Opportunities and Decisions: A Comparative Analysis of the Legal Treatment of Abortion

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As the specialists maintain, the issue of abortion involves a plurality of dimensions: moral, political, medical, and legal (Salles, 2005; Cook, 2005). Each of these dimensions is the object of specific debates that make clear that we are treading on the shifting grounds of disputed territory.

When the question of abortion enters the legal sphere, whether the issue is legalizing or criminalizing it with all of the implications in terms of criminalization, public health policy in general and sexual and reproductive health in particular, there can be no doubt that the quarrel extends beyond what is legal or illegal and is tied to the way adequate social order, ownership of one’s body, the relationship between public and private, faith and reason, state secularity, and above all sexuality, reproduction, and death are all conceived (Klein, 2005). Nonetheless, it must be recognized that when the debate over abortion passes from moral arguments or discussions of how to design and implement public policies into the legal domain at the behest of parties who either support or fight against it, a fundamental delegation of the power to resolve this dispute into the judicial branch takes place. This branch will decide in favor or against a determined legislative measure on the basis of determined reasons.

We will begin by indicating what the present work is not. It is clearly not a legal analysis and it is important that the reader does not lose sight of this clarification. The author is a

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1 Profesora/ Investigadora FLACSO- México. Agradezco la generosidad de Marta Lamas para compartir literatura sobre el tema, asimismo agradezco la sesión de discusión mantenida con la delegación México del SELA la cuál contribuyó a revisar afirmaciones y complejizar el análisis de los casos.
sociologist and political scientist and is trying to approach the judicialization of the dispute over sexual and reproductive rights from the perspective of the social sciences. Because abortion can be considered a paradigmatic case of the conflict regarding these rights, this article will focus on an analysis of the characteristics of its judicialization. The trials that took place in Mexico (2000 – 2002 and 2007 – 2008) and in Colombia (2005 – 2006) will provide the cases for study.

Specifically, this is an analysis of the power of the courts and abortion, aborting being understood as a particular case of expansion (or restriction) of rights through the judicial channel. As can be inferred from the previous paragraphs, the center of our attention will be the judicial branch. We will ask how it enters the conflicts over abortion and how it resolves them, or in other words, in what way the courts intervene to reach some determination.

The cases in Mexico and Colombia were chosen because the effects of the constitutional courts’ decisions were observationally equivalent, that is, they were in the end favorable to the extension of reproductive rights for women. The contrasting models offered by the courts, however, are a point of interest. The Mexican court can be characterized as prudent, organized more for politicians than for citizens, while the Colombian court can be called activist, much more open to the direct claims of citizens. An effort will be made to reproduce the trials that resulted in these decisions with the intention of comprehending those trials.

The first step will consist of synthetically structuring the analytical coordinates of the cases, with special attention on the literature of the judicialization of rights in general. Secondly the cases themselves will be analyzed, and thirdly, the conclusions will be presented.

2. The Power of the Courts and Abortion
The starting points for this work are the changes that occurred in Latin America in consonance with the processes of democratization, with the changes in the equilibrium between branches of government (for example, through the increase of importance in the legislative and judicial branches) (Sieder et. al, 2005; Domingo, 2005), and the relationship between state and society, where social movements and other non-institutionalized forms of political action acquired special importance (Peruzzotti, 1997; Peruzzotti and Smulovitz). The judicial branch is not the same today as it was 30 years ago (Inclán and Inclán, 2005). Without doubt it has gained more power through its capacity to control questions of constitutionality as well as through the amplification of the scope of judicial matters, including those regarding rights in which the spread of international human rights law and the constitutionalization of a broad range of rights are not minor issues (Ferejohn and Pasquino, 2008). The conflicts between legal decisions and the representative institutions are a sign of the times. The controversy has provoked fear in segments of the population at the marked progress of justice, which can be seen in references to a government of judges or juristocracy (Hirschl, 2003). It has also, however, given rise to studies to analyses that examine the conditions and situations that enabled the judicial branch to become an actor that contributes to the extension of rights or an option for social change (Gargarella et al, 2004).

