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## **Reproductive Justice for Women in Mexico**

By Brook Elliott-Buettner

### *Biography*

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### *Abstract*

Abortion rights are critical to women's enjoyment of all other human rights including civil and political rights and participation in democracy. Internationally, reproductive justice has increasingly become recognized as a critical social justice, human rights and public health issue. In Mexico in 2007 this trend played out in the decriminalization of abortion up to 12 weeks of gestation, putting the capital city at the forefront of Latin American reproductive health policy. The law's passage came at a critical political and social juncture in Mexican society and reflected years of struggle by Mexican activists. The law itself was extremely progressive from a public health standpoint, making its implementation more feasible. It was soon challenged, however, by two national bodies before the Supreme Court. Arguments took place over the course of a year, and in August of 2008 the court decided in favor of the law's constitutionality. The arguments presented in the Supreme Court case reflected various facets of the law's significance, including the international character of a woman's right to choose, the public health consequences of the criminalization of abortion, and the constitutionality of the legal elements of the policy.

In April of 2007, the Mexico City Legislative Assembly passed a law that decriminalized abortion up to 12 weeks of gestation in Mexico's capital city. This paper seeks to outline the political and social antecedents of the legislation, the content and legal significance of the law, and its challenge and defense at the level of the Mexican Federal Supreme Court. The law itself was remarkable in comparison with legislation regulating abortion throughout the country and the region, and the declaration of the law's constitutionality by the Supreme Court was an important step toward tying abortion rights to the international human rights framework.

*The Context for Abortion in Mexico*

Mexico, which shares a border with the U.S., is a federal republic with a population of over 100 million. Approximately 20% of the population lives in the capital, Mexico City (officially called the Federal District). Mexico is economically successful but vast inequality means that some regions of the country have Human Development Indices on par with sub-Saharan Africa. Abortion for pregnancies resulting from rape has been legal in all 31 Mexican states and the Federal District since 1931. Actual access to abortion services, however, has been difficult at best and at worst actively impeded by the public health and judicial authorities who must authorize such procedures.<sup>1</sup> Other indications for legal abortion vary by state. Many states include grave fetal malformations and threat to the health or life of the pregnant woman among indications for legal abortion.<sup>2</sup> Until April of 2007, however, Mexican state allowed legal abortion on demand.

A restrictive legal context for abortion is problematic in a number of ways. First, criminalizing abortion creates a public health catastrophe by driving women to clandestine and often unsafe abortion procedures. Second, a restrictive legal context for abortion violates women's human rights to self-determination, health, autonomy, and privacy, among others. Finally, limiting women's control over their own fertility restricts their ability to participate in a democratic society. All of these problems disproportionately affect poor women, intensifying socio-economic inequality.

The public health effects of criminalizing abortion have been clearly demonstrated at the international level and in Mexico. Internationally 70,000 women die every year due to complications from unsafe abortions. That's one woman every eight minutes in developing countries, lost to her family, her children and her society

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<sup>1</sup> For more on access to abortion in the case of rape, please see Human Rights Watch's report, "The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico," available at <http://www.hrw.org/reports/2006/mexico0306/index.htm>

<sup>2</sup> A complete list of indications for legal abortion by state in Mexico is available here: <http://www.gire.org.mx/contenido.php?informacion=31>

because of a procedure that in safe clinical circumstances is as safe as a penicillin injection.<sup>3</sup> In Mexico clandestine abortion is one of the leading causes of maternal mortality.<sup>4</sup> Women die at alarming rates<sup>5</sup> from a procedure made unnecessarily dangerous by its criminalization. These facts become especially tragic given the evidence that criminalization does nothing to change the numbers of women seeking abortions, but simply forces abortion underground into unsanitary and unsafe conditions. A recent study by the Guttmacher Institute showed that abortion numbers are rising in Mexico even though it is generally illegal.<sup>6</sup> The majority of those abortions happen in unsafe conditions.

The restriction of abortion violates women's human rights. Human rights are the rights of all people, regardless of national citizenship, and in theory supersede national rights or restrictions. They are based on a network of international agreements, treaties and pacts to which nations are signatories, and generally protect individuals from the state whereas national criminal law generally protects individuals from one another. Human rights fall into several broad categories including civil and political rights and social, economic and cultural rights, and theoretically frame the conditions necessary for a healthy human existence. Restricting access to abortion violates some of women's most basic human rights including the rights to life and health, the right to privacy and bodily integrity. It also represents a violation of the right to decide the number and spacing of one's children, a right that is also explicitly

