

# The Debate Over Reproductive Rights in Mexico: the Right to Choose vs. the Right to Procreation

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“Thus, from my personal perspective, when striking a balance between interests, I take very much into account that there is no imposition of pregnancy but rather an irresponsible exercise of sexual freedom by the woman.”

“The right to life is protected by the Constitution expressly; not so the right of a woman to decide unilaterally what to do with her body; (...) there is no constitutional clause that expressly recognizes a woman’s freedom to decide over her own body; I’m not proposing that right does not exist, but it is not a right of constitutional rank among us.”

**Chief Justice Guillermo I. Ortiz Mayagoitia**

August 27<sup>th</sup> of 2008.

“Must we impinge upon women’s rights? We must impinge upon them lightly.”

**Justice Mariano Azuela Güitrón**

August 27<sup>th</sup> of 2008.

“Maybe it is true that pregnancy is a form of slavery, but are we not all the products of pregnancy?”

**Dissenting opinion subscribed by Justices Sergio Salvador Aguirre Anguiano, Mariano Azuela Güitrón, y Guillermo Ortiz Mayagoitia**

Constitutional challenge 146/2007 and accumulated 147/2007.

## I.- Introduction

I hold that the right to choose is explicitly established in the Mexican Constitution.

Article 4 states in its second paragraph:

“All persons have the right to choose in a free, responsible, and informed manner the number and spacing of their children.”<sup>1</sup>

It is hard to imagine a constitutional text that speaks more explicitly of the right to choose.

In contrast with what has happened elsewhere, where courts have read the right to choose *into* the constitutional text, the Mexican interpreter need only adopt a strictly textualist interpretation to conclude that, in Mexico, women have the right to choose whether to continue or interrupt a pregnancy.

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<sup>1</sup> The word “decidir” used in the text of the Constitution is most literally translated as “to decide”. However, when speaking of “the right to choose” in the context of abortion debates, the phrase – taken from English – has been translated into Spanish as “el derecho a *decidir*”. Women’s rights groups in Mexico advocate “el derecho a decidir”. Given that the clause was inserted in the Constitution during the early 70’s in the wake of international agreements and conferences that were drenched in the language of population planning and women’s rights, I think it is a better translation to use the word “choose” rather than decide when translating the clause into English because when speaking Spanish, we refer to the right to choose as “el derecho a decidir” which coincides literally with the text of the Constitution.

In less than a decade, the Mexican Supreme Court has ruled on two occasions in cases concerning legal reforms liberalizing abortion.<sup>2</sup> On both counts it has held liberalization to be constitutional. In none has the Court ruled on the basis of the cited clause of Article 4, nor has it offered an interpretation of it that throws light on the specific content of the constitutional text. In both cases, the Court's ruling has focused on technical aspects of the criminal law, leaving aside the substantive issue of women's rights.

This does not mean that the right to choose was not brought into the debate. On the contrary: in the case leading up to the August 2008 ruling – which is the main focus of this article (henceforth, *Decriminalization Case*)<sup>3</sup> – litigants and some of the Justices took on the question of the content and extent of the right established in Article 4.<sup>4</sup> In fact, what most interests me in this article is exploring the enormous discrepancy in the *divergent* interpretations that were offered during the trial, and the underpinning assumptions that underlie these interpretations.

The fact of the matter is that, in spite of the debate that went on between the parties, the Supreme Court, in its ruling, did not speak on the issue. The reasons for this omission are many – and more importantly, I think, strategic – and it is not in the scope of this article to take them on. What interests me is the absence of an actual interpretation of the Court of the constitutional text, and the conflicting interpretations that squander for the position.

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<sup>2</sup> I'm referring to the following cases: a) *acción de inconstitucionalidad* 10/2000 in which reforms to Mexico City's local legislation which extended the number of exceptions to the ban on abortion were challenged, and which was ruled upon in January of 2002 and is popularly known as the *Ley Robles* case; and b) two *acciones de inconstitucionalidad*, 146/2007 and 147/2007, which were ruled upon jointly in which Mexico City's local legislation decriminalizing abortion during the first trimester were challenged, which were ruled upon in August 2008. In the article, I refer to the first case as *Caso Ley Robles* and to the second as *Caso Despenalización*.

<sup>3</sup> The reforms challenged in the *acciones de inconstitucionalidad* 146/2007 y 147/2007 modified the Criminal Code for the Federal District and the Health Law of the Federal District. In criminal law, the reforms redefined the crime of abortion as the interruption of pregnancy with the consent of the woman after the 12<sup>th</sup> week of pregnancy and establishing a different crime when interruption takes place at any time of pregnancy without the woman's consent. Changes to Mexico City's Health Law guarantee that health authorities provide sufficient information concerning sexual and reproductive health – especially prevention of unwanted pregnancies – and offer free services for the interruption of pregnancies on request. Gaceta Oficial del Distrito Federal, «Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de salud para el Distrito Federal.» 26 de abril de 2007: 2-3.

<sup>4</sup> So as to make my own biases explicit, I should point out that I represented Mexico City's local congress before the Supreme Court (technically, I was congress's *delegate*, during litigation).

The absence is important, and the need for a clear ruling on the matter is quickly becoming a pressing matter. In January 2009 a new case regarding abortion was filed before the Supreme Court (*acción de inconstitucionalidad* 11/2009). The *ombudsman* of the state of Baja California challenged a state constitutional reform that explicitly states that the fundamental right to life begins at conception, and mandates that all norms conflicting with it become automatically moot. The constitutional challenge holds, among other things, that in establishing the right to life from conception in the state constitution, the reform unduly sets limits to women's right to choose as established in the federal constitution. Similar or identical reforms have been approved in 6 states (Colima, Durango, Jalisco, Morelos, Puebla and Sinaloa) and are in the process of being approved in 6 other states (Aguascalientes, Estado de México, Guanajuato, San Luis Potosí, Querétaro and Veracruz). We cannot know to how many more states the strategy deployed by those seeking to criminalize women who abort will extend, nor how many of these cases will reach the Supreme Court at one point or another.

