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The Long Quest for Reproductive Justice in Mexico: Feminist Legal Strategies and Challenges to Changing Abortion Precedent in a Federal System

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As the Green Wave echoes throughout the Latin American feminist movement, the Mexican legal system has progressed accordingly. Feminist legal groups have adopted innovative legal strategies to solidify the right to abortion at the federal level, but state-level protections are still needed to satisfy the “my body, my choice” chants taking place in the streets. Similar to how feminist advocacy groups have gradually influenced legal theory, legal changes attempt to counter the conservative, religious perspective on bodily autonomy in Mexico.

Mexico has entered the international spotlight due to a recent federal Supreme Court ruling protecting abortion rights. This groundbreaking decision has resulted from the feminist movement’s continuous litigation and the Court’s 2021 case law both of which have promoted reproductive justice in Latin America. While innovative legal strategies in the feminist movement have characterized the fight for reproductive justice, Mexico’s federalist system presents ongoing challenges to abortion litigation in Mexico. The Supreme Court of Mexico’s major rulings regarding reproductive rights and the challenges of implementing this comprehensive constitutional jurisprudence in a federal system will be discussed.

La Marea Verde and Historic Advocacy for Abortion Rights

In Mexico, abortion rights battles occur between conservative and religious movements that promote the protection of a fetus's right to life and the feminist movement's demand for bodily autonomy. In the 1990s, Mexican feminists claimed that in a modern democracy, women should have the right to access legal and safe abortions. For the feminist movement, women could not achieve full civil and political rights without the right to choose motherhood freely. Thus, the feminist movement, since feminist anthropologist Marta Lamas founded (<https://www.americasquarterly.org/fulltextarticle/marta-lamas-reproductive-rights/>) the Information Group on Reproductive Choice (GIRE (<https://gire.org.mx/?lang=en>)) in 1992, has developed a strong public discourse (<https://www.tandfonline.com/doi/epdf/10.1016/S0968-8080%2897%2990086-0?needAccess=true>) favoring reproductive freedom, secularism, and full citizenship for women. GIRE has promoted (<https://gire.org.mx/?lang=en>) democratic and informed public debate on abortion and supported litigation when authorities deny women legal abortions. GIRE has also connected with other feminist organizations, policymakers, and the media to frame the controversial issue as a matter of human rights.

Starting in 2018, Argentina's Congress debated (<https://www.nytimes.com/2021/01/01/world/americas/argentina-abortion.html>) abortion decriminalization, while the Latin American Green Wave took place. As a part of the Green Wave, a renewed Mexican feminist movement urged the Supreme Court to defend reproductive freedom. After continuous advocacy, on September 7, 2021, the Supreme Court of Mexico unanimously upheld (https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%20148.2017.pdf) the decision on the Action of Unconstitutionality 148/2017, stating that reproductive freedom is a constitutional right of "persons that can become pregnant," which includes women, transgender, and non-binary people. The decision was revolutionary in its scope and use of inclusive language use. The Court determined that the criminalization of abortion violated constitutional rights, including the principle of equality and non-discrimination, the right to health, the autonomy to choose whether to continue a pregnancy, and an individual's liberty to develop their personhood and livelihood. Consequently, the Court concluded that abortion should not be criminalized. It was further argued that in a democratic, secular nation, criminal law should be the *last* reason for the state to intervene in personal decisions such as sexual and reproductive preferences.

Federal Precedent on Abortion Rights

The federal inclusion of abortion under the umbrella of reproductive freedom represents a significant shift in the Court's understanding of this issue from two decades ago. A 2002 ruling (https://bj.scjn.gob.mx/doc/sentencias_pub/TjV93ngB_UqKst8o56Hp/%22Medicina%20preventiva%22) classified abortion as a crime with sexual violence, fetal malformations, and health risks for the mother being the only exceptions. In a 2021 decision, however, the Court considered the right to voluntary motherhood a fundamental right, regardless of gender identity.

