rivas offer an interesting analysis of penal doctrine respecting abortion. In the first place, they agree that embryonic life is not human life and that this proposition could be a formal criterion for accepting abortion during the first stages of pregnancy, suggesting a deadline of two months.[xxix]

With reference to therapeutic abortion, Raúl Carrancá y Rivas argues that he favours a more liberal reform of this type of abortion, which would not reduce it solely to abortion in a state of necessity, i.e. danger of the woman's death, but considered a wider range of social possibilities, including wrongful abortion, and took consent to maternity as fundamental, taking account, moreover, of economic factors, which can impel a woman or a couple to abort.[xxx]

From another aspect, Francisco González de la Vega refers to institutional challenges concerning abortion, going on to produce a statement central to our topic:

> . . . it may be persuasive, in order to avoid this crime (of infanticide) and abortion, to favour some social reforms in order to procure motherhood that is voluntary and economically prepared for: accurate and appropriate sexual education, voluntary contraception, the possibility of identification of paternity, suppression of the penal sanction for underage marriage, increase in charitable institutions for minors, strict fulfilment of Article 123 of the Constitution concerning the work of pregnant and nursing mothers, and above all, equitable economic arrangements and intensive campaigning against the prejudice against extramarital motherhood.[xxxi]

The methods needed to reduce the number of actual abortions in various countries where this has been possible coincide with those of González de la Vega. A crucial means is reformulation of the role of fathers and mothers in housework and the care of children. Carrying out these roles has historically been allocated to women who, in practice, have been household workers as well as continuing to be the principal caregivers to the progeny of the household. The establishing of shared tasks, whereby men and women contribute to housework and the upbringing of children, is crucial when we speak of means likely to reduce terminations of pregnancy: we note that motherhood is not a process lasting just nine months, but for a lifetime.

Furthermore, the introduction of the concept of conscious motherhood carries with it the idea that, in so far as a woman decides to change into a mother, it must be of her own volition, i.e. maternity must at no time be imposed, since 'consciousness' implies a state in which feelings work consistently to produce acceptance or rejection of something.

One of the great additional stumbling blocks to reconfiguring the crime of abortion is the idea that there is no separation between the sexual and the reproductive lives of human beings. Historically, the sexuality of women has been a taboo topic in many societies where nonetheless there are persistent sociocultural constructs which exalt the virginity of women and on the other hand denigrate them when they enjoy the sexual act. When one considers male human beings, it is accepted that enjoyment of the sexual act is unquestionable, is *natural*. In this way of thinking, human sexual life may be deemed permissible or prohibited by reason of one's sex; in the words of Graciela Hierro there exists an historical *asymmetrical evaluation of orgasmic pleasure.*[xxxiii]

The exercise of a free sexual life includes the decision, in the face of the failure of a contraceptive method, whether or not to take on an unplanned maternity. That is, reproduction is not a logical consequence of sexuality, it is a possibility; even less does it constitute an inevitable consequence. Compulsory motherhood is imposed by a society that does not distinguish between sexual and reproductive life, a society which dominates over the female body and by means of the law perpetuates a situation where a woman must be a mother, whether or not she wants it.

The propositions offered on the other side by the penal code could very well be rethought in the light of a defence of freely chosen maternity, i.e. by an adequate argument, the 'state of necessity' could be employed as a cause of justification not only in the case of therapeutic abortion, but also to resituate maternity as a woman's self-determination dependent on her free will. The development of this argument, combined with the positions of Raúl Carrancá y Trujillo, Raúl Carrancá y Rivas and Francisco González de la Vega, could form a convincing argument for legal doctrine to reconfigure the crime of abortion.

6. Conclusions

~~This paper originated in a concern~~ to establish a difference between two judicial terms which are used in an unclear way when people talk of abortion. Throughout this brief overview I have attempted to make a theoretical distinction between 'no case to answer' and 'impunity'.