What we can say is that the debate over the decriminalization of abortion in Mexico is only just beginning. In this context, I hold that it is important that constitutional debates that gravitate around the issue be grounded on a clear interpretation of the right to choose that Article 4 speaks of.

Getting a bit ahead of myself, it is my impression that those who are in favor of criminalizing abortion – both within the Supreme Court and outside of it – are making a relatively conscious and consistent – though not necessarily successful – effort to articulate a substantive interpretation of the specific normative content of the constitutional clause that speaks of reproductive liberty. Without explicitly referring to each other's statements, litigants and Justices that support criminalization of abortion repeat arguments, reproduce concepts, and

touch upon common topics; they start from similar assumptions. They are, in other words, engaged in the enterprise of building a *concept* of the fundamental right in question.

In contrast, those of us in favor of women's right to choose over their own pregnancy have not succeeded in initiating the articulation of a clear concept of the reproductive rights that follow from the constitutional clause in question. In consequence, this article is an exercise in self-criticism at least as much as it is a critique of the opposing position.

Up until now, those of us in favor of widening women's reproductive liberty have carried the day in the cases brought before the Supreme Court, but in them we have not managed to offer a substantive conception regarding the reproductive rights established in the Constitution. For their part, those who seek the criminal prosecution of women who undergo abortion have failed before the Court, but have come comparatively further – in quantity, not in quality, so to speak – in the construction of an interpretation of the constitutional text that is in accordance to their objectives and understandings about the role women should play regarding their sexuality and reproduction.

At the end of the day, and as the constitutional debate moves forward, I'm convinced the Supreme Court will have to offer a substantive interpretation of the Article 4 clause. What that interpretation will be will depend on which side manages to present most convincingly their vision of reproductive rights. However, in order to make a convincing argument, parties must first articulate their vision.

The aim of this article is to identify, analyze and outline the contending interpretations of Article 4, regardless of how embryonic a stage they are currently in. My hope is that this exercise will serve several purposes. First, I want to raise awareness of the importance of taking on the substantive discussion of reproductive rights in the constitution. In particular, I think we must

reorient our argumentative strategy and take up a leading role in the construction of reproductive rights. Up until now, our role has centered on *defending* legal reforms from constitutional challenges. Now, we must also challenge legal reforms (state constitutional reforms, in most cases) and we must do so invoking women's rights: first and foremost their sexual and reproductive rights. In the long run, offering a clear and articulate concept of the right to choose will be indispensable.

In second place, I'm interested in presenting, to those working on the subject outside Mexico, a perspective on the current situation regarding the constitutional interpretation of sexual and reproductive rights in Mexico. This I do with two purposes: first, because Mexico City has become a regional reference on the matter, and it is important to understand the limits of what was achieved in Mexico and to avoid *over*-estimating it; second, because it is my impression that the absence of a substantive interpretation of reproductive rights is partially explained by the poverty of the debate on the matter in Mexican legal academia. It is crucial that Mexican legal academia become involved in a broader conversation, particularly with the rest of the Latin American region, so as to receive feedback on the effort to flesh out a notion of fundamental reproductive rights.

The article is divided in three sections. The first section seeks to identify and analyze the version of women's reproductive rights offered by the pro-life camp during the *Decriminalization Case*, both inside and outside the Court. Its proponents labeled this version the "right to procreation." The second section seeks to identify and analyze what was offered, inside and outside the Court as an alternative to the "right to procreation," which I will label the "right to choose." The third and last section will explore the junction at which we find ourselves in

determining what reproductive rights the Mexican Constitution gives women, and the alternatives that are offered.

## **II. The right to procreation.**

The two government agencies – the Attorney General’s Office (henceforth, PGR for its initials in Spanish) and the President of the Human Rights Commission (henceforth, PCNDH for its initials in Spanish or else Mr. Soberanes) – that challenged Mexico City’s decriminalization of abortion by filing *acciones de inconstitucionalidad* (direct constitutional challenges before the Supreme Court) offer converging interpretations of the second paragraph of Article 4 of the Constitution, quoted at the beginning of this article. Consistently, both refer to the fundamental right there established as the “right of procreation” or the “right to procreation”.<sup>5</sup>

As will be explained in the pages that follow, it is a very different right than what I have referred to as the “right to choose”, even though it is the exact same constitutional clause that inspires both. In this section I will attempt to flesh out the concept of the “right to procreation” as outlined in the initial briefs filed by PGR and PCNDH before the Court, and the dissenting opinion filed by three Justices (out of 11) who voted in favor of those claims. So as to minimize the risk of having my personal position (adverse to the “right to procreation,” to say the least) deform the “right to procreation” offered by PGR and CNDH, and rounded off by the dissenting Justices, I will quote amply from their original texts.

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<sup>5</sup> The President of the Human Rights Commission also uses the term “right to human reproduction”. Demanda inicial de acción de inconstitucionalidad sometida por José Luis Soberanes Fernández, Presidente de la CNDH, p. 29 visible en [www.cndh.org.mx/lacndh/accionesIncontit/derechoVida.pdf](http://www.cndh.org.mx/lacndh/accionesIncontit/derechoVida.pdf) (en adelante, Demanda PCNDH).

## Phases and ends.

The “right to procreation” is fleshed out in most detail by the PCNDH. For the president of the commission, the “right to procreation” is, first of all, a fundamental right opposable to the State and consisting of a prohibition on the State from *forcing* someone to procreate:

“it is opposable to the State, in so far as the State cannot intervene... [...] it is free, in so far as the State cannot force someone to exercise it; [...] The right to procreation is, certainly, an individual right under the perspective that nobody can be forced to procreate.”<sup>6</sup>

So far, there seems to be little cause for controversy. Nevertheless, things change if we ask what is meant by “procreation”. The PCNDH is equivocal in his use of the term “procreation” – for he is never sufficiently explicit as to allow us to determine whether he is referring to the consummation of the sexual act or a successful fertilization of a woman’s egg, what is clear, however, is that he is referring to a specific moment which exhausts itself in an instant. Hence, here begins the controversy:

“... it must be recognized that this individual right is of joint exercise, in a couple, for one person alone, no matter how hard one tries, cannot procreate. In traditional cases, the wills of two people are required, the joint exercise of their right to procreation.