Despite this progress, Mexican federalism remains an obstacle for those seeking reproductive autonomy. In Mexico, federal and state laws have different regulations on access to abortion. However, judicial review of these discriminatory laws can set specific precedents on abortion law that can protect the fundamental rights of women and gender minorities. Thus, the Supreme Court of Justice's rulings of the last decade have established the constitutional parameters for the lower jurisdictions (state and federal) to respect and guarantee equality and reproductive freedom. Despite this progress, only half of Mexico's state constitutions (<https://elpais.com/mexico/2021-09-08/despenalizado-pero-no-legislado-la-aprobacion-del-aborto-en-mexico-dependera-de-cada-estado-del-pais.html>) have established that the protection of life begins from the moment of conception. Mexico's Catholic tradition largely opposes abortion and considers life to be sacred. As a result, the path to judicial consensus on abortion has been difficult. However, advocacy groups like GIRE often use successful legal strategies from high-impact constitutional cases to change precedents at the state and federal levels. The feminist movement's strategic social and legal mobilization over the last two decades has led to the recent legal framing of reproductive rights as human rights.

Advancing reproductive rights at the state level, in 2021, the Court issued decisions on two additional constitutional cases. Analyzing whether the states had the jurisdiction to protect life from the moment of conception, the Court ruled that the fetus could not be considered a *legal person* before birth. Furthermore, the Court ruled (https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%20106-2018%20y%20acumulada%20107-2018.pdf) that states could not authorize absolute protections of prenatal life that disregard

women's and gender minorities' rights to reproductive freedom and sexual health services as described in Actions of Unconstitutionality 106/2018 and 107/2018. In a [ruling](https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%2054-2018%20-%20PROYECTO.pdf) (https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%2054-2018%20-%20PROYECTO.pdf) later that year, the Court stated that a health provider's conscientious objection to performing an abortion is a limited individual right and should not prevent the exercise of sexual and reproductive rights in Action of Unconstitutionality 54/2018. Legally, conscientious objection requires a justified refusal based on an individual's moral principles or religion. Based on these rulings, the Court ordered the Federal Congress to issue a new regulation to adopt the updated constitutional parameters regarding reproductive freedom.

GIRE's Amparo: New Perspectives on Legal Advocacy

The Court's recent [decision](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2023-08/230830-AR-267-2023.pdf) (https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2023-08/230830-AR-267-2023.pdf) regarding a GIRE *amparo*, a constitutional human rights appeal, promotes abortion access in federal hospitals. As a federal republic, Mexico's primary social security institution contains a [chain](https://www.wilsoncenter.org/article/infographic-how-do-mexicans-get-healthcare) (<https://www.wilsoncenter.org/article/infographic-how-do-mexicans-get-healthcare>) of federal hospitals: the Mexican Social Security Institute and the Social Institute for Federal Workers. These hospitals provide public health services to formal workers, totaling [21.8 million](https://ohrh.law.ox.ac.uk/access-to-abortion-at-the-federal-level-another-step-towards-reproductive-justice-in-mexico/) (<https://ohrh.law.ox.ac.uk/access-to-abortion-at-the-federal-level-another-step-towards-reproductive-justice-in-mexico/>) people in 2022. These hospitals had been reluctant to perform abortions because [Article 332](https://cyber.harvard.edu/population/abortion/Mexico.abo.htm) (<https://cyber.harvard.edu/population/abortion/Mexico.abo.htm>) of the Federal Criminal Code considered abortion a crime with one exception: when an "honorable woman is pregnant, and she hides the pregnancy of an illegitimate union." The 1931 provision of the Federal Criminal Code established requirements based on gender expectations for women to solely exercise their sexuality within a marriage. The provision also implicitly intended to protect a "man's honor" by restricting abortion access to a woman who had been unfaithful to her husband and hid the pregnancy.

GIRE [challenged](https://blog.petrieflom.law.harvard.edu/2023/09/25/sex-equality-in-septiembreverde-examining-the-mexican-supreme-courts-abortion-decriminalization-decision/) (<https://blog.petrieflom.law.harvard.edu/2023/09/25/sex-equality-in-septiembreverde-examining-the-mexican-supreme-courts-abortion-decriminalization-decision/>) Article 332, arguing that the exception's language, and therefore the article in its entirety, was rooted in discriminatory gender stereotypes contradictory to the principle of equality enshrined in the Constitution. Based on this article that considered abortion a crime, health providers in federal hospitals had refused to perform abortions, even for women whose health or life was at stake. GIRE's winning *amparo* centered on women's "collective interests" rather than a specific individual. This case marked a procedural shift in non-governmental organizations' approach to *amparo* appeals. The adjudication opened the door to challenging discriminatory legal positions based on gender and sexual prejudices long embedded in criminal law.

