

# Abortion Lawfare in Mexico's Supreme Court: Between the Right to Health and Subnational Autonomy

BATALHA PELO DIREITO AO ABORTO NA SUPREMA CORTE DO MÉXICO: ENTRE O DIREITO À SAÚDE E A AUTONOMIA SUBNACIONAL

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## Abstract

This article addresses Mexico's contentious politics of abortion, legal frames, and the role of the Supreme Court. In Mexico's federal system, subnational legislatures have been the principal site of abortion lawfare, with initiatives passed to both decriminalize and restrict access to abortion, pitting frames of women's rights to health against the fetal "right to life from the moment of conception." In this article we offer a detailed mapping of critical junctures in Mexico's abortion lawfare since 2007, based on a review of draft decisions, public transcripts, and final rulings of the Supreme Court. We suggest that while the Court has appeared largely reactive to different legislative initiatives and legal challenges, failing to produce definitive rulings affirming women's universal right to abortion, its assertion of federal authority and its increasingly restricted reading of the scope of states' policy-making powers has in practice favored the arguments put forward by the pro-choice movement, reaffirming and even expanding women's sexual and reproductive rights. We highlight a key area for future comparative inquiry on sexual and reproductive rights lawfare in Latin America: the interplay between supreme courts and subnational legislatures in federal systems, and the ways that this shapes movement and counter-movement framings and strategies.

## Keywords

Abortion; criminalization; judicialization; federalism; right to life from the moment of conception.

## Resumo

*Este artigo aborda a disputa política do aborto no México, os marcos legais e o papel da Suprema Corte. No sistema federalista do México, os legislativos subnacionais têm sido o principal local de abortion law fare no país, com iniciativas aprovadas tanto para descriminalizar quanto para restringir o acesso ao aborto, contrapondo estruturas dos direitos das mulheres à saúde ao "direito à vida fetal desde o momento da concepção". Neste artigo, oferecemos um mapeamento detalhado da conjuntura do abortion law fare no México desde 2007, com base em uma revisão de projetos de decisão, transcrições de audiências públicas e decisões finais da Suprema Corte. Sugerimos que, embora o tribunal tenha se mostrado amplamente mais reativo a iniciativas legislativas diferentes e desafios legais, falhando em produzir uma jurisprudência definitiva a favor do direito universal das mulheres ao aborto, a afirmação sobre a autoridade federal e a interpretação restritiva sobre a margem de atuação das esferas estatais, na prática, favoreceram os argumentos do movimento pró-escolha, reafirmando e até mesmo ampliando os direitos sexuais e reprodutivos das mulheres. Destacamos uma área-chave para uma futura investigação comparativa sobre a lei dos direitos sexuais e reprodutivos na América Latina: a interação entre as cortes superiores e os legislativos subnacionais nos sistemas federalistas, bem como as maneiras como essa dinâmica molda a estrutura e as estratégias do movimento e do contramovimento.*

**Palavras-chave**

*Aborto; criminalização; judicialização; federalismo; direito à vida a partir do momento da concepção.*

**INTRODUCTION<sup>1</sup>**

Across Latin America, constitutional courts and constitutional law have become central sites for lawfare battles over abortion. Gains made by the pro-choice movement have galvanized counter-movements that aim to further restrict access to abortion. As constitutional law in many countries has increasingly come to reflect international human rights, the anti-abortion camp has not only shifted from religious to rights-based arguments (VAGGIONE, 2012; MADRAZO and VELA, 2013) but has also worked to consolidate its hold within national and, in federal systems, subnational legislatures. Marta Machado and Deborah Maciel have called for “a relational approach to abortion law reform” that analyzes “pro-choice and anti-abortion mobilization in different state arenas and political contexts.” They recommend a focus on “contentious politics” and on seeing change in the abortion field as a relational and dynamic political process (MACHADO and MACIEL, 2017). Different arenas – such as courts and legislatures – present different opportunity structures for movements and counter-movements, forcing them to adapt their strategies, framing, and tactics in response both to the nature of those arenas and to one another. A focus on political process reveals the interrelated nature of dynamics across these different arenas. This paper adopts such an approach, focusing on the contentious politics of abortion in Mexico and specifically on the circulation of legal frames between the Supreme Court and national and subnational legislatures. Since the historic 2007 decision of Mexico City’s legislature to decriminalize abortion in the first trimester and mandate the free provision of abortion services in the capital, movement and counter-movement efforts to expand and restrict rights to legal abortion have moved between subnational legislative arenas and the Supreme Court, tracing a complex line between the limits of states’ jurisdiction to determine their health and penal policies, on the one hand, and emerging national legal doctrine about health and human rights

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protections, on the other. The historic legislative victory for reproductive rights in Mexico City transformed the framings and strategies of Mexico's pro-choice and anti-abortion constituencies. As we show here, abortion law reform and movement/counter-movement dynamics since 2007 have been defined by two cross-cutting axes:

- (1) in terms of key framing arguments, the battle has centered on the fetal "right to life from the moment of conception" versus women's right to health. Both movement and counter-movement have juris-generative pretensions, aiming not only to influence public opinion but also to shape constitutional law;
- (2) with respect to changing opportunity structures, political-legal disputes around abortion since 2007 have centered on debates within the Supreme Court on the nature of the federal pact: do states in the Mexican federation have the power to define new rights or to set their own health policies? Or do federal norms and policies trump subnational autonomy in this contentious field?

Even before the 2011 constitutional reform that made international human rights instruments part of constitutional law and emphasized pro-persona and progressivity principles, opening new possibilities for judicialization, the political and cultural capital and legitimacy of Mexico's Supreme Court judges was increasingly linked to their defense of human rights. We argue that even though the court has failed to produce a definitive ruling affirming a universal right to abortion, its assertion of federal authority and its increasingly restricted reading of the scope of states' policy-making powers has in practice favored the arguments put forward by the feminist movement, which has successfully adapted its strategies to strengthen pro-choice legislation and litigation. As Alejandro Madrazo and Estefania Vela have observed, although guarantees of sexual and reproductive rights in Mexico have emerged from the legislative arena, they have frequently been reaffirmed and even expanded by the Supreme Court (MADRAZO and VELA, 2011). Our article maps movement and counter-movement dynamics across these two axes, framing and opportunity structures, between 2007 and 2020, focusing specifically on interpretative debates within the court over rights at different critical junctures (see Appendix 1).<sup>2</sup> To date, most of the literature on abortion rights lawfare in Mexico has focused on the historic 2007 decision to decriminalize abortion in the first trimester

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2 For each of these critical junctures, we collected national press data for: (1) the month the reform was approved; (2) the month the action was presented; and (3) the month the action reached the Supreme Court. For a detailed analysis of the Supreme Court's previous ruling on abortion and the right to life from the moment of conception, see Pou Gimenez (2009).

in the capital city, and on the conservative constitutional reforms that were subsequently approved in many states of the Mexican federation. Such a focus has tended to interpret developments after 2007 as a backlash. By contrast, we suggest that analysis of the interplay between national and subnational processes across judicial and national and subnational legislative arenas requires a more process-oriented and less binary reading.<sup>3</sup> While elements of backlash are certainly in evidence, the complex dynamics we describe point to the need for a more nuanced view of abortion lawfare in Mexico.

### I. LIBERALIZATION AND COUNTER-REACTION

While President Felipe Calderón and his National Action Party (PAN) held a conservative position endorsing the idea of a “right to life from the moment of conception,” in 2007 the federal government affirmed that it would not exercise a presidential veto and reiterated its respect for the autonomy of Mexico City’s legislature. Following the Mexico City reforms, attempts by pro-choice and conservative groups to expand and restrict, respectively, access to legal abortion throughout the country intensified. Conservatives promoted a wave of constitutional reforms across different states of the Mexican federation to incorporate articles protecting the “right to life from the moment of conception until natural death.” To date, such amendments have been approved in 20 of the country’s 31 states, and conservative parties have made repeated unsuccessful attempts to include such a clause in the Mexican Constitution. In some states, these constitutional reforms were preceded or followed by attempts by pro-choice constituencies and their allies to expand the regime of exceptions for legal abortion via reforms to state penal codes to introduce a trimester regime (as had occurred in Mexico City).