This task has required an analysis of the classification of the crime of abortion in the twenty-three penal codes in force and has shown that the diverse codes follow similar criteria, even if some consider cases of wrongful, ethical, therapeutic and eugenic abortion as cases of impunity while other consider them to constitute no case to answer. The unclear use of these terms has the effect that, if people speak of impunity, using the expressions 'not punishable' or 'not to be punished' in accordance with penal doctrine, the conclusion is that there is in fact a crime but that for certain reasons the penalty does not apply. Legislative consistency according to the terms stipulated by the CEDAW Committee would place acts of abortion in this situation: terminations practised for any of the named situations of criminal abortion would fall under 'no case to answer', which is to signify that crime did not take place.

The main reason why abortion ends up being such a controversial topic and continues to be classified within the penal codes is that

it presumes to control women's bodies on the basis of the religious principle that sexuality must not be separated from reproduction, constituting in this way one, if not the main, of the arbitrary interferences in the lives of women that are a product of patriarchal society.

In reconfiguring the crime of abortion, the very arguments put forward in penal doctrine could be used to defend a consciously chosen maternity. The only abortion which ought to be criminalised, i.e. the sole termination of pregnancy to be considered as a crime established in penal legislation, would be the one performed against the will of a pregnant woman.

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[i] Castellanos, 2005, p.125.

[ii] *idem.*

[iii] We speak of crime according to a legal instrument, logical and of a nature predominantly descriptive, which has as its function the specification of relevant criminal conduct forbidden on pain of punishment; these are the same legal formulae that allow us to specify behaviour prohibited by law. *Cf. Zaffaroni,* 1991, pp.371-373.

[iv] Castellanos, 2005, p.132.

[v] Porte Petit Candaudap, 2007, p.226.

[vi] Castellanos, 2003, p.184.

[vii] *ibid*, pp.169-70.

[viii] *ibid,* p.183.

[ix] *ibid*, p.189.

[x] *ibid*, pp.203-6.

[xi] *ibid*, p.206.

[xii] *ibid*, p.208. In this respect, Castellanos says that the refusal of the Catholic Church to permit abortion even in a state of necessity imposes maternal heroism on women, given the incompatibility of her life with continuing the pregnancy in the normal way.

[xiii] Porte Petit Candaudap, 2007, p.457.

[xiv] Cuello Calón, 1981, p.638.

[xv] Castellanos, 2003, pp.278-279.

[xvi] With regard to abortion performed when the pregnancy is a result of rape, there are theorists who consider that it is not a case of impunity, nor of exclusion from responsibility, since there is no enforceability against a conduct here the motive to act is superior to the obligation not to commit a crime. Therefore there is a criminal act, imputable to the actor and illegal, but not wrongful, since the pregnant woman was motivated to impede the birth of a being generated against her will in a violent act of rape. Cf. Porte Petit Candaudap, 1998, p.453. If this case were one of non-culpability, it would be within the area of no case to answer, where crime was never committed.

[xvii] Castellanos, 2003, p.279.

[xviii] González de la Vega, 1989, p.439.

[xix] Castellanos, 2003, p.279.

[xx] Castellanos, 2003, p.209.

[xxi] Yucatan includes economic grounds as not punishable, provided always that the woman has no fewer than three children and has the consent of the spouse.

[xxii] There are four kinds of penalty for the crime of abortion: prison, prison with fine, compulsory medical treatment and community work: Baja California, Campeche, Chihuahua, Distrito Federal, Guerrero, Jalisco, Estado de México, Nuevo León, Oaxaca, Puebla, Tamaulipas, Yucatán, Zacatecas and the Federal Penal Code prescribe terms of imprisonment from three days to five months for criminal abortion. The State of Mexico, Nayarit, Oaxaca, Puebla, Tamaulipas, Yucatán, Zacatecas and the Federal Penal Code, however, recognise a lesser prison sentence when the woman commits abortion *honoris causa* (is not of ill repute, has concealed her pregnancy and her condition is not the result of adultery).
Guerrero, Querétaro and Quintana Roo provide that punishment is only for abortion in the third term, according to the circumstances of each woman: poverty, age, the support of a spouse, number of children, education.
Campeche and Jalisco rule that the penalty of imprisonment depends on the weeks or months at which the abortion is performed.
Aguascalientes, Baja California Sur, Coahuila, Colima, Durango, Guanajuato, Hidalgo, Michoacán, Morelos, Nayarit, San Luis Potosi, Sonora and Tlaxcala impose a joint penalty of prison and a fine.
Chiapas, Jalisco, Morelos, Tamaulipas, Veracruz and Yucatán set compulsory medical treatment as a penalty. In all entities, except for Chiapas and Veracruz, there is an alternative penalty to imprisonment. In Jalisco, Tamaulipas and Yucatán this alternative treatment is proposed to reaffirm the human value of maternity and strengthen the family.
Baja California Sur, Campeche and the Federal District set community work as the penalty. In Baja California Sur and the Federal District this is an alternative to prison. In Campeche the sentence is community work of the abortion is performed before the twelfth week of gestation.