Federalism has complicated abortion access for women in Mexico for decades. States' criminal codes maintain different legal circumstances for women to access abortions. When Mexico City's Congress decriminalized first-trimester abortion in 2007, women from surrounding states came to the country's capital seeking legal abortions. Subsequently, according to the Ministry of Health, reproductive health clinics in Mexico City have performed 263,267 abortions since 2007, with 31 percent of those patients living in other states or outside of [Mexico](https://www.nytimes.com/2022/05/23/podcasts/abortion-roe-mexico.html) (<https://www.nytimes.com/2022/05/23/podcasts/abortion-roe-mexico.html>). Advocacy groups have also combatted the power of state governments that restrict abortion access. Beginning in 2011, GIRE has challenged discriminatory state laws that prevent women from having safe abortions outside of Mexico City through *amparo* appeals. Through this last *amparo* challenging Article 332 of the Federal Criminal Code, GIRE has opened the door for abortion access in federal hospitals throughout the country even where state regulations prohibit abortion.

Next Steps and Recommendations

Academics—alongside the feminist movement—must continue to advocate for legal protections of abortion. Federalism creates a multi-layered legal system in Mexico. Thus, a series of challenges remain necessary to ensure reproductive rights for all women and gender minorities.

Considering that the Supreme Court has framed voluntary motherhood as a fundamental right of persons, abortion should no longer be criminalized. All federal judges and tribunals must apply the Supreme Court's jurisprudence so that the judicial system can retroactively liberate women and health providers convicted or sentenced to prison for practicing abortion during the early

stages of pregnancy. The Federal Congress should also follow the constitutional parameters outlined by the Supreme Court in [amending \(https://elpais.com/mexico/2023-11-15/objecion-de-conciencia-que-es-y-en-que-consiste-la-reforma-a-la-ley-de-salud-en-mexico.html\)](https://elpais.com/mexico/2023-11-15/objecion-de-conciencia-que-es-y-en-que-consiste-la-reforma-a-la-ley-de-salud-en-mexico.html) the General Health Law to regulate conscientious objection. The Senate will soon discuss this bill. Finally, the Ministry of Health should issue clear guidelines on how medical personnel—especially in public hospitals—should provide sexual and reproductive services to all people, regardless of their gender and sexual identities. These guidelines should guarantee the patient’s reproductive freedom.

Given Mexico’s federal system, much work remains necessary at the state level. Only [twelve out of thirty-two states \(https://www.hrw.org/es/news/2023/09/07/estado-mexicano-se-convierte-en-el-12o-en-despenalizar-el-aborto#:~:text=El%2030%20de%20agosto%2C%20la,las%20sanciones%20penales%20por%20aborto\)](https://www.hrw.org/es/news/2023/09/07/estado-mexicano-se-convierte-en-el-12o-en-despenalizar-el-aborto#:~:text=El%2030%20de%20agosto%2C%20la,las%20sanciones%20penales%20por%20aborto) in Mexico allow abortion during the first twelve weeks of pregnancy. The remaining states must reform their criminal codes and health laws to establish a reasonable timeframe for legalizing abortion. These reforms to comply with the Supreme Court’s rulings are subject to political will and depend on liberal or left-wing parties presenting bills within states’ congresses.

The protection and exercise of reproductive freedom in Mexico are embedded in a complicated legal apparatus. Legislators, policymakers, and federal judges must understand the Supreme Court’s new constitutional parameters to affirm the feminist claim of “my body, my choice.” In the next few years, feminist advocacy and legal pedagogy will be integral to promoting the implementation of the Court’s jurisprudence at the state and federal levels. New opportunities to file *amparos* to guarantee collective interests based on gender grounds will allow the feminist movement to achieve reproductive justice. Only through activist legal victories can Mexico ensure reproductive justice and dignity for all genders.

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