Evidence from Mexican sexual and reproductive rights organizations suggests that the symbolic effects of “right to life from the moment of conception” clauses in state constitutions made access to legal abortion even more difficult and led to the increased criminalization of poor women, prosecuted in some states for the more serious crime of “kinship homicide” (GIRE, 2012, p. 6).<sup>4</sup> Movement and counter-movement continued to target state and national legislatures, with conservatives attempting to change the terms of debate through constitutional amendments aimed at presenting embryos as persons and hyper-penalizing abortion, and pro-choice activists attempting to secure decriminalization and the implementation of the existing regime of exceptions. While lawfare battles over abortion after 2007

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<sup>3</sup> For critiques of “backlash,” see Greenhouse and Siegel (2011); Keck (2009).

<sup>4</sup> The definition of kinship homicide, or *homicidio en razón de parentesco*, varies from state to state but covers infanticide, parricide, and filicide. It carries more severe custodial sentences than homicide.

focused on subnational legislative arenas, they were simultaneously and increasingly displaced to the Supreme Court and to a sphere of argumentation focused on division of policy-making powers, ultimately supporting a federal agenda that in recent years has strengthened women's human rights. The court's historic interpretation of 2008-2009 (spanning the public hearings and final ruling),<sup>5</sup> and its subsequent reaffirmation, has proved central to shaping these subnational fields of contentious politics, ultimately limiting the scope of states' jurisdiction to pass measures limiting women's reproductive health rights. In the following sections, we analyze key Supreme Court rulings in the recent trajectory of abortion rights lawfare in Mexico. These include: (1) the court's public hearings and final ruling in 2008-2009 on the constitutionality of the reforms approved by Mexico City's legislature to its penal laws and public health policies; (2) the court's deliberations and rulings in 2011 on challenges to the conservative reforms of the constitutions of the states of San Luis Potosí and Baja California; and (3) the court's deliberations and rulings in 2013 on three separate constitutional appeals presented by municipalities against "right to life from the moment of conception" constitutional reforms in the states of Querétaro, Oaxaca, and Guanajuato. We trace the different framings and arguments put forward by Supreme Court justices in these critical sentences, revealing how judicial exercises in balancing women's right to health and the fetal right to life, and in determining the scope of states' policy-making powers vis-à-vis Mexico's international human rights commitments, have strengthened women's ability to exercise their reproductive rights. We then point to the ways in which federal initiatives to address gender violence have opened new opportunities for pro-choice activists to decriminalize abortion in local penal codes, including in states that have "right to life from the moment of conception" clauses in their constitutions (see also Appendix 1).

## 2. CONSTITUTIONAL CHALLENGES I: MEXICO CITY

At the end of May 2007 at the behest of the *panista* federal government, two constitutional challenges were presented against Mexico City's trimester regime reforms.<sup>6</sup> The head of the

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- 5 To decide constitutional cases, the Mexican Supreme Court first publishes an initial draft proposal or decision (known as a *proyecto*) put forward by one Justice. The Justices in session then publicly debate and vote either for or against. The elaboration of the final ruling (known as an *engrose*) is assigned to a different Justice, who exercises a considerable margin of interpretation.
- 6 The Supreme Court rules on the constitutionality of laws and decides whether they violate constitutional rights. Constitutional challenges can be presented by federal and state-level senators and deputies when those presenting the action make up at least 33% of the chamber in question. The attorney general and political parties can also present unconstitutionality actions. The Supreme Court also resolves constitutional controversies when a law, administrative rule, or decree assumes functions that correspond to

National Human Rights Commission, José Luis Soberanes Fernández, presented an action arguing that articles 22 and 123 of the Constitution, which refer to the right to maternal health and of gestational life, implied the right of the product of conception to protection during the gestational process. The action also rejected Mexico City's reforms on equality grounds, arguing that men should have equal rights and obligations over a pregnancy as part of their equal "right to procreate" and that there should be no difference in the protections extended to the product of conception before and after 12 weeks (GIRE, 2010, p. 19).<sup>7</sup> Significantly, the action also argued on other grounds, such as competence (alleging that health policy was a matter for the national Congress) and legality (arguing that certain aspects of the reformed law contradicted Mexico's federal laws and international treaty obligations, leading to a situation of "legal uncertainty").<sup>8</sup>

At the same time, Attorney General Eduardo Medina Mora presented an additional constitutional challenge, alleging that the definition of a criminal offense in the new law was inconsistent and that the Federal District's legislature lacked the jurisdiction to override the (federal) General Health Law. The Office of the Attorney General's action invoked the Supreme Court's nonbinding criteria P./J.14/2002, which referred to "the right to life of the product of conception," together with protections deriving from Mexico's Constitution and international treaties.<sup>9</sup> The action claimed that a law could not allow the privation of life of the product of conception, stating that "the right to life is the indispensable basis and condition of all other rights," and that protection could not be limited through discriminatory measures such as limits on the period of gestation (SUPREMA CORTE DE LA NACIÓN, 2007). In effect, both the National Human Rights Commission and the Office of the Attorney General maintained that women's right to bodily autonomy ended at procreation, when they acquire obligations and rights toward life in gestation.

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another government agency; however, such constitutional controversies can be presented only by federal executive and legislative bodies, judiciaries, legislatures and executives of the states of the federation and municipalities.

<sup>7</sup> Individuals can present writs of *amparo* concerning a concrete violation of their constitutional rights. For a detailed analysis, see Pou Gimenez (2009).

<sup>8</sup> For a detailed analysis, see GIRE (2010).

<sup>9</sup> On August 18, 2000, a series of modifications to Mexico City's penal code were approved, reducing criminal charges for the crime of abortion; removing clauses related to honor (*aborto honoris causa*); and adding new extenuating circumstances (severe defects of the fetus, threats to the pregnant woman's health, and nonconsensual artificial insemination). This reform – known as the Robles Law – was challenged before the Supreme Court by deputies from the PAN and the Ecologist Green Party of Mexico (PVEM). In 2002, the Supreme Court upheld the constitutionality of the reform.

Once the battle shifted to the Mexican Supreme Court, the language of argumentation moved to the domain of the legal-technical. This signified a transformation of the political opportunity structure for movement and counter-movement. The court was facing several challenges to its legitimacy, and in March 2008, in an unprecedented move, its president announced that six public hearings would be held to hear diverse opinions from academia and organized civil society about the constitutional challenges regarding abortion. The instructing justice charged with drawing up the draft decision was Justice Salvador Aguirre Anguiano, a conservative and close ally of the PAN (he had previously run for congress on a PAN ticket) and one of the four justices who in 2002 had voted against the decriminalization of abortion in cases of rape or fetal malformation. As anticipated, Aguirre proposed striking down the reforms, with his draft decision instead supporting the rights of the unborn and barely mentioning women's autonomy or right to health (SUPREMA CORTE DE LA NACIÓN, 2007).

The government of Mexico City assembled an impressive legal team to contest Soberanes's and Medina's arguments, affirming its jurisdiction to legislate on health matters and referring to international treaty obligations calling for the decriminalization of abortion. Those supporting the unconstitutionality actions argued that article 29 of the Constitution recognized that personhood begins at conception or fertilization and that the embryo is independent of the woman (GIRE, 2010, p. 32), while pro-choice advocates maintained that women's rights to health and autonomy should prevail over the supposed "rights" of the product of conception. They argued that article 4 of the Constitution recognized the right to voluntary motherhood and that women's rights to self-determination and freedom were tied to their reproductive capacities (ARANDA, 2008). They also put forward broader arguments about the right to health (citing maternal deaths due to clandestine abortions) and equity (stating that Mexico's international treaty obligations demanded that women of all economic circumstances have access to family planning and to legal and safe abortion services).

Politically, the central issue was federalism: Mexico City Mayor Marcelo Ebrard emphasized the city's jurisdiction to set its own health policies, saying that it would be unprecedented if the court overturned existing public policies designed to ensure the right to health of its inhabitants.