[xxiii] Cf. Concluding Observations of the Committee of CEDAW 2012 (published 23 February 2014).

[xxiv] *idem.*

[xxv] Baja California, Chiapas (Chihuahua is not included in the list because its reforms to protect life from conception date from 1994), Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosi, Sonora, Tamaulipas and Yucatán.

[xxvi] Grupo de Información en Reproducción Elegida, 2012, pp.26-27.

[xxvii] Alan Guttmacher Institute, Population Council and El Colegio de México, 2008 (published 23 February 2014).

[xxviii] By effective action we mean that the subjects named in a law must produce the conduct that was presumably sought by the law's author. A regulation will be effective if one can say that the obligation to produce specified behaviour does in actuality produce it.

[xxvix] Carrancá y Trujillo y Carrancá Rivas, 1999, p.590.

[xxx] *ibid*, p.616.

[xxxi] González de la Vega, 1988, pp.127-128.

[xxxii] Hierro, 2003, p.37.

Where There is Uncertainty, There is Freedom: Liberty of Conscience and Women's Right to Decide

BY FÁTIMA MONETA ARCE

Catholics for the Right to Decide have been working for a feminist Catholic ethics in order to reaffirm women's moral authority to make free decisions with regard to their health, their bodies and their lives. They have fought for over twenty years for society to respect the right to freedom of conscience in making decisions and for the State to promote legal instruments and services guaranteeing the exercise of women's rights. Above all they have struggled tirelessly against the churches, especially the hierarchy of the Catholic Church, intervening in matters of policy so as to impair women's rights, especially reproductive and sexual rights.

For many years, but more urgently since the papacy of John Paul II, the Catholic hierarchy has sought to impose a singular and punitive morality controlling women's bodies and sexual activity, especially in everything related to sexual pleasure and reproduction. It has demonised the use of condoms, contraceptive methods, the morning after pill, methods of assisted reproduction and abortion, with serious consequences for the health of women and men throughout the world. But its aim has not been limited to influencing the behaviour of its membership, rather the Catholic Church has sought in every way to make its dogmas the law for everyone and has spared no effort in transforming its moral beliefs into a political agenda to the extent allowed by civil authority.

Because of this, I, as a Catholic woman, want to pursue the topic of decriminalisation of women who abort, using a framework of liberty of conscience and the secular state. In the first section, I will explain that the official position of the Catholic Church, that of penalising abortion and criminalising women who practise it, is not the only position within the Church. I will indicate the principles within its traditions that support a person's autonomy in thought and decision-making, even when those decisions differ from the moral precepts preached by the hierarchy. In the second part, I will argue that the secular state is, *par excellence*, the judicial system that protects freedom of conscience against any danger that threatens it. Finally, I will discuss the broad scope of secularism in Mexico and how its existing regulatory framework can be a valuable tool for the protection and guarantee of women's right to choose.

Liberty of conscience in the Catholic Church[1]

Catholic traditions recognise the importance of acting with freedom of conscience. We can observe this in the documents emanating from Vatican Council II and in the concepts of the Well-informed Conscience and Probabilism.

For the Catholic world, Vatican Council II (CVII) constituted a watershed in the relation of the Church to modernity. For the first time in its history, the Catholic Church accepted the scientific developments that had taken place throughout history, adopted a positive view towards pluralism and stopped denying the existence of 'other truths of faith'. It was intent on approaching the 'separated children', i.e. the Protestants, but above all it recognised the laity as the fundamental part of the church, requiring the expression of religious content according to lived reality and not the reverse.