“Thus, once the right to procreation is exercised (...) it must always be considered in a **positive sense**, for otherwise procreation, which is what is sought in exercising this right, may not materialize, which is contradictory. In exercising the right to procreation the decision to procreate is taken and this is a situation that must be constitutionally privileged as much as possible. One does not exercise sexual freedom – in its procreation phase – not to achieve procreation. If the decision to procreate was taken one should not act against procreation, otherwise we would fall in the absurd of subjecting procreation to the simple will of one person. Once the right is exercised, then the law comes into action as a result, establishing rights and obligations to both the parents and the State.”<sup>7</sup>

The “right to procreation” gives people a *freedom* that allows them to either engage in sexual relationships or not engage in them (“in traditional cases” the author of the brief would tell us). Once this right is exercised “in a positive sense” – that is, once sex takes place and/or, it is understood, it leads to pregnancy – the “right to procreation” ceases to be a freedom and bifurcates: on one hand, it provides a right to *protection* – opposable to the State – so that no one

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<sup>6</sup> Demanda PCNDH, pág. 32.

<sup>7</sup> Demanda PCNDH, pág. 33.

is prevented from carrying a pregnancy to term; on the other hand, it transforms into a series of *obligations* on the part of “the parents”. What are these obligations? The brief does not specify them, but without doubt one of them – an obligation for women – is to bring a pregnancy to term. Reproductive freedom is thus reduced to sexual freedom in its narrowest sense: no one can be forced to engage in *coitus*<sup>8</sup> against her will.

With regards to a woman’s autonomy regarding her own body *after* having “exercised” the “right to procreation”, José Luis Soberanes Fernández, the President of the Human Rights Commission (PCNDH), tells us that “we don’t see anywhere that the right to procreation implies a woman’s fundamental right of self-determination of her body, much less of an isolated maternity, that is, without consideration of the father.”<sup>9</sup> Regarding women’s self-determination, he states that:

“This self-determination, if one wants to place it correctly, will be found before the exercise of the right to procreation. Someone may dispose of their own body before having exercised the right to procreation, which is acceptable, for we must recognize life as a person’s good integrated into their circle of liberty; each can dispose of their own sexuality and integrity, as long as this act is an act that is not prohibited by law.

In contrast, the phase of responsibility that is involved in the free exercise of sexuality implies that the situation be evaluated before exercising the right, precisely because of the possibility of procreation, so that the measures corresponding to what is wanted be taken, because after having exercised it [the woman] will find limits regarding the life of the product of conception and the father.”<sup>10</sup> The “right to procreation” as offered by the PCNDH can so far be articulated thus: the right to procreation is composed of two phases. The first “phase” – let us call it *sexual freedom* – can manifest itself in two possible ways: in a “positive sense” and in a “negative sense” (as opposed to the former). In a “positive sense” it is a right of “joint exercise”,

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<sup>8</sup> I use the term *coitus* because it refers specifically to the “carnal joining of a man and a woman”, that is, the vaginal sexual act between a heterosexual couple. Although they never say so explicitly, I believe the proponents of “the right to procreation” had that specific type of sexual act in mind, and not others.

<sup>9</sup> Demanda PCNDH, pág. 32.

<sup>10</sup> Demanda PCNDH, pág. 36.

that is “in a couple”. In a “negative sense” it constitutes an individual right, opposable to the State, consisting in the protection of being forced “to procreate”, that is, to have coitus.

A second “phase”, labeled by Mr. Soberanes as the “phase of responsibility,” begins upon “procreation” (i.e. “coitus”); the *right* is reduced to receiving protection so that third parties don’t interrupt gestation. Together with this reduced right, *obligations* for the “progenitors” emerge, including in particular the woman’s obligation to carry her pregnancy to term.

So let us call the first “phase” sexual freedom and the second the “right to procreation, strictly speaking.” There is one last characteristic of the “right to procreation” (that is, of the two phases just mentioned) which establishes a necessary link between both phases and which is worth pointing out: the sequencing between sexual freedom and the “right to procreation” strictly speaking is not only chronological but instrumental. Sexual liberty, exercised in a “positive sense” has the purpose of activating the second phase: to procreate. In other words, sexual freedom may be exercised as abstinence or as a means to exercise the “right to reproduction” strictly speaking. The interpretation that the Mexican *ombudsman* offers does not consider the (positive) exercise of sexual freedom with ends different from procreation. Let us remember that the PCNDH holds that the right “must always be considered in a positive sense, for otherwise procreation, which is what is sought in exercising this right, may not materialize, which is contradictory.”

Let us give Mr. Soberanes the benefit of the doubt and suppose he does not hold that *in all or in the majority of cases coitus should or must have reproduction as its end*. It is impossible to hold that, in fact, people have sufficient information and sufficiently effective contraceptive means so that *only* the coitus that is undertaken to produce fertilization results in it. In consequence, his statements must be understood as holding that law *attributes* the *purpose* of

procreation to whoever “exercises” (in the “positives sense”) their sexual freedom. Let us go back to the text at hand:

“One does not exercise sexual freedom – in its procreation phase – not to achieve procreation. If the decision to procreate was taken one should not act against procreation, otherwise we would fall in the absurd of subjecting procreation to the simple will of one person.”

Thus, the “right to procreation” offered by the ombudsman *presumes* that “sexual freedom” is exercised “positively” with the *specific and determined* purpose of reproduction. This imputation of intention is key. The presumed purpose attributed to those who undertake coitus (exercise of sexual freedom in its positive sense, would say Mr. Soberanes, blushing) is the keystone that explains much of his depiction of the “right to procreate.”