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<sup>3</sup> World Health Organization. *Safe Abortion: Technical and Policy Guidelines for Health Systems*. Geneva, 2003. Available at [http://www.who.int/reproductive-health/publications/safe\\_abortion/safe\\_abortion.pdf](http://www.who.int/reproductive-health/publications/safe_abortion/safe_abortion.pdf)

<sup>4</sup> The detrimental health effects of unsafe abortion are the fifth leading cause of maternal mortality nationally, and were the third leading cause in Mexico City before the new law went into effect. See the National Population Council of Mexico, [www.conapo.gob.mx](http://www.conapo.gob.mx)

<sup>5</sup> Ipas, Schiavon et al. *Abortion-related morbidity in public sector hospitals in Mexico, 2000-2005*. Results presented at IUSSP Seminar on Measurement of Abortion Incidence in Paris, France November 7-9, 2007.

[http://www.gire.org.mx/english/Abortion\\_morbidityhospitals\\_Mexico\\_2000\\_05.pdf](http://www.gire.org.mx/english/Abortion_morbidityhospitals_Mexico_2000_05.pdf)

<sup>6</sup> Guttmacher Institute, *Abortion on the Rise in Mexico despite Legal Restrictions*, ^2008. Available at: <http://www.guttmacher.org/media/nr/2008/10/06/index.html>

enshrined in the Mexican Constitution. International law has repeatedly recognized the importance of access to safe abortion services within the human rights framework.<sup>7</sup> Several years ago in Mexico, a case of legal abortion denied to a rape victim by state authorities was brought before the Inter-American Commission on Human Rights, a regional body charged with investigating claims of human rights violations. The friendly settlement of the case was signed by the Mexican government, an implicit recognition of abortion as a human right.<sup>8</sup>

Restricting women's right to abortion also limits democratic participation. Women's part in society is limited by factors like maternity leave that can set back career trajectories and care-giving responsibilities that require time and energy. Especially in societies where citizenship is heavily defined by participation in and contribution to the economic system, a woman's role is limited by forced definition as child-bearer. Without the right to decide when or if to have children, women are reduced to little more than uterus life-support systems, degrading their status as moral actors and limiting their participation as citizens in their societies.

All of the above-mentioned effects of the criminalization of abortion hit poor women hardest, reflecting and intensifying socioeconomic inequality. Maternal mortality the world over is extremely concentrated in developing countries.<sup>9</sup> Poor women lack access to information, health services, and contraceptive methods. They are also unable to seek costly illegal (but safe) clinical abortion services. In Mexico, women with means have always had the option of paying a doctor to perform an

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<sup>7</sup> Center for Reproductive Rights Briefing Paper, *Safe and Legal Abortion is a Woman's Human Right*, August 2004. Available at [http://www.reproductiverights.org/pdf/pub\\_bp\\_safeandlegal.pdf](http://www.reproductiverights.org/pdf/pub_bp_safeandlegal.pdf)

<sup>8</sup> GIRE: *Pualina: Topics for the Debate* series, three volumes available at <http://www.gire.org.mx/contenido.php?informacion=153>. The text of the friendly settlement is available at the Inter-American Commission on Human Rights webpage at: <http://www.cidh.org/annualrep/2007eng/mexico161.02eng.htm>

<sup>9</sup> International Planned Parenthood Federation. *Death and Denial Unsafe Abortion and Poverty 2006*. Available at [http://www.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death\\_Denial\\_unsafe\\_abortion\\_poverty.pdf](http://www.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death_Denial_unsafe_abortion_poverty.pdf)

illegal abortion or of traveling to the U.S. where abortion is legal. Poor women bear the brunt of the restrictive legal context and suffer and die needlessly.

### *Factors of the Decriminalization*

The groundwork for the passage of the Mexico City law was laid nationally and internationally years before its passage.<sup>10</sup> At the international level human rights agreements, rulings in international courts, the gradual liberalization of abortion laws at the national level all over the world, and the work of Non-Governmental Organizations (NGOs) evidence a slow but steady international shift toward recognition of the importance of abortion rights. As discussed above, access to safe and legal abortion has been recognized as a human right in a variety of international court rulings, and the World Health Organization (WHO) has called for access to safe clinical services. Sixteen countries have liberalized abortion policy in the last ten years,<sup>11</sup> and not just reproductive rights NGOs are fighting for women's right to safe and legal abortion.

Nationally, several factors paved the way for the passage of the Mexico City law. First, Mexican society has undergone a gradual process of social liberalization. While 85% of the population call themselves Catholic, many people disobey church teachings by engaging in premarital sex or cohabitation, or use contraceptives. The average number of children per family in Mexico has fallen from 7 to 2.5 in just a few generations,<sup>12</sup> and recent legislation—especially in Mexico City—shows a trend toward liberalization in everything from sexuality education to gay rights.