### 2.1 SUPREME COURT FRAMINGS IN 2008

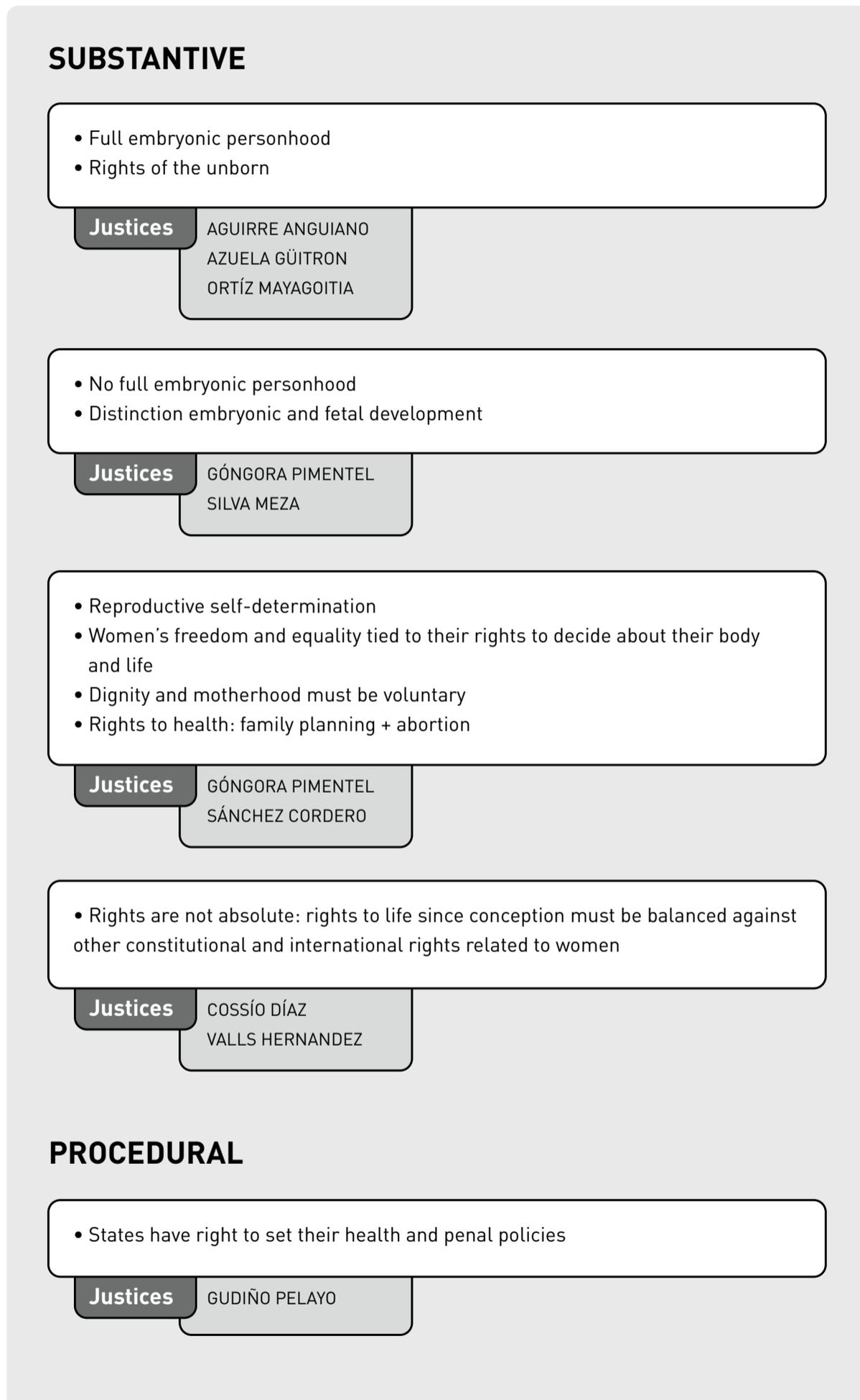
In framing their opinions, the Supreme Court justices drew on amici, expert testimonies and evidence, and legal interpretations set out in the public hearings, signaling an incipient shift toward a more dialogic engagement with movement and counter-movement. Justice Genaro Góngora Pimentel, arguing against Aguirre's draft decision, reasoned that women's human and fundamental rights are tied to sexual and reproductive rights because they are the first step to recognizing equality and the full exercise of citizenship. He argued that banning

abortion and legally forcing women to bring a pregnancy to full term was a curtailment of women's rights and freedoms that prevented them from exercising their right to equality with men (GIRE, 2010, p. 36). Justice Olga Sánchez Cordero countered the arguments advanced in the public hearings that granting women the right to terminate a pregnancy violated men's rights to fatherhood, saying that granting men the power to decide whether a woman should continue with a pregnancy she does not want would violate women's rights to freedom and equal value as a person (GIRE, 2010, p. 36). The court deliberated the central question of the right to life from the moment of conception and whether the embryo should be understood as a person with rights, ultimately leading to the reversal of its non-binding precedent of 2002, which had referred to prenatal personhood.<sup>10</sup> Justice José Ramón Cossío Díaz pointed out that no rights were absolute and that the right to life from the moment of conception would have to be balanced against others and harmonized in accordance with the values protected in the Constitution (GIRE, 2010, p. 37). Justice Sergio Valls Hernández similarly observed that protection of the life of the embryo is not absolute in the Constitution or international conventions and that it must be considered together with other values protected in the Constitution, specifically those related to women. For Valls, women could not be rendered "mere instruments of the unborn life," as this would sacrifice their fundamental rights. Justice Góngora rejected full personhood of the embryo, stating that "the imposition of a subjective assessment, such as accepting that the product of conception is a person, affects the democratic state, as well as the freedom of thought and religion" (GIRE, 2010, p. 38). Justice Silva Meza pointed out that the twelve-week period for legal abortion corresponds to the initial stage of embryonic development, not fetal development (when the sensorial and cognitive abilities of the *nasciturus* develop) (GIRE, 2010, p. 38). Justices Aguirre (as the instructing justice), Mariano Azuela Güitrón, and Guillermo Ortiz Mayagoitia were the only justices who voted in favor of the draft decision – that is, against the constitutionality of Mexico City's decriminalization of abortion. Justice Gudiño's vote was central; he argued that protection of the right to life meant supporting the reforms and that beyond the diverse interpretations, the court had to respect the jurisdiction of the different entities of the country to determine how to punish common crimes (ARANDA, 2010).

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<sup>10</sup> In 2002, the court did not explicitly mention women's reproductive rights, instead placing its emphasis on the right to health (article 4 of the Constitution) and the rights of pregnant women in the workplace (article 123 of the Constitution) in order to protect the woman and the unborn child at any moment of its development.

FIGURE 1 – **KEY ARGUMENTS IN MEXICAN SUPREME COURT, 2008**



Source: Authors.

On August 28, 2008, in an 8-3 vote, the Supreme Court issued its decision upholding the constitutionality of the reforms and confirming the right of Mexico City's government to set its own health and criminal justice policies. As Paola Bergallo and Agustina Ramón Michel note, even though the court's minimalist approach failed to expand the constitutional interpretation of women's rights, its "assertion that the legislative margin of appreciation encompassed the option to eliminate the criminalization of abortion in the early stages of pregnancy constituted the most permissive approach to the constitutionalization of abortion across Latin America" (BERGALLO and RAMÓN, 2016, p. 45-46). This assertion by the court effectively transformed the structure of political and legal opportunities for pro- and anti-choice activists in the subsequent decade.