On the topic of conscience, Vatican II stopped considering it to be a passive receptacle of teaching and renewed an emphasis that the Church had earlier placed on autonomy, interpreting it as an integral part of human dignity and of the moral reason with which God had endowed human beings.[2] The Pastoral Rules *Gaudium et Spes* (*Rejoicing and Hope*) state that conscience is 'the most secret and sacred innermost being of man *(sic)* within which he is alone with God, whose voice echoes in the most intimate recesses of every person . . . the thing that, in the most admirable way, lets us know that the law which is to be fulfilled consists in the love of God and one's neighbour.'[3]

It is important to understand that, though revolutionary in many respects, Vatican Council II did not formulate a new way of understanding conscience, but rather recovered one of the less widely known Catholic traditions: *Probabilism.*

Probabilism arose in the sixteenth century when Catholic theologians had to confront situations in which established consensus melted away and people asked if it was possible or not to have guidance over a point of view then in dispute.[4] Probabilism allowed for possible diversity of opinion in moral matters and considered that there ought to be an institutional channel to resolve the debate that such differences occasioned. It was based on the conviction that one could not impose a moral precept where there were reasonable doubts as to whether it was certainly true and possessed enough custom or authority to validate it.

Probability must proceed from a conviction that one works out in one's own conscience or arrives at with the help of Catholics expert in doctrine. 'In the face of doubt, there is freedom' is the principle probabilism works with in arguing that a moral decision should be in the hands of whoever must take it and not depend on some particular ecclesiastical authority.

At the time, probability was considered to be of two kinds: intrinsic and extrinsic. *Probabilidad intrínseca* comes about when the subject notes the inapplicability of a particular doctrine without needing to consult ecclesiastical scholars. Tradition stipulates that: (1) the probability must have a solid basis, what the relevant doctrine calls 'firm probability' and (2) the reasons causing the believer to question the moral precept are 'convincing, but not necessarily conclusive.' In other words, it states that the reasons causing dissent from a doctrine must be convincing personally to the one who holds them, but not necessarily convincing to any other person. It is also a way of protecting the possibility of equivocation, since it implies that arguments to the contrary are also probable; i.e. 'in matters of morality, faced with the impossibility of placing in the bosom of the church a firmly established truth, all positions have the same right to be argued as predominant, but if a truth is not impossible, then belief is more acceptable and advisable.' [5]

In the past, the accepted process of extrinsic probabilism meant that a person who doubted could place his trust and quest for truth in five or six theologians who fulfilled two prerequisites: that their moral character was impeccable and that they supported the dissenting point of view. Extrinsic probability was regarded so seriously by the church that when it was known that at least five or six theologians of repute held a dissenting point of view on moral matters, Canon Law required confessors to report those confessing to distinct points of view on a disputed matter, so that the misgivings of these people could be resolved by the comparison of arguments and a decision reached between them. The confessor was required to make a report even when he disagreed with the dissenting theologians.

To sum up, probabilism maintains that as long as legal prohibition or prescription of an action is not manifestly reasonable, one may suppose that the law cannot be properly proposed or promulgated. This is extremely important for the topic of women's right to decide, as we will see a little later. The reason why probabilism gives primacy to conscience is precisely because each and every one, as Francisco Suárez, a sixteenth century Jesuit theologian, has said: 'in intimate dialogue with God, can come to hold a 'probably reasonable' opinion that may permissibly be pursued, even though there exists a contrary opinion actually more probable. It is consequently not legitimate to act against one's own conscience in order to follow another opinion, even though the latter is supported by *very learned men*[6] (my italics).

