https://repository.uaeh.edu.mx/revistas/index.php./MBR/issue/archive

Mexican Bioethics Review ICSa

Biannual Publication, Vol. 5, No. 10 (2024) 26-30

Mexican Bioethics Review ICSA

ISSN: 2683-2062

The current panorama of the legislation on the legal interruption of pregnancy in Mexico

El panorama actual de la legislación sobre la interrupción legal del embarazo en México.

Alejandro Pacheco Gómez [a]

Abstract:

The termination of pregnancy is a highly controversial issue in several areas. In Mexico, most criminal legislation defines abortion as the death of the product of conception at any time during pregnancy. With the evolution in the recognition and defense of human rights, it has come to be considered that the prohibition of abortion affects the exercise of reproductive freedom and access to health services since it forces women to procreate and prevents them from accessing safe abortion. Thus, approximately one-third of the local laws have modified the crime of abortion to define it as the termination of pregnancy after the twelfth week of gestation; this has started a trend towards the non-prohibition of this procedure during the first twelve weeks of pregnancy. However, it is not without ethical and legal implications, since health personnel may also object to participating on grounds of conscientious objection.

Keywords:

Termination of pregnancy, Abortion, Ethical Legislation

Resumen:

La interrupción del embarazo es un tema de gran polémica en diversos ámbitos. En México, la mayoría de las legislaciones penales definen al aborto como la muerte del producto de la concepción en cualquier momento de la preñez. Con la evolución en el reconocimiento y defensa de los derechos humanos, actualmente se ha llegado a considerar que con la prohibición del aborto se afecta el ejercicio de la libertad reproductiva y del acceso a los servicios de salud, pues se obliga a la mujer a una procreación y se le impide acceder al aborto seguro. Así, aproximadamente una tercera parte de las leyes locales, han modificado el delito de aborto para definirlo como la interrupción del embarazo después de la décima segunda semana de gestación; con ello se ha iniciado una tendencia hacia la no prohibición de ese procedimiento durante las primeras doce semanas del embarazo. Sin embargo, no deja de tener implicaciones éticas y jurídicas, pues también el personal de salud puede oponerse a participar por motivos de objeción de conciencia.

***Palabras Clave**:*

Interrupción del embarazo. Aborto. Bioética. Legislación

INTRODUCTION

The topic of pregnancy termination has been the object of major juridical, ethical, bioethical, and social controversies; as a consequence, from diverse perspectives, this issue must be addressed. This behavior has been considered as one of the ways to exercise reproductive rights, taking into account the restrictions imposed by the legal standards, and the gestational age, among others.

Currently, in Mexico, there is no uniformity in the legislation about the permission or prohibition of this practice because most of the criminal laws contemplate abortion crime to the interruption of gestation at any moment during pregnancy. There are only some of the updated local legislations to exclude the prohibition and the interruption within the first twelve weeks of gestation.

On the one hand, establishing the interruption for the pregnancy at any moment is a felony that impedes autonomy rights and reproductive rights to women who do not want to continue being pregnant. On the other hand, if a woman decides to interrupt her pregnancy, the health personnel may express their objection to participating in this procedure arguing that it is contrary to their ethical, conscious, and religious convictions. In other words, dilemmas can arise due to the autonomy principle, which is part of the doctor-patient relationship.

[a] *Corresponding author, Pacheco Gomez Alejandro Autonomous University of Hidalgo State, https://orcid.org/0000-0002-5591-602X, Email: alejandro_pacheco@uaeh.edu.mx*

Received:22/09/2023, Accepted: 27/11/2023, Published: 05/ 01 /2024

DOI: https://doi.org/10.29057/mbr.v5i10.12116

Because of that prohibition, the affected people have considered amparo trial to sue the principles of the penal code which define the abortion crime at any moment of the pregnancy, and are opposed to the constitutional document, and the international treaties regarding human rights since they unreasonably restrain the freedom of a person's reproductive life. The federal courts have resolved that women's human rights have been infringed.

Referring to this aspect, legal interruption has emerged from the legal codes that do not punish it and from those sentences given by the judges who solve punitive regulatory precepts opposite to the human rights recognized in the Mexican legal order.

The following research paper will check the current legal regulation of pregnancy interruption.

CONCEPTS

In Mexico, the legal changes for not penalizing the interruption of pregnancy have excluded the abortion crime during the first twelve weeks of gestation, being forbidden the death of the fetus since the thirteenth week. Nonetheless, there are causes of justification or excluding legal responsibilities that focus on the permission granted by the legal standard to commit criminal conduct without the corresponding punishment applied.