On March 2, 2009, the Supreme Court released its final ruling (known as an *engrose*), the drafting of which had been entrusted to Justice Cossío. In its ruling, the court established important precedents about the interpretation of the right to life as a non-absolute right; the decision states that while life is legally protected (*un bien jurídico*), it is not a necessary condition for the existence of other rights. It also defended the reforms as measures that protect women's rights to bodily integrity, to physical and mental health, and even to life (GIRE, 2010, p. 40). On the claim raised by the National Human Rights Commission that giving women the right to decide on abortion was a violation of men's right to fatherhood, the court stated that the continuation of an unwanted pregnancy asymmetrically affected women's life chances, and therefore the trimester reform gave women the final decision about whether to interrupt a pregnancy. The decriminalization of abortion was thus understood as a measure to reduce gender inequality (GIRE, 2010, p. 40). On the issue of federalism and the scope of states' jurisdiction, the court also rejected plaintiffs' arguments that only the federal government can decide health policy, upholding the autonomy of the capital's assembly to legislate in health matters. Although the court failed to develop a more robust ruling advancing women's rights and specifically reproductive rights (and in this sense, as Francisca Pou Gimenez (2009) observes, did not develop a strong constitutional dialogue), its deliberations on the issues of prenatal life and federalism were critically important for framing subsequent movement and counter-movement arguments and tactics.

### 3. CONSTITUTIONAL REFORMS TO PROTECT "LIFE FROM THE MOMENT OF CONCEPTION": MOVEMENT AND COUNTER-MOVEMENT REFRAMING

The Supreme Court's endorsement of the right of Mexico City's government to set its own health policy and to reform its criminal provisions governing abortion proved a powerful incentive for the country's anti-abortion movement. Henceforth, conservative political alliances in different states would promote reforms aimed at restricting women's sexual and reproductive rights and preventing the decriminalization of abortion – reforms that were

defended under the same arguments of division of powers and states' jurisdiction championed by those in the pro-choice camp. Just two months after the Supreme Court's ruling, the PAN-dominated congress of the state of Sonora ratified an amendment to the local constitution to protect life "from the moment of conception until natural death." Other states approved similar reforms, often through alliances between the PAN and the Institutional Revolutionary Party (PRI), but also in some cases including the Party of the Democratic Revolution (PRD), the Green Party (PVEM), and other minority parties.<sup>11</sup> These states included Baja California, Campeche,<sup>12</sup> Chiapas, Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Tamaulipas, Yucatán, Veracruz, and Sinaloa (Chihuahua had already reformed its constitution to this effect in 1994). In March 2019, Nuevo León became the last state to ratify such an amendment.

Establishing the obligation to protect and guarantee the right to life for the product of conception, these reforms attempted to give legal personhood to the zygote or embryo, considering it a "person" or a "born person" from the moment of conception or fertilization, and were clearly aimed at preventing future attempts to decriminalize abortion through reforms to state penal codes (the tactic successfully adopted in Mexico City in 2007). These subnational reforms were facilitated by alliances between the Catholic Church and conservative forces within the PAN, the PRI, and other parties.

The success of "right to life from the moment of conception" amendments in state constitutions and the increasing presence of this construct in legal debates in turn influenced framings and strategies within the pro-choice movement. As judicial deliberations on abortion evolved with a focus on the issue of prenatal personhood and protection, Mexican pro-choice activists emphasized women's narratives and health rights, countering the embryo-centric narratives of proponents of the "right to life from the moment of conception" by putting women and the material and political conditions affecting conception, pregnancy, and family life back at the heart of narratives about prenatal development. Such framings were central to a sustained campaign of pro-choice strategic litigation involving individual *amparo* writs, unconstitutionality actions (presented by pro-choice allies in state human rights commissions and legislatures), and constitutional controversies (presented by municipal governments against state governments, alleging infringement of their jurisdiction).

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11 While the PRD in Mexico City, under the leadership of Marcelo Ebrard, adopted a firm pro-choice stance, this was not the case for the party throughout the country. However, all the initiatives for legal abortion presented prior and after the constitutional reforms were put forward by the PRD.

12 Campeche modified its constitution in August 2009, but the official version published in November 2010 struck down the second paragraph of article 6, which contained a clause protecting life from the moment of conception.

In 2012, the pro-choice organization Information Group on Reproductive Choice (Grupo de Información en Reproducción Elegida, or GIRE) published a report entitled *Women's Human Rights and the Protection of Prenatal Life in Mexico* in which it argued that given that “right to life from the moment of conception” constitutional reforms were increasing judicial insecurity and negatively affecting women’s health rights, the onus was on the government to legislate and develop public policies protecting both the life of the unborn and the rights of women to health and reproductive freedom and autonomy (GIRE, 2012). These rights could be protected through, for example, medical attention during pregnancy, adequate nutrition, opportune monitoring, safe deliveries, and nurseries (TAMES, 2011, p. 3). GIRE drew a distinction between the protection of life in gestation (which allowed for measures to protect the rights of the mother and the welfare of the product of conception) and the granting of personhood to the product of conception. This positioning aims to protect prenatal life – which the Supreme Court, in 2008 and again in 2011 (see below), confirmed was a constitutional *value* but not an absolute right – while supporting the agency and autonomy of women in their reproductive decisions. Pro-choice organizations signaled the need for policies to support the pregnancies and maternity of women, especially poor women, while they insisted on women’s reproductive autonomy and rejected absolutist claims about fetal personhood. This powerful argument was developed in response to the conservative camp’s framing of the state’s positive duty to protect prenatal life.

### 3.1 CONSTITUTIONAL CHALLENGES II: SAN LUIS POTOSÍ AND BAJA CALIFORNIA

In January 2009, Baja California’s human rights ombudsperson presented an action of unconstitutionality against the reformed article 7 of the local constitution protecting the “right to life from the moment of conception.” The action alleged that the reform endangered women’s rights and that it defined the moment when life commenced, something not stipulated in the Mexican Constitution or international instruments (SUPREMA CORTE DE LA NACIÓN, 2009a). It argued that while life was legally protected, a fertilized embryo was not a person or individual and therefore not a subject with legal standing or rights. Importantly, the action went on to argue *against* a generous interpretation of the scope of state’s policy-making powers, stating that if the Mexican Constitution and international instruments did not understand the product of conception to be an “individual,” then the state constitution could not confer rights on this group of “subjects” (SUPREMA CORTE DE LA NACIÓN, 2009a). In October of the same year, a group of congressional deputies in San Luis Potosí presented an action against article 16 of San Luis’s constitution, which “recognized human life as the basis of all rights”; affirmed that life is “protected and respected from the moment of its beginning at conception”; and (making explicit the prohibition of the death penalty) stated that the death of the product of conception would be exempt from criminal prosecution only when it occurred via the existing regime of

exceptions.<sup>13</sup> As well as arguing against prenatal personhood, the unconstitutionality action contested the explicit hierarchy of rights established by San Luis's reform (SUPREMA CORTE DE LA NACIÓN, 2009b).

Debates in the Supreme Court on both constitutional challenges focused on two areas of contention: first, the scope of jurisdiction of state governments vis-à-vis the federal government and of state law vis-à-vis the Mexican Constitution, and second, the substantive rights implied by different formulations of rights to life and health. Consensus existed on the need to protect life in gestation but not on whether that right is absolute or on whether the embryo should be considered a person (as stated in Baja California's reformed constitution). The two draft decisions prepared by Instructing Justice Fernando Franco argued that article 7 of Baja California's constitution and article 16 of San Luis Potosí's constitution should be declared invalid on the grounds that: (1) according to the Mexican Constitution and international human rights instruments, the unborn product of conception is not a human being or a person, and therefore is not a subject of rights; and (2) protecting the life of the unborn limits the dignity and rights of women, particularly their health and reproductive rights (SUPREMA CORTE DE LA NACIÓN, 2011a).

The draft decisions stated that the "right to life from the moment of conception" articles harmed the dignity of women by reducing them to instruments of reproduction (SUPREMA CORTE DE LA NACIÓN, 2009a). They also observed that granting the legal status of a person to the product of conception and guaranteeing an absolute right to life would mean that certain contraceptive methods (including emergency contraception and intrauterine devices), in vitro fertilization, and legal abortions could be considered homicides. Justice Franco reiterated the arguments set out by the court in 2008 – that the right to life of the product of conception cannot be absolute but rather must be protected in a gradual manner to allow for the protection and exercise of other fundamental rights specified in the Constitution, such as the right to decide the number of one's children (which can imply the use of assisted reproduction) and the right to decide not to have children (which implies the use of contraceptive methods) (SUPREMA CORTE DE LA NACIÓN, 2009a). He argued that adequate healthcare for pregnant women is a more effective means to protect prenatal life that does not negatively affect women's rights. He also stated that article 29 of the Mexican Constitution does not determine when life itself begins and underlined the need to apply the pro-person principle established in the constitutional

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13 "No es punible la muerte dada al producto de la concepción, cuando sea consecuencia de una acción culpable de la mujer, el embarazo sea resultado de una violación o de una inseminación indebida, o de no provocarse el aborto la mujer corra peligro de muerte." By enumerating the existing regime of exceptions in the state constitution, the reformed article aimed to block legislative measures to expand them in the future.

reform of 2011, whereby norms must be interpreted in such a way as to increase protections for the existing rights of people.