Probabilism and women's right to decide

To turn now to the practical application of probabilism to the topic that concerns us today: abortion. First it must be pointed that there is no single position on abortion in the history of the Catholic Church. The official position is relatively new. Pius IX in 1869 in an *ex cathedra* statement converted abortion into a grave sin, to be punished with excommunication. This was made more severe when John Paul II described induced abortion as 'a serious misdeed, inasmuch as it is the deliberate elimination of an innocent human being.'[7]

The historic attitude of the Church to abortion differs substantially, however, from the present one. St Augustine and Saint Thomas Aquinas considered that one could not punish the practice of abortion because one could not identify the moment the soul entered the body (for Saint Augustine there can be no soul in a body without sensation while Saint Thomas placed the soul after the fortieth day). A debate continues to our time between those who argue that the soul is instilled in the body from conception and those who argue for 'delayed animation', i.e. that the soul enters the foetus only at a time when it is in a state to admit it. In fact, in the middle of the twentieth century, in its *Declaration on Abortion* (1974), the Catholic Church stated that 'neither science nor technology has been able to determine the beginning of human life' and that, on the topic of the instilling of the spiritual soul 'there is not a unanimous tradition . . . for some it happens in the first instant, for others it cannot be before 'nesting' (attachment to the endometrium).[8]

It is also necessary to point out that Roman Catholic teaching on abortion is not subject to the doctrine of papal infallibility. The dogma of infallibility is an article of the Catholic faith that states that the Pope cannot be incorrect on manners of faith when he speaks *ex cathedra*[9] [from the Papal chair]. But it is important to differentiate between the doctrines covered. Within the Catholic Church there is a group of true beliefs that constitute the Creed. Tradition and the teachings accumulated in the Church's history have made these infallible, for instance belief in one God and acceptance of baptism as the way to acquire divine grace. There are also other beliefs that concern morality, but are matters between individuals and their consciences; these are not dogmas. Actions that have to do with reproduction, sexuality, use of contraceptive methods, maternity and paternity cannot be subject to papal infallibility because they do not signal the crossing point of belonging or not belonging to the Catholic faith.

However, some Popes, especially John Paul II and Benedict XVI, have abused the principle of infallibility by spreading abroad the criminalisation of abortion as *revealed truth*, a dogma of faith, not a moral issue that can be questioned and re-evaluated. They have, moreover, condemned to instant excommunication (*latae sententiae*) both the women who abort and those who support them.

This punishment, apart from being unmerciful and blind to the reality of women's lives, contradicts the dictates of the very law of the Church. The Code of Canon Law, in canons 1321, 1323 and 1324, establishes attenuating circumstances that exculpate most women who abort from the punishment of excommunication. These extenuating circumstances are:

- When it cannot be seriously imputed to fraud or negligence;
- If someone is under the age of 16;
- If someone is blamelessly unaware that she was infringing a law or precept;
- If someone acted on account of rape, or some serious anxiety, even if it was only relatively [serious] or through necessity, or to avoid serious injury;
- If the [finding of] criminality is intrinsically wrong or results in spiritual danger.

So then, given the examples above, we can see the diversity of positions concerning the matter of abortion, and can conclude that 'it cannot reasonably be either prohibited or prescribed by law' and moreover that 'in the presence of uncertainty, there is freedom', so that each and every one may decide whatever they consider correct according to their conscience. While we add that abortion is never an easy decision, that it is a serious ethical dilemma for those practising it, we maintain that women's legitimate right to decide about their health, autonomy and life must be the rule, even if it contradicts the opinion of those 'most learned' men who presume to impose their dogmas as universal.

What we can learn from other religions

The freedom to decide according to conscience is, however, not exclusive to the Catholic religion. If we think about one of the strongest claims of Vatican Council II, its opening up to other faiths by accepting that there is no single truth, it behoves us necessarily to look at what is postulated in other religions, in particular in relation to morality and freedom of conscience.

Consider a statement made by Grand Mufti Goma'a, an Egyptian scholar and leader in interpretation of Islamic law. During a public discussion that took place in this country in 2007, he spoke about hymenoplasty[10] as a possible resource for women to 'save their honour':

> Hymenoplasty could be used as a tool whereby women could save their marriage . . . since a woman who marries without a hymen will be condemned by her future spouse . . . but he is not the one who should judge the woman's decision. Only God can know if she has completely repented after violating Islamic law [in having sexual relations before marriage], and no man has the right to interfere in this private relationship between the woman and God.[11] (My translation)