This paper proposes the following concepts to distinguish the diverse assumptions of the interruption of pregnancy:

a) Voluntary termination of pregnancy:

The termination done during the first twelve weeks of gestation does not require that a woman asks for it or justifies any cause. It is relevant to remember that during this period, the behaviour is not a felony. It will apply only to federal entities in which penal legislation reflects abortion as illegal from the thirteenth week of gestation.

b) Legal termination of pregnancy:

It refers to being performed with the authorization of the law, that means when there is a cause of justification not to apply the penalty,e.g., Article 158, section III, of the Penal Code for the State of Hidalgo excludes punishment when the pregnancy puts into risk the woman's life(The Penal Code for the State of Hidalgo,1990).

c) Abortion:

It is viewed as the typified behaviour as a crime of penal norm and defined according to each legal code. For instance, in the State of Hidalgo, Article 154 of the Penal Code claims it as the termination of pregnancy after the twelfth week of gestation (Penal Code in the State of Hidalgo,1990). On the contrary, the legislation that does not permit it, as stated in Article 158 of the Penal Code of the State of Guanajuato, defines it as the death of the fetus during pregnancy. (Legal Cide of the State of Guanajuato,2001).

PENAL LEGISLATION THAT ALLOWS THE LEGAL TERMINATION OF PREGNANCY

Consecutively, from those federal entities that allow the termination of pregnancy, legal codes will be quoted:

A) Baja California:

Article 132: Abortion is the termination of pregnancy after the twelfth week of gestation (Penal Code of the State of Baja California,1989).

B) Baja California Sur:

Article 151: Abortion is the termination of pregnancy after the twelfth week of gestation (Penal Code of the State of Baja California Sur, 2014).

C) Coahuila de Zaragoza:

Article 195: Commits abortion to whoever causes the death of the fetus at any moment of the pregnancy.

Article 196: (Self-induced or consented abortion). The sentence of one to three years imprisonment for a woman who voluntarily practices her miscarriage or a person who participates in performing an abortion with the consent of that woman (Penal Code of Coahuila de Zaragoza, 2017).

Nevertheless, Article 196 was declared invalid due to the sentence emitted by the Supreme Court of Justice of the Nation through the Unconstitutionality Action Number 148/2017. Thus, establishing a penalty for consent abortion takes into consideration the elimination of the women's rights to decide, so it violates their reproductive freedom.

D) Colima:

Article 138: The felony of abortion is committed by whoever interrupts the pregnancy after the twelfth week of gestation. (Penal Code of the State of Colima,2014).

E) Mexico City:

Article 144: Abortion is the termination of pregnancy after the twelfth week of gestation

It is worth mentioning that this was the first legal code that did not forbid the termination of pregnancy (Legal Code of Mexico City,2002).

F) Guerrero

Article 142 Concept of abortion: Abortion is the termination of pregnancy.

Article 155 Consent Abortion: Whoever practices abortion to a woman who has twelve weeks of pregnancy, and with the consent of the last one, a penalty of from six months to two years in prison shall be imposed on anyone who resorts to doing

it, except for those excluding of responsibility (Penal Code of the Free and Sovereign State of Guerrero, 2014).

That implies,*contrario sensu*, there is no punishment if the termination is done within the twelfth week of gestation.

G) Hidalgo:

Article 154:Abortion is the termination of pregnancy after the twelfth week of gestation. (Legal Code of the State of Hidalgo,1990).

H) Oaxaca:

Article 312:Abortion is the termination of pregnancy after the twelfth week of gestation. (Penal Code of the Free and Sovereign State of Oaxaca, 1980).

I) Quintana Roo:

Article 92:For the purposes of this Code, abortion is the termination of pregnancy after the twelfth week of gestation.(Legal Code of the Free and Sovereign State of Quintana Roo, 1991).

J) Veracruz:

Article 149:Commits crime of abortion who stops pregnancy after the twelfth week of gestation (Penal Code of the State of Veracruz de Ignacio de la Lave, 2003).

Aguascalientes represents a particular case, so two of its civil associations obtained the protection of federal justice to the effect that Local Congress reforms its Penal Code to eliminate the criminalization of the voluntary consent of pregnancy. Even though, there is no deadline for such modification.
Apenas son diez entidades federativas, incluyendo a la Ciudad de México, que no prohíben la interrupción voluntaria del embarazo.
There are only ten federal entities including Mexico City that forbid the voluntary termination of the pregnancy.

Based on the foregoing, people who express being affected in their rights to free self-determination and reproductive freedom demand through amparo proceedings, the violation of their human rights. In this sense, access to termination of pregnancy is ensured by laws that do not forbid it or in juridical decisions that recognize it is contrary to these fundamental rights.