The constitutional challenges for Baja California and San Luis Potosí were heard on two consecutive days. In the case of Baja California, seven justices supported Justice Franco's draft decision. Debate centered on the scope of states' jurisdiction, but also on the relationship between women's rights and protection for the product of conception. Justice Luis María Aguilar Morales argued against having different constitutional orders in different parts of the country, stating that it could lead to injustice, inequalities, and discrimination. He also held that a state constitution cannot define the moment at which life begins, something that only drafters of the Mexican Constitution can establish (SUPREMA CORTE DE LA NACIÓN, 2011b, p. 30-34). Justice Cossío expressed his concern that giving rights to the product of conception "cancels any possibilities of dialogue" between a constitutionally protected good (the *nasciturus*) and the rights of women to decide on the timing and number of their pregnancies (SUPREMA CORTE DE LA NACIÓN, 2011c, p. 8-9). Justice Valls argued that states must respect the limits of the Mexican Constitution and international treaties and cannot restrict or annul rights contained therein (the principle of progressivity). He also affirmed that states in the federation cannot define the moment at which human life begins (SUPREMA CORTE DE LA NACIÓN, 2011c, p. 12-13). Importantly, Justice Silva argued that the local expansion of human rights can occur only when it does not contradict federal laws. Justice Sánchez argued that Baja California's reform restricted not only women's rights but those of all citizens, as it did not provide them with clarity about how and when they could exercise their rights. She asked, for example, at what moment is the use of contraceptives to impede fertilization or block implantation in the womb "the exercise of a right (to use contraceptives) or [...] [the] committing [of] a crime [by] ending the life of a person?" (SUPREMA CORTE DE LA NACIÓN, 2011c, p. 26-28). Justice Zaldívar argued that no state could be above the Mexican Constitution, as states are autonomous but not sovereign; therefore, they cannot define the content of the concept "person," which is a constitutional and national concept. He was also of the view that "right to life from the moment of conception" reforms could limit women's rights and even criminalize women, stating that "criminalizing women, above all poor women, isn't the solution. To condemn them to jail, to clandestinity, to put their health and life at risk seems to me to be profoundly unjust, profoundly immoral, and profoundly unconstitutional" (SUPREMA CORTE DE LA NACIÓN, 2011b, p. 28).

Four judges opposed the draft decision, arguing that article 7 of Baja California's constitution was constitutional. According to Justice Aguirre, the article did not contradict the "right to life" set out in the Mexican Constitution or article 4 of the American Convention on Human Rights, nor did it contravene the rights of women (SUPREMA CORTE DE LA NACIÓN, 2011b, p. 28); he reaffirmed the view he had set out in his 2007 draft decision, in which he argued that the embryo has legal personhood and women's rights cannot overrule that right to life. Aguirre maintained that because embryos were people, the pro-person prin-

ciple of reformed article 1 of the Mexican Constitution extended protection to them. This position was echoed by Justice Ortiz, who held that the federal and state constitutions were complementary and that the former supported protection of life, observing that “there seems to be no opposition to recognition of the right to life, but there is an insistent argument to avoid recognizing it in all its dimensions” (SUPREMA CORTE DE LA NACIÓN, 2011c, p. 37).<sup>14</sup> Justice Margarita Luna Ramos – who had supported the constitutionality of Mexico City’s reforms in 2008 on the grounds of local legislatures’ jurisdiction to decide the sanctions to be applied to a specific common crime – argued that states could indeed establish the moment at which life begins, given the lack of definition on this point in the Mexican Constitution and international treaties. She also rejected the argument that protecting life from the moment of conception harmed women’s rights (SUPREMA CORTE DE LA NACIÓN, 2011c, p. 26-58 and 63). Justice Jorge Mario Pardo believed the Mexican Constitution did indeed protect life from the moment of conception but that:

[even] if we conclude that our Constitution establishes no explicit rights for the unborn product of conception [...] then [referring to article 4.1 of the American Convention on Human Rights] we have international instruments which have established that this unborn being is the subject of rights and not simply a subject of legal protection. (SUPREMA CORTE DE LA NACIÓN, 2011d, p. 8)<sup>15</sup>

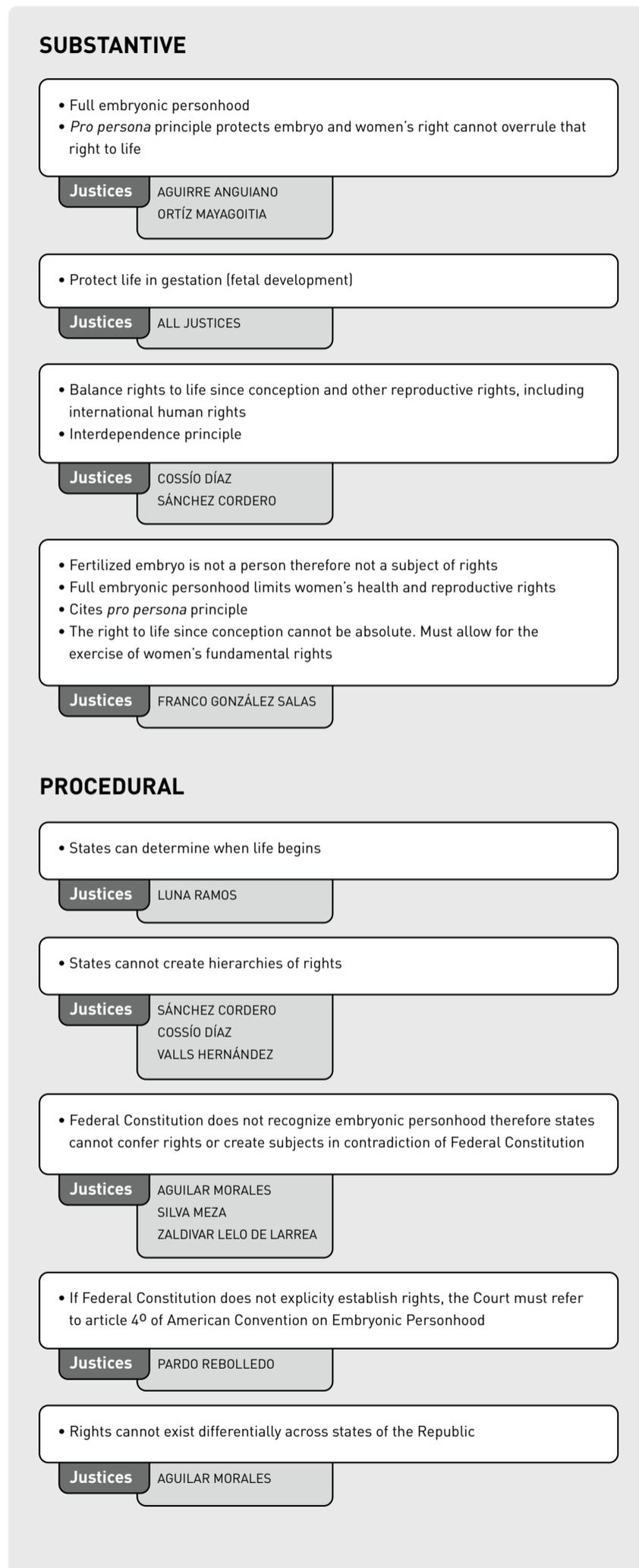
Therefore, in his view, different states in the federation could indeed decide at what point legal protections should be extended to the product of conception.