First of all, the finality attributed to the deployment of sexuality explains the necessary link between sexual freedom and the “right to procreation” (strictly speaking), a link so strong that the two form a conceptual unity. If sexual freedom is seen as a *means* and a *prerequisite* for the existence of the “right to procreation” (strictly speaking), this explains why sexual freedom is actually conceived of as an preliminary “aspect” of a single right, and not a right in itself. Second, it also explains the *binary* nature of sexual freedom: it is either exercised “negatively” through abstinence with the purpose of *avoiding* procreation; or else it is exercised “positively,” through coitus, so as to effect procreation. The concept of the “right to procreation” does not allow that its phase of sexual liberty be exercised, for example, for playful purposes, or any other that do not entail the intention of conceiving.

Thirdly, the binary nature of sexual freedom explains, in turn, why the ombudsman does not “see . . . anywhere” a woman’s right to self-determination of her body: she has no broader choice than that presented between the “positive” exercise (coitus) and “negative” exercise (abstinence) of sexual freedom. If coitus has a fixed, necessary, end, then freedom is limited to

undertaking or not undertaking the pursuit of that end. The body is to be used for procreation or not to be used: these are the alternatives.

Finally, the presumption at hand explains why sexual freedom exercised “in the positive sense” (coitus) must be exercised *jointly* and, more specifically, *in couples* (heterosexual, we are to understand). To procreate a couple – man and woman – is needed; no less, no more. More, fewer or different types of participants are too many, too few, or otherwise defeat the purpose of “positively” exercising sexual freedom. They fall outside what is considered normal and, in consequence, outside the norm. It is obvious that the Mexican ombudsman has a specific conception of what he considers “normal” reproduction that does not include technology or more than two people.<sup>11</sup> Though he does not state it explicitly, in saying that the right is to be exercised “in couples”, the ombudsman makes it clear that he is presupposing what he considers the *natural* form of human reproduction. The importance of the *natural* character of human reproduction presupposed by the PCNDH shall be explored further on.

The profile of the “right to procreation” offered by the PCNDH is now rather well defined. Before going into the contributions of the PGR and the dissenting Justices to this “right to reproduction”, recapitulating what has been depicted so far seems worthwhile:

- The “right to reproduction” embodies two facets: that of “sexual freedom” and that of “responsibility” (or “right to reproduction” strictly speaking). The former consists of the liberty – opposable to the State – of opting between having sexual relations or abstaining from having them; while the latter is initiated when sexual relations take place and consists of protecting the product of conception. This latter aspect primarily implies

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<sup>11</sup> Human reproduction can take place without a couple and sex, with reproductive ends, can take place between more than two people. However it is of no interest right now to counter the presumption of normalcy, but to flesh out the concept of the “right to reproduction” that is offered.

obliging those participating in sexual acts and the State to protect the product of conception (in the right to demand that protection).

- The facet of sexual freedom, when exercised “negatively” is an individual right. In contrast, when exercised “positively,” it is a right jointly exercised by a couple.
- Specifically, a woman’s self-determination regarding her body is limited to the phase of “sexual freedom”, for she is obliged, at the minimum, to endure a pregnancy once the phase of “responsibility” begins.
- The complex conceptual construction is upheld by *attributing* the purpose of procreation to those involved in coitus.

### **A right subject to conditions**

The PGR is much less verbose in its interpretation of the second paragraph of Article 4. In contrast with the PCNDH, the PGR does not offer an articulated profile of the “right of procreation” (as it refers to it), yet does make a clear contribution that is compatible with the outlook of the PCNDH and complements its construction of the “right to procreation”.

Following the example of the PCNDH, the PGR – after selectively invoking passages from the legislative process that resulted in the inclusion of the clause of interest into the constitutional text – offers his opinion:

“... there is no room for doubt that the Reforming Power of the General Constitution of the Republic (sic) recognized in the constitutional article under study, the inherent right of people to decide **in a free, responsible and informed manner** the number and spacing of their children.

Nevertheless, it should be underlined that the freedom of procreation, which is both of men and woman as analyzed, means that the exercise of this right is subject to three conditions:

1. That the decision be free.
2. That the decision be responsible.
3. That the decision be informed.

“If the constitutional clause and the motives at its origin are analyzed carefully, one will reach the inevitable conviction that the use of the abortive measure (sic) cannot be considered as part of the exercise of the freedom of procreation, because it would then obviously not be the product of

responsibility and information, for it supposes a pregnancy that was not responsibly planned.”<sup>12</sup>

With the contribution of the PGR, the “right of procreation” is conditioned to its being informed and responsible. That is, if the right was not exercised responsibly, then there is no right. We have here the case of a constitutional right conditioned to its *proper* use. Who is to say what use is proper? We have to suppose that, at least at first glance, it is the PGR himself who is allocating himself the power to qualify whether the right was exercised responsibly or irresponsibly, for in the end it is the attorney general’s office (or, district attorney’s office) that monopolizes the power to exercise criminal prosecution.

The PGR tells us that, due to logic, abortion cannot find grounding in the right of (responsible) procreation because, by definition, abortion implies an irresponsible pregnancy. This statement, taken on its face, is faulty insofar as there is the possibility of supervening reasons of why a wanted pregnancy, duly planned, can turn into an unwanted pregnancy. However, it is not my interest here to point out the PGR’s inconsistencies, but to depict the profile of the “right of procreation” that it puts forth. Unfortunately, the PGR is satisfied with the argument of the logical impossibility of an abortion grounded on the “right to (responsible) procreation” and does not flesh out as to what the content of the “right to procreation” of which it speaks. We find ourselves forced to turn to the PCNDH for assistance, but we now turn to it with a new piece of the puzzle, for sexual liberty is not even a right if the person does not satisfy the preconditions of making responsible and informed decisions.

### **The dissent**

In August 2008, the Supreme Court ruled in favor of the constitutionality of legal reforms decriminalizing abortion during the first trimester of pregnancy. Eight Justices ruled in favor of

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<sup>12</sup> Demanda inicial de acción de inconstitucionalidad sometida por Eduardo Medina-Mora Icaza, Procurador General de la República, p. 96, en archivo con el autor (en adelante, Demanda PGR). Énfasis en el original.

upholding the law. Three Justices, including the Chief Justice and the Justice writing the draft opinion pronounced themselves for holding the law unconstitutional. The draft opinion, offered by Justice Sergio Salvador Aguirre Anguiano, was rejected by a qualified majority of the Court, and the drafting of the opinion passed to Justice Cossío. Each of the Justices who voted to uphold the constitutionality of the law presented a separate concurring vote.<sup>13</sup> The Justices that made up the minority, in contrast, cast a joint dissenting vote. This dissenting vote is the one that most interests us, for in it the dissenting Justices take up much of the “right to procreation” and the “right of procreation” offered by the PCNDH and the PGR.