THE TERMINATION OF PREGNANCY AND THE EXERCISE OF HUMAN RIGHTS

Article 1 from the Political Constitution of Mexican States (Political Constitution,1917) claims that all people will enjoy the human rights recognized in the same constitutional document and the treaties and conventions internationals concerning Mexican State's declaration.

Human rights are viewed as those inherent to human beings, and in each historical moment concrete the requirement for human dignity, freedom, and human equality, which must be acquainted positively by the legal systems of national and international levels (Pérez Luño 2007).

In other words, they are rights that will be enjoyed by all people as they belong to the human species.The same constitutional precepts are perceived as guiding principles such as universality, interdependence, indivisibility, and, progressivity.

The constitutional standard verifies the characteristics of universality, interdependence, indivisibility, and, progressivity. (Of Justice of the Nation, Coordination of Compilation and Systematization of Tesis & Meza, 2013):

a) Universality: they are instinctive to all people and as they have their origin in dignity, belonging to the human specie are enough to enjoy them. Son inherentes a todas las personas y como tiene su origen en la dignidad, la pertenencia a la especie humana es suficiente para gozar de ellos.
b) Interdependence: they refer to those human rights related among themselves, thus the satisfaction or affectation of one of them can transcend the rest.
c) Indivisibility: human rights are part of a whole, so they are not objects of fragmentation, in contrast, they protect their totality.
d) Progressibility: their acknowledgment and protection do not allow a setback. On the opposite, they will move forward to guarantee their guardianship.

Among the human rights, we can identify reproductive rights. Its acknowledgment in the national area is found in Article 4 of the Political Constitution of Mexican States; in the external area, among others, it has its sustain in the Convention on All Forms of Discrimination Against Women (CEDAW).

Taking as a reference the constitutional precept, reproductive rights are understood as the right to decide freely, responsibly, and informed about the number and children's recreation.

Its exercise will be based on other rights, such as the protection of health, access to information, and education, just to mention some.

In the federal entities in which voluntary termination of pregnancy is allowed, it is recognized as a health service. In the case of the Hidalgo State, the Health Law mentioned in Article 5 that institutions that provide health services must provide for the legal termination of pregnancy free of charge and in quality and sanitary conditions that guarantee the human dignity of the women. That means a health service is established, so authorities and institutions must ensure access, and clear any

obstacle that prevents it. Then, the State must ensure the necessary means to do that.

As mentioned before, people are affected because the legal standards applied to them disallow the interruption of pregnancy at any moment. Consequently, they must attend to the courts to take legal action against these standards which are opposite to the human rights recognized both nationally and internationally.

This year, the First Chamber of the Supreme Court of Justice of the Nation, resolved the injunction under review 267/2023[1], whenever a civil organization sued collectively since Article 329 of the Federal Penal Code considers the crime of abortion as the death of the fetus at any moment during pregnancy. It is unconstitutionally as it impedes a woman from exercising their reproductive rights (1st SCJN, A.R. 267/2023).

Concerning this issue, the sentence of the 1st Chamber claimed that the crime of abortion constitutes a violation of the women's autonomy to freely exercise their sexuality to procreate, establishing compulsory destination maternity.

So far the sentence of protection not only affects the people who filed the complaint, but also there is a principle called relativity of the sentence. Once it becomes jurisprudence, it will be a compulsory criterion for the triers.

With this sentence, there is a precedent to consider that the prohibition of the termination of pregnancy at any moment is contrary to the human rights recognized by the Constitution and the international treaties.

Meanwhile, when there is no prohibition of interruption of pregnancy during the first twelve weeks of gestation, the health legislation incorporates it as a health service. As an example, Article 5 Ter, comments that public health institutions, social or private, must provide for free the service. Furthermore, the economic impact that generates that gratuity transcends to the professionals of health. Thus, they ensure human rights as well as, assume the obligation of giving the service.

Notwithstanding, the autonomy enjoyed by the professionals will let them oppose its implementation through the objection of consciousness which is defined as the negative reply from a person to follow a legal mandate to consider it against their major convictions whether it is religious, ethical, or philosophical nature (Capdevielle, 2023).

In Mexico, the Constitutional Article 24 recognizes the right that whoever has the freedom of ethical and conscious convictions. A means of exercising this right is the objection of consciousness, then it is opposite to the legal mandate due to its contrary to internal convictions.

The relationship between the right to voluntary termination and legal pregnancy with the objection of consciousness focuses on the possibility that health personnel dispute to practice this procedure to collide with their ethic and consciousness convictions

As a way of regulating conscientious objection, in 2018, article 10 Bis of the General Health Law verified this right of the medical and nursing personnel with the limitations that they can not get involved when the life of the patient is in danger, or it is a medical urgency[2].