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14 In 2010, Aguirre and Ortiz had voted against reforms in the Federal District that allowed same-sex marriage and adoption rights.

15 This was, of course, prior to the historic 2012 ruling of the Inter-American Court of Human Rights in *Artavia Murillo v. Costa Rica*, which definitively resolved disputes over article 4.1 of the American Convention on Human Rights, namely the issue of embryonic right to life. See Lemaitre and Sieder (2017).

FIGURE 2 – KEY ARGUMENTS IN MEXICAN SUPREME COURT, 2011



Source: Authors.

On September 28, 2011, a seven-justice majority voted to declare Baja California's reform unconstitutional; but the fact that this was one vote short of the minimum of eight votes needed to invalidate a constitutional norm meant the action of unconstitutionality was rejected on legal-technical, not substantive, grounds. The vote meant that the protection of life from the moment of conception remained in Baja California's constitution. However, although opinion was divided, the positions staked out in the court signaled the dominant tendency to balance protections for prenatal life with women's reproductive rights.

A similar 7-to-4 vote occurred on the action from San Luis Potosí. In addition to the arguments set out for the Baja California case, Justice Sánchez held that the hierarchy of fundamental rights established in San Luis Potosí's constitutional article 16 was incompatible with the interdependence of human rights and the harmonization expected between the Mexican Constitution and international human rights treaties (SUPREMA CORTE DE LA NACIÓN, 2011d, p. 18). Justice Cossío rejected San Luis's formulation specifying the existing regime of exceptions on the grounds that this would prevent future legislative changes, specifically future possibilities of allowing abortion on grounds of women's right to health or fetal malformations, or of passing a trimester reform in line with that approved in the Federal District (SUPREMA CORTE DE LA NACIÓN, 2011d, p. 18). Justice Valls also rejected the attempt to establish a hierarchy of rights and emphasized that state constitutions are not penal codes; the legislature must decide what social conducts are defined as crimes or should be penalized (SUPREMA CORTE DE LA NACIÓN, 2011d, p. 21). Justice Aguilar believed no local congress could regulate fundamental rights and that these rights could not exist differentially across the different states of the federal republic.

Arguing against the draft decision, Justices Pardo and Luna were not of the view that article 16 created a hierarchy of rights or established any right as absolute; nor was Justice Luna of the opinion that the article prevented a future decriminalization reform, *in vitro* fertilization, or certain contraception methods. Justices Aguirre and Ortiz also voted against.

In short, the vote on the unconstitutionality actions in 2011 was decided on increasingly narrow, legal-technical questions, not on substantive issues relating to women's sexual and reproductive rights. Yet following the 2011 constitutional reform, debates on the extent of states' policy-making powers were increasingly framed by international human rights law and the pro-person and progressivity principles. The positions staked out in the debate again provided important signals for reshaping movement and counter-movement strategies and framings.

### 3.2 CONSTITUTIONAL CHALLENGES III: QUERÉTARO, GUANAJUATO, AND OAXACA

Pro-choice activists continued to seek ways to challenge the constitutionality of "right to life from the moment of conception" amendments. In April and May 2013, the Supreme Court debated three separate constitutional appeals presented in 2009 by municipalities against the reforms in the states of Querétaro, Oaxaca, and Guanajuato (SUPREMA CORTE DE LA

NACIÓN, 2009b, 2009c and 2009d). Procedurally, these actions, known as *controversias constitucionales* (constitutional controversies), offer narrower grounds for argumentation: they challenge acts or norms that allegedly infringe on the competences of government authorities rather than debate whether fundamental human rights violations have occurred (art. 105 of the Mexican Constitution).

The case of Querétaro was resolved on jurisdictional grounds with limited effects.<sup>16</sup> In Oaxaca and Guanajuato, the municipalities – supported by pro-choice lawyers – had claimed that the amendments infringed on their mandates as public authorities to provide healthcare (particularly certain kinds of contraception) in accordance with federal health norms and laws concerning gender violence, which state that emergency contraception must be offered to rape victims. This argument was rejected for the case of Oaxaca by a vote of five justices.<sup>17</sup> However, despite the court's rejection of pro-choice lawyers' attempts to use constitutional controversies to debate fundamental rights issues, in 2013 the justices again debated prenatal personhood and the implications of “right to life from the moment of conception” reforms. On this occasion, Justice Franco's draft decision specifically referred to the landmark 2012 decision of the Inter-American Court of Human Rights in the case of *Costa Rica v. Artavia Murillo*, which rejected Costa Rica's decision to ban in vitro fertilization on the basis that embryos had full personhood and therefore the right to life (SUPREMA CORTE DE LA NACIÓN, 2013).

In 2008, Justice Sánchez had referred to an “inhibiting effect” of clauses protecting the right to life from the moment of conception. However, in debates on the constitutional controversies in 2013, Justice Cossío affirmed that independently of whether a state reformed its constitution, all public authorities were obliged to comply with federal healthcare norms. He thereby explicitly rejected the idea that such clauses in state constitutions prohibited local authorities from providing access to emergency contraception or abortion in the case of rape or other exceptions.<sup>18</sup> Cossío argued that accepting the grounds of the constitutional appeal

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16 In an 8-4 vote, the Supreme Court found that procedural errors had occurred in drafting the respective clause but determined that this meant it was invalid for the municipality that had presented the action rather than for all municipalities in the state of Querétaro.

17 The court deemed there had been no direct act violating the municipality's competences. The municipality in question in Guanajuato withdrew its action following the vote on the Oaxaca controversy. The lawyer in both cases was Alejandro Madrazo.

18 In a clear signal to pro-choice activists, Cossío stated that if a woman was denied access to contraception or legal abortion services based on “right to life since the moment of conception” amendments, then she could present an *amparo* to ensure the guarantee of her sexual and reproductive rights (SUPREMA CORTE DE LA NACIÓN, 2013). See also Ortíz Trujillo (2013, p. 30).

– that such an “inhibiting effect” did indeed exist – would be counterproductive, as it would in effect mean that municipalities in states with “right to life from the moment of conception” amendments could indeed cease to apply federal health norms, something that would be both unconstitutional and a major setback in the struggle for women’s sexual and reproductive rights in Mexico.

Although these constitutional controversies were again resolved on legal-technical rather than substantive grounds,<sup>19</sup> Justice Cossío’s affirmation that such constitutional amendments do not have any legal effects on federal health norms was significant and reinforced an earlier decision of the court to uphold federal health policies. This had occurred in 2009 when the governor of Jalisco presented a constitutional challenge to Official Health Norm 046 (published in April 2009) (SUPREMA CORTE DE LA NACIÓN, 2009e), a reform secured following years of mobilization by pro-choice and women’s rights groups to ensure protection of the rights of victims of familial, sexual, and gender violence. Norm 046 was one outcome of the friendly settlement reached by Mexico and the Inter-American Commission on Human Rights concerning the case of Paulina, a thirteen-year-old rape victim who was denied access to legal abortion in Baja California. The outcome of careful lobbying by pro-choice groups, the norm stipulates that all federal and state health services must provide emergency contraception, post-exposure prophylaxis against HIV and syphilis, and access to abortion for rape victims. In response to the constitutional challenge by the governor of Jalisco, Instructing Justice Cossío explicitly rejected attempts to define emergency contraception as “chemical abortion” and upheld the constitutionality of Official Health Norm 046, stating that it did not interfere with states’ competencies to define penal law. Ten of the eleven justices supported Cossío’s draft decision upholding the validity of Norm 046.<sup>20</sup>

In short, in 2013, the Supreme Court continued to insist that “right to life from the moment of conception” constitutional amendments have no binding effects and could not trump federal health laws and norms. However, by resolving the actions on jurisdictional and legal-technical grounds, it failed to overturn these amendments as pro-choice activists had demanded, instead adhering to its default position of upholding states’ legislative autonomy (while at the same time limiting the effects of subnational legislative action).

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19 Conservative position: Justice Gutiérrez stated that “[t]his is a case about federalism, not about the right to life or abortion.” Rejecting Franco’s assertion that the draft decision was in line with the *Artavia Murillo* sentence, he stated that “[t]he definition of right to life should not be addressed in a constitutional action” (SUPREMA CORTE DE LA NACIÓN, 2013).