Despite the criticisms that can be made of these statements from the position of human rights and feminism, the importance that they confer on freedom of conscience is noteworthy, as it means that women are free to decide, without interventions or impositions, personal questions relating to their sexuality, their body, their health and their pleasure. Furthermore, as Goma'a has indicated: 'And it does not fall to a man [and let us add nor to the State nor society, and much less to the churches] to pass judgment on a woman's decision.' Even less does it fall to anyone to persecute or condemn her or put her in prison 'for only God knows what that woman has undergone *and no man whatever has the right to interfere in this private relationship between the woman and God.*'

Freedom of conscience, so understood, guarantees that one should not penalise, prohibit or impede any decision just because there are certain moral precepts to the contrary; especially when such precepts take no account of the needs, desires and dreams of actual women.

Freedom of conscience in the secular state

This paper has tried to show the importance of freedom of conscience in making intimate and personal decisions such as those that concern the body, and has attempted also to stress that, despite what the hierarchy of the Catholic Church is at pains to tell women who dare to make autonomous and free decisions, there are, within Catholic tradition, principles that protect freedom of thinking and acting according to what is believed to be most appropriate for one's own life.

Now this second part will talk about the strong connection between liberty of conscience and the secular.

It seems surprising that it should be necessary in this day and age to vindicate once again the right to health, in particular sexual and reproductive health. It is surprising that the possibility of enjoying a responsible and pleasurable sexuality – one that does not have reproduction as its sole objective and is not affected by violence; that guarantees safe, healthy and happy motherhood or otherwise guarantees access to a safe and legal abortion with neither stigma nor persecution – is reserved for a small group of women and men, when everyone should have the possibility of such a life as a fundamental human right, without distinction of ethnicity, race or gender.

For this to be possible, it is essential that the state should be secular. In November 2012, exactly a year ago today, a constitutional reform of Article 40 was promulgated wherein secularism was established as one of the governing principles of the Mexican State:

> Article 40. It is the will of the Mexican people to be part of a Republic that is representative, democratic, secular and federal, composed of States free and sovereign in all that concerns their internal governance but united in a federation according to fundamental principles of law.

It should be noted that in Mexico citizens depend on a regulatory framework that guarantees secularism, that indispensable basis for the protection and guarantee of sexual and reproductive rights, as indicated earlier in previous papers. Nonetheless, state secularism is always vulnerable. What do does this mean? How is it that the principles that should govern a secular state are not respected by public servants and ministers of religion? This means that from January to the present date there have been at least twenty-one documented cases of violations of the secular state, with actions ranging from the consecration of states to the Sacred Heart of Jesus and Mary and Presidents visiting the Pope to citizens being required to 'convert' to a particular religious denomination in order to access public works and services.[12]

Consider the case of the Bishop of Aguascalientes, who was publicly known to be a lobbyist for state parliament to put in place an initiative to protect life from conception. Catholics for the Right to Decide (CDD) in conjunction with the Alliance for the Right to Decide, the National Campaign for the Right to Decide and other organisations, presented a complaint to the Interior Ministry (SEGOB) against the Bishop's conduct and publicly denounced the strategy he had used to meddle in local politics (direct influence on two deputies; creation of a civil association whose explicit aim was to promote his initiative; abuse of his religious status to coerce the deputies to vote according to his instructions and failure to conform to the ethical principle of the common good, which should guide all public servants).[13]

At the time of the seminar at which this paper was given, SEGOB, which is the body charged with handling such matters, has neither replied nor condemned the Bishop.
Paradoxically, these obvious violations of the secularism of the Republic allow us to see more clearly the link between the guarantee of secularism and the full exercise of reproductive and sexual rights. We can infer the following:

(1) Secularism provides the necessary conditions for a genuine separation of spheres of competence: the health of individuals must be regulated by institutions of health and not governed by religious or philosophical beliefs;

(2) Secularism guarantees that individuals should be given a real possibility of being able to make free and informed decisions through access to health and an education grounded in scientific criteria. As Dr. Pauline Capdevielle put it very well some months ago:

What meaning does the recognition of human rights have (in Article 40 of the Constitution for instance) if there is no truthful information about sexual and reproductive rights, if there is no guarantee of access to contraception or the morning after pill or if the right to abort for established reasons is denied? It is in guaranteeing these rights that the principle of secularism provides for their actual realisation.[14]

The regulatory framework of secularism: an opportunity to decriminalise the right to decide

To conclude with a brief review of how the regulatory framework of secularism current in Mexico could be a useful tool for the decriminalising of women.