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<sup>10</sup> For a complete discussion of the social and political antecedents of the passage of the Mexico City law, see Fuentes, Paine and Elliott-Buettner, *The decriminalization of abortion in Mexico City: How did abortion rights become a political priority?* Oxfam's Gender and Development, June 2008

<sup>11</sup> Guttmacher Institute News Release: *Abortion Laws Liberalized in 16 Countries since 1998*. 2008. Available at: <http://www.guttmacher.org/media/nr/2008/10/27/index.html>

<sup>12</sup> National Population Council of Mexico. See: [http://www.conapo.gob.mx/publicaciones/sdm2006/sdm06\\_04.pdf](http://www.conapo.gob.mx/publicaciones/sdm2006/sdm06_04.pdf)

The Catholic Church aggressively opposed the legislation to decriminalize abortion during debates in the Legislative Assembly,<sup>13</sup> but had lost credibility during pedophile priest scandals and because of their open pressure on lawmakers in spite of Mexican laws against interference from the church in politics and Mexico's strong secular constitutional framework. In fact, some politicians mentioned their need to prove their commitment to secularism in the face of threats of excommunication by the Church when discussing their support of the law.

Another important social factor was the decades of work by the Mexican feminist movement to decriminalize abortion. The movement in Mexico was extraordinarily well coordinated in terms of arguments and use of resources. In other countries, fractious activist movements have often impeded pressure for social. The national movement in Mexico developed coordinated, appropriate, and effective messages. Another undeniably important factor was the collaboration of five powerful pro-choice NGOs to form the National Pro-Choice Alliance.<sup>14</sup> This donor-initiated partnership divided resources and roles among the five agencies and has allowed the feminist movement not only to consolidate efforts but to work more efficiently and effectively to promote abortion rights.

The political context also facilitated the passage of the Mexico City law. Abortion policy had been liberalized twice in Mexico City in the previous seven years by the left-wing Party for a Democratic Revolution (PRD), which has controlled the local legislative and executive branches since the city was granted the ability to elect its

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<sup>13</sup> International Planned Parenthood Federation, "Catholic Church Mounts Campaign Against Mexico City Bill." 2007. Available at: <http://www.ippf.org/en/News/Intl+news/Catholic+Church+Mounts+Campaign+Against+Mexico+City+Bill.htm>

<sup>14</sup> The Alliance is made up of Católicas por el Derecho a Decidir (CDD, Catholics for the Right to Decide); Equidad de Género: Ciudadanía, Trabajo y Familia (Gender Equity: Citizenship, Work and Family); Grupo de Información en Reproducción Elegida (GIRE, Information Group on Reproductive Choice); Ipas Mexico; and the Population Council's Mexico office.

own local officials. In 2000 fetal malformation, threat to the pregnant woman's health, and non-consensual artificial insemination were added to rape as indications for legal abortion. This legislation was challenged before and upheld by the Federal Supreme Court. In 2003 the law was further refined to include regulating conscientious objection, limiting it to an individual rather than an institutional position.

In addition, a rare national political situation created good conditions for the surprising legislation. In 2006, amid cries of fraud by the left-wing party, the PRD officially lost the national presidential election by an extremely narrow margin. Many political analysts felt that because of the controversy the PRD had to prove its liberal credentials and to push for its three-part party platform of gay rights, death with dignity and the decriminalization of abortion.<sup>15</sup> Moreover, the local PRD in Mexico City wanted to prove its independence from the national party after what some saw as a botched presidential campaign. Ultimately the Mexico City PRD worked with several moderate parties to pass the legislation with an overwhelming majority.

#### *The Mexico City Law and Its Challengers*

The law itself, passed 46 of 66 lawmakers on April 24, 2007, does a great deal more than decriminalize first-trimester abortion. It reformed both the Penal Code and the Health Law. The Penal Code reforms did not legalize abortion, but rather decriminalized it during the first 12 weeks of gestation. Abortion remains decriminalized later in pregnancy for indications that pre-date the law including rape, grave fetal malformation, and risk to the pregnant woman's health. The law also defined pregnancy as beginning at implantation, important because of implications for stem cell research and emergency contraception.

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<sup>15</sup> For an in-depth discussion of the political context of the law, see GIRE, Norma Ubaldi Garcete, *The Process of Decriminalizing Abortion in Mexico City*, 2008. Available at <http://www.gire.org.mx/contenido.php?informacion=220>

The law mandated that public health institutions provide free abortion services and increased the penalty for forcing a woman to undergo an abortion against her will. Punitive sentences for women who undergo illegal abortions were reduced. Finally, sexuality education and prevention of unwanted pregnancy and sexually transmitted infections were explicitly prioritized. The law emphasized service provision for marginalized populations such as youth. These holistic aspects of the law likely helped the legislation garner its multi-party support.