In the first place, the *name* of the concept – “right of procreation” – was adopted by both the minority opinion<sup>14</sup> and the draft opinion.<sup>15</sup> Next, the minority opinion identifies the exercise of reproductive freedom with the freedom to choose between abstinence and coitus. Once the decision to engage in coitus is taken, freedom is limited to protecting the woman from an unwanted abortion, but imposes the obligation to carry the pregnancy to term:

“Although a pregnancy cannot be imposed on anyone, a pregnancy, when it results from the sexual exercise freely exercised (sic) and decided and not imposed through coercion, the condition of responsibility to which this constitutional right is tied imposes the duty not to interrupt it.”<sup>16</sup>

In the second place, the dissenting Justices maintained the *impossibility* of a pregnancy being imposed:

“... to speak of imposed pregnancies is to ignore all of the protection that the Constitution and laws offer a woman to exercise her sexual freedom, from which, as a logical consequence, pregnancies can result; therefore the constitutional and legal possibility of imposed pregnancies

<sup>13</sup> A noteworthy and unfortunate exception was Justice Cossío’s decision not to present a concurring opinion, but instead to limit himself to the very slim opinion he drafted in name of the majority.

<sup>14</sup> The final document includes not only the opinion, and the concurring and dissenting votes, but also – as annexes to the dissenting vote – the draft opinion that was rejected and the public interventions of the three Justices in the minority. Below we shall see the portions of the “right to procreation” proposed by the PCNDH and the PGR that were taken up by the minority only, due to space. Nevertheless, those interested should look up the annexes, which are quite revealing of the thought process that guide the dissenting justices. Voto de minoría en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, pág. 54, en <http://informa.scjn.gob.mx/sentencia.html> (en adelante, Voto de minoría)

<sup>15</sup> Proyecto de sentencia realizado por el Ministro Sergio Salvador Aguirre Anguiano, pág. 368. En adelante, Proyecto.

<sup>16</sup> Voto de minoría, pág. 55

does not exist.”<sup>17</sup>

Thirdly, the dissenting Justices take for granted the PGR’s affirmation that sexual freedom is a conditioned right; a right that imposes more obligation than empowerment:

“The sexual freedom that our constitutional and legal order guarantees, is subject to the condition that its exercise be responsible and informed, that is to say that the decision shall be taken in a responsible and informed manner, thus it not possible to speak of imposing pregnancies to women who freely hold and accept sexual relations from which a pregnancy can result.

(...)

... we do not find ourselves before the imposition of a pregnancy but, in any case, before **an irresponsible exercise of sexual freedom by the woman**; and, on the other hand, that sexual freedom is constitutionally subjected to the conditions of information and responsibility.

“... Article 4 of the Constitution establishes obligations in order for the woman to enjoy her rights...”<sup>18</sup>

In this tone, the dissenting Justices inform us that, in their opinion, “the consequences of sexual freedom exercised with irresponsibility must be assumed by the person responsible for them.”<sup>19</sup>

Fourthly, the minority also maintains (either hypothetically or in blatant contradiction with its previous statements) the need for exercising “the right to procreation” in joint manner or “in couples” *when deciding to abort*:

“The possibility that a mother unilaterally decide the death of the product of conception undermines the father’s right, whose will should be taken into account.

“Just as conception was realized by two people, it is illogical that the result of conception not be shared between the two people that produced it. If the exercise was irresponsible, both should shoulder the consequences, but if it is decided that it is better to kill a human being than for those two people to shoulder the consequences of their free actions, at least both parties that intervened in the creation of a new human being should be heard.”<sup>20</sup>

Fifthly, it is clear that, together with the PCNDH, the dissenting Justice fails to see a woman’s right to self-determination anywhere in Article 4: “The precept under analysis does not

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<sup>17</sup> Voto de minoría, pág. 163

<sup>18</sup> Voto de minoría, pág 163-4. Énfasis agregado.

<sup>19</sup> Voto de minoría, pág. 172.

<sup>20</sup> Voto de minoría, pag. 175.

expressly establish the rights to self-determination of the body and life-plan that the Justices in the majority implicitly draw.”<sup>21</sup>

The quotes that could be taken from the dissenting opinion and its appendixes that are worth exposing would require several pages of transcription. However, in the interest of moving forward, let us analyze the Court’s grounds for reaching the juncture at which we find ourselves now.

### **III. The (potential) right to choose.**

Those of us engaged in the defense of the decriminalization of abortion invoked sexual and reproductive rights repeatedly. We quoted from Article 4 as well as from international instruments that speak on the issue. We did not, however, offer an articulated concept of the constitutional “right to choose” to counter the “right to procreation”. The reasons for this are various, most of which concern strategy and are tied to the fact that we were *defending* an existing law and thus benefited from a procedural *presumption of constitutionality* in our favor: we needed to convince only four out of eleven Justices that decriminalization was constitutionally permitted for it to remain in place; we had no need to demand that a woman’s right to choose be recognized as a constitutional right. We focused on other arguments that we believed were more likely to succeed and channeled much energy to taking apart the arguments brought forth by the PCNDH and the PGR.

In hindsight, with the confidence that a favorable ruling provides (especially one in which we achieved 8 votes, twice what we needed), and considering the current context in which local legislative majorities are embedding the criminalization of abortion through state constitutional reforms throughout the country, I wonder whether we should have insisted that the Court

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<sup>21</sup> Voto de minoría, pág. 56.

pronounce itself on the correct interpretation of the constitutional clause that interests us. In any case, what I wish to point out is that during litigation we chose to invoke women's sexual and reproductive rights without elaborating them argumentatively, and worse yet without truly explaining the "right to choose."