(1) One example is Article 1 of the Constitution, which, since its reform in 2011, obliges the State of Mexico to promote, respect, protect and guarantee the human rights of all persons without discrimination. Furthermore, this encourages us to understand secularism in the light of its more progressive tendency of constantly seeking the highest standard of protection in the amplification of freedoms.

Article 24 of the Constitution, recently revised, now protects liberty of conscience with regard to ethical and religious beliefs. The explicit recognition of freedom of conscience implies the decriminalisation of actions and practices that concern individuals' decisions about their private lives.

(3) Article 40 of the Constitution establishes the Republic as representative, democratic, federal and secular. This represents a guarantee of the three principles of secularism: the autonomy of politics from religion, protection of freedom of conscience and equality before the law and absence of discrimination. The State is obliged:

- to provide public services that pay effective regard to freedom of conscience and decisions resulting from it, guaranteeing that such services will be offered to all without discrimination;
- to promote a culture of respect and tolerance, preventing campaigns that violate the rights of some sectors of the population and that also provide scientific, truthful and suitable information.
- to punish the incursion of any church into areas that are not within its competency; likewise public servants who as functionaries presume to impose their religious morality to the detriment of the freedoms and rights of others.

Finally, it is important to point out that as Catholic women we seek a Church that respects and values us as persons of dignity, with moral authority to make decisions. But it is also necessary to indicate that as citizens we fight for a state that guarantees the full exercise of our human rights without impositions or subjugations of any kind. Above all, state secularism is a necessary condition for the guaranteeing and respect of our right to decide . . . no matter who thinks otherwise.

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(Endnotes)

1 *Cf.* Mejía Piñeros, 2001.

2 Briggs, 1998.

3 Constitución Pastoral *Gaudium et Spes*, §16.

4 Maguire, 1998, p.8. However, Leticia Mayer, 2008, pp.65-70, proposed that the first probabilists arose from the discovery of Otherness, in particular via the missions into America and Asia. For the missionaries, the contact with other cultures so different from their own, with other cosmologies, habits and ways of relating to the sacred, made them doubt the moral precepts of the time. In other words, the encounter with the *other* produced confusion, doubts and a re-evaluation of their own Western culture as to what was 'good' and 'bad'.

5 Mejía Piñeros, 2001 and similarly Mayer, 2008, p.80. The best known probabilist, San Alfonso María de Ligorio, patron saint of confessors, certainly argued with complete clarity and rigour, and he affirmed that human freedom takes priority over law, calling into question the idea of 'the law of nature' and affording an important value to the individual conscience. He is the proponent of *equiprobabilismo*, which occurs when two moral opinions are able to be equally possible even though they are complete opposites.

6 Mayer, 2008, p.79.

7 *Evangelium Vitae,* 1995.

8 Declaration Concerning Abortion, 1974.

9 Popes may make a pronouncement *ex cathedra* when, in the exercise of their office as pastor and leader of all Christians and in virtue of their supreme apostolic authority, they define that a tenet of the faith must be maintained by the entire Church.

10 Hymenoplasty is a surgical repair that reconstructs the membrane covering the entrance to the vagina.

11 Eich, 2010.

12 The information can be accessed at: http://www.catolicasmexico.org/ns/medios/boletines-de-prensa/de-cdd/recientes/257-flagrantes-violaciones-al-estado-laico-quedan-en-la-impunidad.html

13 More information is available at the following:
Georgina Montalvo, 'Denuncian a Obispo Hidrócalido', *Reforma*, 26 July, 2013 – see: http://www.reforma.com/nacional/articulo/708/1415112/
Eugenia Jiménez, 'Acusan a Obispo de violar el Estado laico,' *Milenio*, 28 July 2013 –see: http://www.mileno.com/estados/Acusan-obispo-Aguascalientes-querer-violar-0-123587841.html
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