20 Dissenting Justice Aguirre opposed the draft decision, arguing that Mexico’s international treaty obligations did not oblige it to provide emergency contraception (GARCÍA MARTÍNEZ, 2010).

#### 4. CHALLENGES IV: BETWEEN THE RIGHT TO HEALTH AND SUBNATIONAL AUTONOMY

Movement and counter-movement legal engagements over abortion in Mexico continue to hinge on jurisdictional questions surrounding the limits of subnational state autonomy and federal law. The anti-abortion movement, led throughout the country by elected representatives for the PAN, continues to promote “right to life from the moment of conception” amendments to state constitutions and restrictive reforms of state penal codes, but has also mounted new constitutional challenges to federal health norms on the grounds of infringement of states’ jurisdiction. While the anti-abortion movement maintains political advantage in many of the state legislatures, pro-choice organizations have pursued a sustained campaign of litigation to challenge conservative attempts to further restrict legal abortion and to secure more progressive constitutional jurisprudence on women’s rights to health. This includes an important strand of ongoing litigation through *amparo* writs, aimed at making access to decriminalized indications for legal abortion more effective and advancing other aspects of the right to health, irrespective of the content of states’ penal codes (GIRE, 2018). Attempts to decriminalize abortion at the subnational level have increasingly been tied to the enforcement of federal norms addressing violence against women.

While pro-choice groups have undoubtedly driven the judicialization of the struggle over abortion, changes to federal health law – prompted by earlier transnational litigation by pro-choice groups – sent the anti-abortion lobby back to the Supreme Court. In March 2016, new reforms to Official Health Norm 046 were published permitting abortion in the case of rape without the previous requirement of filing a judicial complaint; women could now simply confirm in writing that they had been raped (in the case of minors, parents or guardians could provide such a written statement). This measure brought the health norms in line with Mexico’s General Law on Victims, which requires public health facilities to provide abortion for rape victims as an emergency medical service, without making them first file a judicial complaint. It also responded to a recommendation in 2015 by the United Nations Committee on the Rights of the Child, which called on Mexico to harmonize its federal and state legislation to permit access to legal abortion without judicial authorization for girls victim of rape or incest or whose health was endangered by pregnancy. In April and May 2016, the PAN led a national campaign to reassert subnational sovereignty: two constitutional controversies were presented by the congresses of PAN strongholds Aguascalientes and Baja California arguing that the federal health norm violated state penal codes – which in both states require the prior filing of a legal complaint in order to request an abortion in cases of rape – and civil codes and the Law on the Rights of Children and Adolescents, which specify parental custody of minors until the age of eighteen. The controversies called on the Supreme Court to resolve the matter for all states, arguing that a federal norm cannot overrule local constitutions and secondary laws.

In August 2019, the Supreme Court upheld Norm 046, allowing women to access abortion in cases of rape. The norm orders all institutions in the national health system (which

includes the public, social, and private sectors) to guarantee access to abortion in such cases; women do not need to file a criminal complaint with the police, and minors do not need to obtain parental permission. Justice Pardo had presented a draft decision opposing the modifications to Norm 046; eight justices voted against. They supported the reforms, arguing that their purpose was to bring access to abortion provision in cases of rape in line with the stipulations of the General Law on Victims, which states that this provision should be timely and without any impediments. (In two cases heard in 2018, the court had confirmed that denying a rape victim access to abortion constituted a violation of human rights and that victims of rape should receive comprehensive and effective reparations.) Voting in support of reformed Norm 046, Justice Javier Laynez argued the court had an obligation to “issue an interpretation with a gender perspective,” while judge Norma Lucía Piña argued that the court should support the ruling on human rights grounds. Judge Zaldivar was of the view that the court must send a clear message that women’s rights are protected, and that the federal health norm makes access to justice much easier and more straightforward in cases where their rights to sexual liberty have been gravely and violently affected (GIRE, 2019).

The election of President Andrés Manuel López Obrador in 2018 opened new political opportunities for pro-choice activists.<sup>21</sup> Although by no means are all representatives of López Obrador’s party – the National Regeneration Movement (MORENA) – pro-choice, in the state of Oaxaca an alliance between MORENA deputies and feminist activists led to a historic vote in September 2019 to decriminalize abortion in the first trimester, making Oaxaca the second state after Mexico City to approve such a reform. In July 2021, a similar alliance made Hidalgo the third state in the Mexican federation to decriminalize abortion in the first trimester. Contentious politics at the subnational level indicated the continuing relevance of the court’s historic stance on the issue of embryonic personhood and women’s rights to health. In 2019 and 2020, anti-choice politicians in several states challenged renewed pro-choice initiatives to decriminalize abortion in the first trimester for victims of gender violence, arguing that “right to life from the moment of conception” clauses in local constitutions made such moves unconstitutional. The Supreme Court’s arguments balancing the scope of states’ policy-making powers against women’s right to health were replayed within local legislatures, ultimately strengthening the position of the pro-choice camp. In effect, the cases of Oaxaca and Hidalgo proved that a reform of the penal code to decriminalize abortion does not require the prior reform of the constitutional clause protecting the right to life from the moment of conception. As pro-choice organization GIRE underscored:

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21 López Obrador’s first interior minister and former Supreme Court judge Olga Sánchez allied with feminists to promote the incorporation of the decriminalization of abortion during the first trimester within the federal Penal Code. Given the court’s stance on the margin of appreciation in recent years, if achieved, this would effectively legalize abortion in the first trimester nationwide.

Although article 12 of the state constitution protects the right to life from the moment of conception and the reform of this article was not discussed, the Supreme Court has stated that protecting life does not imply criminalizing abortion, and that the denial of access to a legal termination of pregnancy violates the right to health. (GIRE, 2019)

## FINAL REFLECTIONS

In this article, we have shown how battles over abortion in Mexico since the historic decriminalization reform in Mexico City have been simultaneously displaced to subnational legislatures and the Supreme Court, as movement and counter-movement engage each other on the legal terrain. While in the subnational legislative arena, the conservative crusade to protect life from the moment of conception initially gained the upper hand, the Supreme Court became a key focus for pro-choice movement activists, who were able to frame their arguments in terms of constitutional and international human rights, particularly after the country's constitutional reform of 2011.

In terms of framing, in response to the decriminalization of abortion in Mexico City in 2007, the anti-abortion movement adopted more legal and bioethical arguments on the “right to life,” emphasizing prenatal personhood as a “grand narrative” to counter the decriminalization of abortion. However, this failed to gain significant traction within legal interpretative debates in the Supreme Court. Rather, the Mexican court is in line with regional trends whereby constitutional courts have gradually enshrined a progressive understanding of the “right to life from the moment of conception,” viewing it as a non-absolute right and emphasizing the need to balance the rights of the fetus against those of the mother. This judicial balancing has produced a definitive position on the issue of prenatal life, explicitly rejecting the idea that the embryo or fetus is a “person.”<sup>22</sup> At the same time, the battle over the right to life from the moment of conception has influenced framings and strategies within the pro-choice movement, with some pro-choice activists turning tactically to a greater focus on maternal health and “reproductive justice” and choosing not to reject openly the “right to life” but rather to focus on the measures that will best protect women's rights and prenatal life (COOK, ERDMAN and DICKENS, 2017, p. 8).

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22 Bergallo and Ramón Michel observe that the balancing approach adopted by some of Latin America's constitutional courts has “yielded more complex judicial arguments about the constitutional status of unborn life and the duty to balance it against increasingly elaborate conceptions of dignity, autonomy and equality between the sexes ,” creating “a promise of moderation, negotiation, and conciliation to positions that were formerly staged as deeply antagonistic” (BERGALLO and RAMÓN MICHEL, 2016, p. 37 and 54).