The Justices who voted in the majority did not offer a substantive depiction of the fundamental right established by the second paragraph of Article 4 either. They affirmed the existence, importance, and preeminence of one or another of women's rights (a matter of no small importance, by the way, if we take into account that the draft opinion originally presented to the Court did not even consider them as such, and that the opinion of the Court mentions them in a rather succinct manner), but they did not build on the normative implications of the constitutional text. Moreover, the dispersion of concurring opinions and the absence of cross-references between them (which would shed light onto which portions of the opinion or on the other concurring opinions each Justice subscribes), are circumstances that make it difficult to identify a common grounding, or even a dialogue, among the Justices participating in the majority, making it practically impossible to develop a concept of the "right to choose". Let us take a look.

In his concurring opinion, Justice Góngora Pimentel invokes women's "sexual and reproductive rights" and emphasizes their relation to other fundamental rights. He holds that sexual and reproductive rights "are the key to recognizing true equality and full exercise of citizenship."<sup>22</sup> Doubtlessly it is important to establish the close link between sexual and

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<sup>22</sup> Voto concurrente que formula el Ministro Genaro David Góngora Pimementel en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, pág. 10. (en adelante, Voto Góngora). Desafortunadamente, fuera de esa afirmación, su análisis quedó en pie de página, afirmando que:

"...resulta relevante que se identifique que los derechos humanos de las mujeres tienen un especial pronunciamiento en lo relativo al verdadero ejercicio de la ciudadanía equitativa que tiene un papel central en los derechos sexuales y reproductivos por ser en sí mismo el derecho que les permite tener acceso a otros derechos, ya que son las reproductoras de la especie."

reproductive rights and other rights, such as citizenship and equality. But that does not amount to a substantive depiction of sexual and reproductive rights; it merely points to their relationship with other rights.

Justice Valls, in his opinion, also links what he labels as “reproductive freedom” and “freedom of procreation” with other fundamental rights, concretely with the free development of personality and with health.<sup>23</sup> He puts forth two elements – the minimal intervention of the State and the intimate character of the decision *Aporta dos elementos* – that could contribute to a more substantive depiction.<sup>24</sup> Nevertheless, he does not expand on these elements.

Justice Franco speaks of a right particular to women, which he calls “the right to self-determination in questions of motherhood”<sup>25</sup>, but he does not construct it conceptually. Also, he underlines the modalities of responsibility and information that the constitutional text speaks of, but contrary to what the PGR and the dissenting Justices hold, he does not consider these *preconditions* to the exercise of the right, but rather *obligations* of the State to provide adequate information and the necessary means for making responsible decisions.<sup>26</sup>

Justice Sánchez Cordero also recognizes a link between “reproductive freedom” and other rights such as dignity, self-determination and the free development of personhood,<sup>27</sup> but she does not provide a structured concept either, nor does she build on the normative content of “reproductive freedom.”

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<sup>23</sup> Voto concurrente que formula el Ministro Sergio A. Valls Hernández en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, pág. 9. (en adelante, Voto Valls).

<sup>24</sup> Voto Valls, pág. 10

<sup>25</sup> Voto concurrente que formula el Ministro Fernando Franco González Salas en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, pág. 8. (en adelante, Voto Franco).

<sup>26</sup> Voto Franco, págs. 15-6.

<sup>27</sup> Voto concurrente que formula la Ministra Olga Sánchez Cordero de García Villegas en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, pág. 7. (en adelante, Voto Sánchez).

Finally, Justice Silva Meza is he who, in his concurring opinion, most openly reprimands the draft opinion and the dissenting opinion for taking up “women’s issues” only tangentially.<sup>28</sup> He holds that the proper identification of women’s rights is *indispensable* in resolving the constitutional question at hand. Consistently with his critique, he identifies women’s basic rights as fundamentally involved in the matter (“life, health, equality, non-discrimination, sexual and reproductive freedom, self-determination and intimacy”) and, regarding the constitutional clause that concerns us, he states:

“Regarding gender equality, sexual, and reproductive freedom, I must say that both from the text and the legislative process that lead to the reform of Article 4 of the constitution ... one can conclude that the consecration of the postulates there expressed sought, in an important degree, to mitigate the discrimination of which the female gender suffered.

“(…)

“Things being so, it is clear that what the Legislator wanted to establish was the state’s duty not to intervene in a personal decision such as family planning, affirming furthermore the clear commitment to providing the populace with sufficient and effective means for exercising what is called ‘responsible parenthood.’”<sup>29</sup>

Silva Meza provides three important elements in clarifying the reach of “sexual and reproductive freedom”: a) they have a close link with gender equality (substantively, let us assume), b) together, they aim at minimizing gender-based discrimination, and c) they translate into two concrete obligations for the state: non-intervention in personal decisions regarding family planning, and providing sufficient means (information and services, let us suppose) to exercise reproduction “responsibly.”

This brief summary of the concurring opinions reveals a fractured panorama: there is little constructive dialogue between the Justices. Instead of a dialogue, we seem to be in the presence of personal positions that do not any concrete terms engage in one another. For starters, it seems noteworthy that there is enormous disparity in the terms used by the Justices to refer to

<sup>28</sup> Voto concurrente que formula el Ministro Juan N. Silva Meza en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, págs. 6-7. (en adelante, Voto Silva). Justice Silva Meza complains also that the opinion does not pick up the *emphasis* that the majority put on woman’s rights. Voto Silva, pág. 1.

<sup>29</sup> Voto Silva págs. 10-1.

the “right to choose” established in Article 4 (a disparity that contrasts with the consistent use of the terms “right to procreation” and “right of procreation” by the dissenting minority, the PGR and the PCNDH). Secondly, we can see that, in most cases, the evocation of the right established in Article 4 is limited to that: a reference; or at best to the pointing out of a link between it and other fundamental rights.

Recapitulating, the concurrent opinions do offer some substantive normative implications of the constitutional text (non-intervention from the state in matters of family planning, the obligation of the state to provide information, the purpose of mitigating inequality and gender discrimination). Nevertheless, these elements are neither consistently mentioned nor fully developed.