Given such an open wording that only focuses on these restrictions and does not assure the availability of the personnel to object in the health institutions, the National Human Rights Commission filed an action for unconstitutionality (54/2018) to consider that it limited the women's rights to access to the termination of pregnancy services, among others.

Through the sentence published in the Diario Oficial de la Federación on December 21, 2021, the Supreme Court of Justice of the Nation resolved to declare invalid article 10 Bis of the General Health Law to estimate in general terms that the precept do not establish the guidelines and necessary limits to consciousness objection could be exercised without putting into risk the human rights of other people, especially to the right of health exhorting Union Congress to take into account the contents in the sentence to draft in a better way the regulatory dispositions of consciousness objection.

As it is noticed, no prohibition of termination of pregnancy allows women to ask for it as a health service, but bioethical dilemmas are not left out at the moment of performing this procedure.

Based on the mentioned, the spaces of *ad hoc* are the Hospital Bioethics Committees that look for the analysis, deliberation, and recommendation about the means of following.

CONCLUSION

To conclude, in the Mexican Legal System, there is no homogeneity in the punishment to interrupt the pregnancy.

Of the 11 federal entities that have eliminated criminalization, nine of them were because of reform of penal codes, and two of them were due to a court decision. In the case of the Federal Criminal Code, we must wait until the precedent of the sentence

[1] The public version of the judgment is available: https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2023-08/230830-AR-267-2023.pdf

[2] This reform was published in the Official Gazette of the Federation on May 11, 2018, available at: https://sidofqa.segob.gob.mx/notas/5522437

becomes compulsory to modify it and eliminate it as a felony of interruption during the first twelve weeks of gestation.

Once abortion is not forbidden, health institutions perceive it as a health service since they must have the necessary supplies and attend the cases in which health personnel is seen as a conscientious objector to objectively deliberate an option chosen to allow the harmonization of the user's autonomy and the one of the health care provider.

Without a doubt, given the progressivity of human rights in this area, it will consider the following reforms to eliminate the felony of interruption of pregnancy during the first weeks of gestation.

REFERENCES

- Action of Unconstitutionality 148/2017, Mexican Supreme Court of Justice (SCJN) Accessed on September 9, 2023 and available at: https://sidofqa.segob.gob.mx/notas/5640922
- Action of Unconstitutionality 54/2018, Mexican Supreme Court of Justice (SCJN) Accessed on September 9, 2023 and available at: https://sidofqa.segob.gob.mx/notas/5638915
- Amparo en revisión 267/2023. 1st Chamber of the Supreme Court of Justice of the Nation (1ª S.C.J.N.) Accessed on September 9, 2023, and available at: https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2023-08/230830-AR-267-2023.pdf
- Capdevielle, P. (2023). El right to abortion and conscientious objection in health matters in Mexico (Vol. 63). Institute of Legal Research. National Autonomous University of Mexico.
- Of Justice Of The Nation Coordination Of Compilation And Systematization Of Theses, M. S. C., & Meza, J. N. S. (2013). Human rights: general part.
- Penal Code of Coahuila de Zaragoza (CPCOAH), Reformed, Periódico Oficial October 27, 2017, (Mexico).
- Penal Code for the Federal District (CPCDMX), Amended, Official Gazette of July 16, 2002, (Mexico).
- Penal Code for the State of Baja California, (CPBJ) Reformed, Periódico Oficial August 20, 1989, (Mexico).
- Penal Code for the State of Colima (CPECOL) Amended, Periódico Oficial of October 11, 2014, (Mexico).
- Penal Code for the State of Hidago, (CPEH), Reformed, Periódico Oficial del Estado June 9, 1990, (Mexico).
- Penal Code for the State of Veracruz de Ignacio de la Llave, (CPVER) Official Gazette of November 7, 2003, (Mexico).
- Penal Code for the Free and Sovereign State of Baja California Sur (CPBCS), Amended, Official Gazette November 30, 2014, (Mexico).
- Penal Code for the Free and Sovereign State of Guerrero (CPG), Official Gazette August 01, 2014, (Mexico).
- Penal Code for the Free and Sovereign State of Guerrero (CPGRO), Periódico Oficial.
- Penal Code for the Free and Sovereign State of Oaxaca. (CPO), Official Gazette August 9, 1980, (Mexico).
- Penal Code for the Free and Sovereign State of Quintana Roo, (CPQROO), Official Gazette of March 29, 1991, (Mexico).
- Pérez Luño, A. (2007) Theory of Law. A conception of legal experience. Edit. Técnos, Madrid.