In terms of opportunity structures, we have demonstrated how the battle within the Supreme Court on access to legal abortion in Mexico has hinged on jurisdictional issues of the scope of states' policy-making powers. Following the court's historic sentence of 2008, jurisdictional dimensions have outweighed the establishment of more substantive precedents on abortion rights. At the same time, anti-abortion activists have responded to the balancing developed by the court by increasingly focusing their legal arguments on issues of jurisdiction to try to secure margins of action for their attempts to further restrict abortion throughout the country. Our analysis indicates that while in 2008 the court upheld the autonomy of subnational legislatures to determine health policy, by 2019 the court was in effect reasserting federal sovereignty and its own role in defining policy, pointing to emerging legal arguments on sexual and reproductive rights that reflect Mexico's international human rights commitments, commitments strengthened since the 2011 constitutional reform affirming the *pro-persona* principle. Within this evolving framework of judicial deliberation, women's reproductive rights have also been reinforced by emerging regional jurisprudence and by new international and national instruments to challenge gender violence.

Developments in Mexico point to key questions for women's health rights guarantees in federal systems: how far does states' autonomy to legislate extend? Can states overrule or extend rights set out in the Mexican Constitution or international human rights instruments? The Mexican Supreme Court has played a complex game, affirming the autonomy of states to legislate but also stating that "right to life from the moment of conception" amendments cannot trump its interpretation of constitutional rights or advances in international human rights case law. Through the different constitutional controversies over abortion discussed in this article, important interpretations have been established to progressively lock Mexican constitutional law into international human rights frames. The Mexican case shows how the increasing constitutionalization of human rights, combined with a strategic emphasis on rights to health by pro-choice activists, has advanced women's sexual and reproductive rights, even in the face of continued high levels of mobilization and legislative victories by the anti-abortion movement. Despite its inability to prevent the counter-mobilization to secure subnational constitutional reforms to protect "life from the moment of conception," the national alliance of pro-choice organizations in Mexico has proved adept at negotiating between different state arenas and sustaining its focus on the Supreme Court, identifying key cases for strategic litigation, and building alliances with pro-choice subnational state actors to develop arguments before the court. Given the lack of a strong commitment by any of Mexico's political parties to legalize abortion, over time the court has ultimately proven to be a more effective defender of women's rights.

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## APPENDIX I

### CRITICAL JUNCTURES IN ABORTION LAWFARE, MEXICO

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<b>2007</b>	<ul style="list-style-type: none"> <li>• Conservative Federal government of Partido Acción Nacional (PAN) supports “right to life since conception”</li> <li>• <b>4 April</b> Federal District legislature approves reforms to Penal Code and Health Law guaranteeing Legal Termination of Pregnancy (LTP)</li> <li>• <b>May</b> Federal government through CNDH and PGR presents two constitutional challenges against trimester regime reforms</li> </ul>
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<b>2008</b>	<ul style="list-style-type: none"> <li>• <b>March</b> SCJN carries out six public hearings on constitutional challenges on abortion</li> <li>• <b>28 August</b> SCJN votes over constitutionality of reforms confirming right of Federal District’s government to set their health and penal policies</li> <li>• Anti-abortion movement achieves first state constitutional reforms for protect the right to life since conception: Morelos and Baja California</li> </ul>
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<b>2009</b>	<ul style="list-style-type: none"> <li>• <b>26 January</b> Baja California’ human right ombudsman presents action of unconstitutionality before SCJN against local constitutional reform that protects right to life since conception</li> <li>• <b>16 April</b> Official health norm NOM-046-SSA2-2055 published. Family, sexual and violence against women. Criteria for prevention and care</li> <li>• <b>May</b> State congress of San Luis Potosí approves constitutional reform recognizing that all human life begins at conception</li> <li>• <b>11 June</b> Governor of Jalisco presents constitutional controversy against official health norm 046</li> <li>• <b>October</b> Twelve congressional deputies in San Luis Potosí present action of unconstitutionality against the state’s right to life since conception constitutional reform</li> <li>• Twelve more states reform their constitutions to protect the right to life since conception</li> </ul>
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<b>2010</b>	<ul style="list-style-type: none"> <li>• <b>27 May</b> SCJN resolves constitutional controversy presented by governor of Jalisco, declaring it without merit and upholding validity of NOM-046</li> <li>• <b>December</b> State congress of Tamaulipas amends its constitution to protect the right of life from conception to natural death</li> </ul>
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<b>2011</b>	<ul style="list-style-type: none"> <li>• <b>28-29 September</b></li> </ul>	<p>Ministers in SCJN vote on actions of unconstitutionality of Baja California and San Luiz Potosí. Minimum votes necessary to invalidate the constitutional norms not obtained in either session</p>
	<ul style="list-style-type: none"> <li>•</li> </ul>	<p>Municipalities in different states present in the SCJN constitutional controversies against state constitutional reforms that protect the right to life since conception: Uriango in Guanajuato (July 6), Arroyo Seco, Querétaro (September 30) and Asunción Ixtaltepec, Oaxaca (October 25)</p>
<b>2012</b>	<ul style="list-style-type: none"> <li>•</li> </ul>	<p>Presidential federal election: winner Partido Revolucionario Institucional</p>
<b>2013</b>	<ul style="list-style-type: none"> <li>• <b>2 May</b></li> </ul>	<p>SCJN in controversy of Oaxaca resolves municipalities' competences not violated. Municipality in Guanajuato withdraws its action following the vote on Oaxaca</p>
	<ul style="list-style-type: none"> <li>• <b>30 April</b></li> </ul>	<p>SCJN resolves case of Querétaro on procedural grounds with limited effects: norm only invalid for the Arroyo Seco municipality</p>
<b>2016</b>	<ul style="list-style-type: none"> <li>• <b>21 January</b></li> </ul>	<p>State congress of Veracruz approves constitutional reform recognizing that all human life begins at conception</p>
	<ul style="list-style-type: none"> <li>• <b>24 March</b></li> </ul>	<p>Amendments to the official health norm NOM-046-SSA2-2005 published</p>
	<ul style="list-style-type: none"> <li>• <b>9 May</b></li> </ul>	<p>Governor of Baja California presents constitutional controversy against NOM-046</p>
	<ul style="list-style-type: none"> <li>• <b>May</b></li> </ul>	<p>Congress of Aguascalientes presents constitutional controversy against NOM-046</p>
<b>2017</b>	<ul style="list-style-type: none"> <li>• <b>13 December</b></li> </ul>	<p>Declaration of Alert of Gender Violence against Women for <i>Agravio Comparado</i> for Veracruz</p>
<b>2018</b>	<ul style="list-style-type: none"> <li>•</li> </ul>	<p>Andres Manuel López Obrador wins presidency and Movimiento Regeneración Nacional (MORENA) wins governorship and majority in federal congress and several local congresses</p>
	<ul style="list-style-type: none"> <li>• <b>28 September</b></li> </ul>	<p>Congress of Sinaloa approves constitutional reform that protects the right to life since conception</p>
<b>2019</b>	<ul style="list-style-type: none"> <li>• <b>5 August</b></li> </ul>	<p>SCJN rejects two projects of constitutional controversies by Baja California y Aguascalientes aimed at invalidating NOM-046</p>
	<ul style="list-style-type: none"> <li>• <b>25 September</b></li> </ul>	<p>Congress of Oaxaca legislature approves reforms to Penal Code and Health Law to guarantee LTP. Initiative to reform local constitution that protects life from conception postponed</p>

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- 2018-2020**
- Nine legal reform initiatives presented to incorporate LTP in states with constitutional protection of life from conception: Quintana Roo, San Luis Potosí, Guanajuato, Querétaro and Puebla
  - States without constitutional reforms for the protection of life from conception presented ten legal initiatives for LTP (Baja California, Aguascalientes, Estado de Mexico, Coahuila, Tlaxcala, Hidalgo and Michoacán) and nine initiatives for constitutional protection of embryonic right to life (Baja California Sur, Aguascalientes, Estado de México, Coahuila, Tlaxcala, Hidalgo, Michoacán and Zacatecas)
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**2020** • 5 June Declaration of Alert Gender Violence against Women of *Agravio Comparado* for Guerrero

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SCJN: MEXICAN SUPREME COURT; LTP: LEGAL TERMINATION PREGNANCY; CNDH: NATIONAL HUMAN RIGHTS COMMISSION; PGR: ATTORNEY GENERAL

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