Not long after the law passed, however, it was challenged by two bodies at the level of the Supreme Court. The Ombudsman of the National Human Rights Commission presented a claim without the support of his board of advisors. Although the National Human Rights Commission is one of the best-funded commissions of its kind in the world, its effectiveness has been challenged.<sup>16</sup> The National Attorney General's Office also challenged the law's constitutionality.

#### *Defending the Law and Women's Rights*

Following the challenges the Mexico City government, including the Legislative Assembly and the local Human Rights Commission, along with feminist and progressive NGOs, launched a defense of the law and its constitutionality. The Supreme Court waited for over a year before finally voting on the Mexico City law, giving both sides time to develop their arguments. During that time, justices accepted private appointments from interested parties, including civil society, and asked for a "course" on fetal development from leading bioethics experts.

Although the Supreme Court does not generally deliberate publicly, it called for eight public hearings wherein interested parties from both sides were allowed to testify. On its website, the Court cited several reasons for holding the rare public

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<sup>16</sup> Human Rights Watch, *Mexico's National Human Rights Commission: A Critical Assessment* February 2008. Volume 20, No. 1(B) Available at: <http://www.hrw.org/reports/2008/mexico0208/>

hearings, including the high level of public interest in the issue and the value of transparency and accountability for such weighty matters. The hearings were broadcast live on the Court's website and on government access television channels.

The Court also accepted written briefs. In early 2008 NGOs, universities, and multilateral agencies presented *amici curiae* (friend of the court) briefs outlining various legal aspects of the issue. Defense of the law mirrored the original arguments for the liberalization of abortion policy, including social justice and public health arguments and discussions of the international significance of abortion rights within the human rights framework.

### *The Supreme Court Decision*

On August 28, 2008 the Supreme Court voted for the constitutionality of the Mexico City law. The Court's decision was especially noteworthy for several reasons. First, the Court heard from society during their deliberations. This is not common for the Mexican Supreme Court, but was widely hailed due to the controversial nature of the topic. Second, the vote in favor of constitutionality was extremely strong—eight of the eleven justices. Because of the Mexican judicial framework, eight votes based on the same legal arguments would create jurisprudence for lower courts throughout the country. One of the justices in this case, however, based her arguments on different legal precepts, calling the jurisprudential strength of the decision into question. The ultimate impact of the vote will become clear when the written final decision is officially released late in 2008.

Moreover, the justices' deliberation and comments were significant because a number of them referenced international law. Human rights frameworks create a bottom barrier, or floor, for rights that transcends national law. It is extremely significant that a national constitutional court acknowledged that abortion is a human

rights issue. This strengthens the case for liberalization of abortion law and for public reproductive health services all over the world.

### *Hope for the Future of Women's Rights and Lives in Latin America*

The decriminalization of abortion up to 12 weeks of gestation in Mexico City, a product of years of work and of a gradually shifting national and international context, is important on many levels. The women of Mexico City can now effectively exercise their right to safe and legal abortion services and are doing so in huge numbers. During the first year that the policy was in place, public hospitals with capacity to provide abortion services were inundated, providing nearly 8,000 procedures that year alone. Without access to public health services, many of these women would have turned to unsafe clandestine providers.

The women of other states in Mexico may also soon be affected. After the law passed in Mexico City, legislators in other states presented both copycat and backlash bills. It is likely that several states may implement similar policies. Since the Supreme Court's ruling, one state has voted to alter its constitution to explicitly protect "life from the moment of conception," which threatens existing laws that allow a woman to have an abortion to preserve her life or health.

There has also been a ripple effect in the Latin American region. Recently Uruguay's senate approved a bill that would decriminalize abortion up to 12 weeks of gestation, the same time period defined in the Mexico City law. The president later vetoed it, but the senate majority was very strong. Implementation of the law remains uncertain. Also late this year, the Supreme Court in Bolivia mandated that all lower courts implement indications for legal abortion in cases of rape, incest, and danger to a pregnant woman's life or health contained in the Penal Code. Members of the feminist movement in Mexico hope that the Mexico City law and the victory at the

Supreme Court will mean the expansion of reproductive freedom for women all over the country and the region. It is a victory that brings more international validity to abortion rights as human rights, and proves the power of coordinated feminist movements and committed civil society working for justice to make real change in the policy context and in the lives of women.