#### **IV. Nature, essence and ends.**

What can be said of this? I want to focus my analysis on a very specific issue: that the (relative) success of the proponents of the “right to procreation” in articulating it and the (relative) failure of the potential proponents of the “right to choose” to do the same<sup>30</sup> can be explained in part by the fact that the *conceptual architecture* that prevails in legal doctrine is much more favorable to the *ends* pursued by the proponents of the “right to procreation” and the assumptions about human reproduction that they start from.

I’ll try to explain briefly and clearly.

#### **Conceptual architecture and the teleological-conceptual method**

The architecture – that is, the “current structure of belief”<sup>31</sup> – that often structures the legal concepts we use comes from what James Gordley has labeled the *teleological-conceptual*

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<sup>30</sup> Of course, I include myself in this group which I call “potential” proponents precisely because I think we have not yet articulated a substantive content for Article 4, but I think we can (and should) do so.

<sup>31</sup> Ver Paul W. Kahn, *The Cultural Study of Law: reconstructing legal scholarship*, The University of Chicago Press, 1999. La cita la tomo de la traducción de Daniel Bonilla publicada por Editorial Gedisa, 2001, pág. 60.

method, a method used to develop concepts and draw normative consequences from them.<sup>32</sup> The teleological-conceptual method was developed by Spanish theologians during the 16<sup>th</sup> century, who synthesized the Aristotelian-Thomastic philosophy with the Roman legal texts of the *Corpus Iuris*. They took concepts and institutions to be *substances* (that is, natural or artificial entities, such as an animal or a chair) with a fixed and determined *essence*. In an effort to grasp this *essence* they built concepts following the Aristotelian theory of the four causes, according to which the essence of something is known when their *causes* are identified (final cause, formal cause, efficient cause and material cause). In building these concepts, following Aquinas, they gave preeminence to the “final cause”, which is why Gordley labels the method *teleological-conceptual*. In this scheme of things, the final *cause* of a legal institution (e.g., a contract) corresponded to the end that, by its *nature*, the institution aimed at, not the freely chosen objective of whoever, to use the same example, was party to the contract.

Gordley tells us that, with the passing of centuries and the discredit in which scholastic thought fell, the method was lost, together with its ontological and methodological underpinnings. The concrete doctrines, concepts and definitions, however, endured, in an altered – or even deformed – manner and came to be inoperative in many respects. Regardless, Gordley tells us that the method shaped, at least, the larger part of the conceptual and doctrinal apparatus of private law (property, torts, and unjust enrichment) that we have inherited at present time, including in common law.<sup>33</sup>

For my part, I hold that the conceptual architecture – not the method in its original form – has served as the prototype in the development of concepts and doctrines different from the ones

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<sup>32</sup> Ver JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (Clarendon Press, 1991). Para una síntesis de las propuestas de Gordley específicamente enfocadas a lo que aquí interesa, ver Alejandro Madrazo, “*From Revelation to Creation: The Origins of Text and Doctrine in the Civil Law Tradition*”, *MEXICAN LAW REVIEW*, vol. I, number 1, pág. 50 y siguientes.

<sup>33</sup> James Gordley, *FOUNDATIONS OF PRIVATE LAW*, Oxford University Press, 2006.

inherited in private law, extending, for instance, into administrative and constitutional law.<sup>34</sup> By imitation (of private law, or more precisely of the key subject of contracts), we have learned to construct and operate in the image of the concepts produced by the teleological-conceptual method of the Spanish theologians. If this is so, the conceptual architecture inherited from the teleological-conceptual method should help understand both the structure of the proposed “right to procreation” as well as the apparent ease with which its proponents offer (as well as the uneasiness with which the virtual proponents of the “right to choose” have taken on the fundamental right that so concerns us).

### **Essentialism and finalism**

There is no need to dwell too much on the details of the teleological-conceptual method for exploring the point of conceptual architecture that I’m interested in and that I believe underlies the “right to procreation.” Let us only focus on two aspects: i) the teleology of the right and ii) the essentialism on which it rests.

As I mentioned, the *final cause* was privileged over the other causes by the teleological-conceptual method. Thus, I will focus on analyzing the prominent role played by the *imputed end* of the “right to procreation.”<sup>35</sup> Recall that the *final cause* was not an *end* in the sense of an objective, but a *natural tendency* or *inclination* of the *substance* of concern. In this context, the *inclination* or final cause was regardless of the actual *will* – the objective – of the person that exercised the right or participated in the activity. The *imputed end* that the proponents of the “right to procreation” attribute to the person that exercises the right is consistent with the role of

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<sup>34</sup> Ver “Conclusiones” de Alejandro Madrazo, *Revelation and Creation: The Theological Foundations of Modern Legal Science in Mexico*, presentada como tesis para la obtención del grado de J.S.D. en la Escuela de Derecho de Yale.

<sup>35</sup> One could analyze different aspects of the “right to procreation” from the perspective of the conceptual architecture of the teleological-conceptual model that Gordely describes. For instance, the efficient cause would be the “couple” (hence the requisite that it be exercised “in couples”); the material cause would correspond to the “product of conception” (hence the impossibility of aborting). However, it is not of interest here to use the “right to procreation” as an example of the applicability of this conceptual architecture to legal concepts, but rather to use the conceptual architecture to better understand a specific concept, that of the “right to procreation.”

the final *cause* – the actual will of the persons involved is of little consequence, what interests is the *natural tendency* of coitus. In other words, if we understand that the *teleology* of the “right to procreation” does not correspond to the will of the parties but to that to which coitus tends *by nature*, we cease to be mesmerized by the indifference of the proponents of the “right to procreation” to discussing ends other than procreation as possible ends of coitus. In their understanding, there is no room – or more precisely, it is of no interest – whether people engage in coitus, for instance, for fun, curiosity, status, money, shame, vengeance, control, the satisfaction of sadistic or masochistic impulses, fantasy, or simply for sport and exercise. All of those ends would be *accidental*, not essentials to coitus (in their understanding of coitus), and thus to the right that protects it.

This brings me to the next issue: the fictitious imputation of the will to procreate presumes that there is *one and only one natural* way of engaging in coitus. That is, coitus, and consequently its legal reflection – the “right to procreation” – has a nature, an essence. That *essence* does not hinge on will (passing, *accidental*) of the people who engage in it, or the *accidental* manner in which it takes place (i.e. *who* participates, *when*, *where*). The essence persists *in spite* of the passing will or the accidental modalities and, in consequence, it is the enduring *essence* and not the passing *will* that law recognizes, consecrates, tutors. That is, law – through the recognition of a fundamental right – protects only that which corresponds to the nature, the essence, of reproduction/coitus. That is why, as a right, it must be exercised “in couples” (more than two is a distortion) and why it is presumed that it is exercised jointly *by a man and a woman* (other options are *contra natura*). That also explains that the “right to procreation” does not even take into account, for instance, different forms of procreation that technology or society “artificially” enable. In speaking of the “right to procreation” that is

exercised “in couples” one cannot speak of renting a womb, donating sperm, adoption by a single person (although I must confess that I am very anxious to know what the proponents of the “right to procreation” have to say about adoption by a homosexual *couple*).

This essentialism, which is indifferent to the real objectives of the subject, is made evident when the PCNDH tells us that “one should not act against procreation” (i.e. abort) “otherwise we would fall in **the absurd of subjecting procreation to the simple will of one person.**” Is not the text of the constitution, in telling us that all people have the “right to choose” concerning their reproduction, saying *precisely* that procreation must be **voluntary**? No. For the proponents of the “right to procreation” subjecting the normative consequences of a fundamental right to the *will* of a person would represent the denial of its *essence*, it would mean defining the right in function of what is an *accident*. In Aristotelic-Thomistic tradition, which shapes the teleological-conceptual method and the conceptual architecture stemming from it, things have their own *nature* and, if altered, the thing ceases to be what it is. That is why the PGR and the dissenting minority tell us that *wanting to have an abortion logically implies that one is not exercising a fundamental right*, but rather an apparent right, because coitus was not undertaken responsibly. The prerequisite of responsibility plays the role of a requirement of exercising the right according to its nature, respecting its essence and seeking what it naturally tends to (its natural *end*).

The main point of my argument is that the essentialism that pervades the entire theoretical construction of the “right to procreation” finds a good fit in our conceptual architecture. Once the attributed purpose that proponents give coitus – that is, procreation – is identified, the characteristics and normative consequences that proponents suggest follow with

ease in the legal imaginary shared by the legal profession (even if they don't follow logically). The "right to procreation" is easily grasped by the legal mind.

Luckily for us, the concept is poorly constructed and the arguments that support it suffer from so many contradictions (not to mention that its proponents are notably candid about their ideological inclinations) that it is unlikely to stick. But it remains important to oppose to it a better construed alternative, for silence will be taken as concession.

### ***Final causes for the right to choose***

I would not like to close this paper without reflecting upon the absence of an alternative to the "right to procreation" at this point in the constitutional debate over abortion. In contrast with the "right to procreation," the sexual and reproductive autonomy which is sought by those of us seeking to broaden women's rights does not fit easily with the conceptual architecture that lawyers are comfortable with. If, according to the conceptual architecture in question, a concept is to be constructed around a necessary and determined *end*, then self-determination and the plurality of sexual and reproductive preference that we seek to protect find no easy fit. If we attribute a *presumed end* to the person exercising the "right to choose" we defeat the very purpose of our effort: that each person choose their reproductive life.

On the other hand, if we want to develop a concept of the "right to choose" that is widely accepted by the profession, we need to build it so that it is *user friendly* to our way of understanding the (legal) world. The solution is not easy, but I think there are paths that are worth exploring. In my opinion there are two potential *teleologies* that can anchor the "right to choose" and from which a substantive concept can be built that in turn results in acceptable normative consequences. The trick is, in building the concept, to focus not on the end pursued by

the person who exercises the “right to choose”, but rather to inquire into the ends that the *constitutional legislator* pursued in giving people the right to choose.

I propose two candidates: a) substantive gender equality and b) self-determination. I won’t elaborate on these ends or on the right to choose that could be fleshed out from them for my objective in writing these lines is precisely to *ignite* a dialogue that feeds that effort. I will limit myself to pointing out the following:

i) *Substantive equality*. The natural candidate to occupy the position of *final* cause in our right is substantive equality between woman and man. The constitutional reform that inserted the clause that gives each person the “right to choose” the number and spacing of their children also included clauses establishing that “man and woman are equal before the law” (Article 4); that the family should be protected (Article 4); and refurbishing the labor regime so as to recognize the specific needs of women – such as the respecting the final weeks of pregnancy and the period of breastfeeding (Article 123). From the initiative and the legislative debates<sup>36</sup> one can see with clarity that both the clause speaking of the “right to choose,” the one protecting the family, and the refurbishing of labor rights were included as *instrumental* changes for making equality between man and woman effective. In addition to this genealogical argument, there exist numerous reasons that support the notion that control over their own maternity is indispensable for bringing about the effective substantive equality of women to men.

ii) *Self-determination*. Few circumstances have such a deep impact on the way in which one conceives him or herself than the existence of a mother-daughter relationship (in my case father-son). Self-determination as the *end* of the right to choose is not only congruent with the express text of the constitution, but it also enables us to establish a teleology that does not ignore the real motivations someone has when participating in sex or in human reproduction (whatever form it

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<sup>36</sup> FALTA REFERENCIA PRECISA.

takes). On the contrary, it allows us to *incorporate* them into the concept so as to fully respect each individual.

These reflections aim at provoking a brainstorm and critique-storm (constructive, please) that will help undertake the task of building a concept of the “right to choose” that, eventually, will serve as grounding for decision-makers to decide controversies in the matter that concerns us (as well as other matters). What is clear to me is that if we want to defend and widen the right to choose, we had better start articulating it and pointing out its extent and limits.