In this context, a few attempts have been made to explain the judicialization of rights (Epp, 1998; Sikkink, 2005; Wilson, 2008; Hilbink and Couso, 2009). This literature emphasizes different factors of varying types: institutional design, the ideology of the courts, or the legal support structures of the actors promoting rights. It is important to stress that for analytical reasons, although it is not always obvious, the process of judicialization includes two dimensions: how the courts enter the conflict, that is, the delegation to the judicial branch the capacity to
resolve the dispute, in our case, abortion; and secondly how the conflict is resolved, or the form
in which the judicial branch intervenes and makes a determination in this conflict.

Now, as our principal interest is the process of judicialization of the
criminalization/decriminalization of abortion, it must not be ignored that historically the
protagonist on the side of decriminalization in the struggle in the regions has been the women’s
movement in opposition to the Catholic Church along with the groups referred to as “pro-life” on
the side of criminalization (CLADEM, 1993; Lamas, 2008). It is a dispute whose progressive
side is occupied by the women’s movement seeking an extension of sexual and reproductive
rights, while the conservative faction has been led by the hierarchy of the Catholic Church.
These movements and actors are present in different ways in the processes of judicialization.

Since in the two cases studied the role of the women’s movement is central in this
process (González Vélez, 2006; Gire, 2008), reference must be made to the literature that
examines the relationship between the judiciary branch and social movements in order to
understand it.

The basis for this will be the concept of legal and political opportunity structure
proposed by Kathryn Sikkink (2005). Sikkink uses this scheme to analyze the actions of human
rights movements in response to the rights violations of the recent past during the military
dictatorships in Argentina, Chile, and Uruguay, in which special attention is paid to the
combination of internal and international opportunities used to bring this type of violation before
justice. The notion of political and legal opportunities is a depositary for the concept of political
opportunity structure that was coined in the literature surrounding social movements (Tarrow,
1994; McAdam, 1996; McAdam et. Al 2001), and refers to “the dimensions of the political
environment that create incentives and restrictions for people undertaking collective action, affection their expectations for success or failure” (Sikkink, 2008:317).

Clearly the differences between the dispute over abortion and the cases of transitional justice that Sikkink refers to cannot be ignored. In the measure, nonetheless, that our subject is the legal opportunities for criminalizing or decriminalizing behaviors related to the protection of rights, with the right adjustments this conceptual framework can be applied in a comparative approach to the analysis of the judicialization of abortion.

The structures of legal opportunities are understood (in a sense that is analogous to the definition of the structures of political opportunities already outlined) as: the dimensions of the legal environment that establish incentives and restrictions in order for social movements to undertake collective action aimed at protecting rights and that affect their chances for success or failure.

As can be seen, the definition refers to dimensions of the legal environment, two of which we consider fundamental for our case: a) what Charles Epp (1998) referred to as the support structure for legal mobilization, that is, whether movements are able to count on the assistance of lawyers capable of bringing forth new cases with innovative arguments, and b) what Sikkink (2008) called the openness or closure of legal institutions to the participation of NGOs, or in other words, the degree of access of these organizations. It is considered that openness, in our case synonymous with the degree of citizen access to the jurisdiction of the highest constitutional courts in each country, can be categorized as open jurisdiction (when citizens can litigate directly before a constitutional court), as closed jurisdiction (when access to the jurisdiction of this court can only be achieved by means of a case’s attraction or because of
specific alliances with actors with the competence for gaining access); the degree of openness of representative institutions to the demands of civil society, that is, the characteristics of the majorities in the parliaments, and the position of the (local or federal) executive branch as regards the topic.

As for the second dimension of judicialization regarding the manner by which the high courts deliver sentences on the disputes, the intervention will be analyzed in terms of the court’s consideration of the essential questions of the matter (the position it takes on the sexual and reproductive rights of women) or its avoidance of this discussion. Court interventions that address the deep issues will thus be qualified as maximalist, and those that do not will be termed minimalist.

3. Structures of Legal Opportunities: Legal Differences, Political Similarities?

From a conceptual point of view the debate over abortion is altogether extensive, and in it many tensions can be seen: between the domains of the private and the public, between privacy and the intrusion of the state, between abortion as strictly a matter of individual choice and abortion as a public issue, between abortion as a legal question of rights and abortion as a question of each woman’s unique experience (Salles, 2005; Klein, 2005; Lamas, 2006; Cook, 2003). Many contributions have been made from these perspectives.

Without ignoring the importance of these discussions, analyzing abortion from the point of view of its judicialization implies understanding it as a dispute over extending or restricting reproductive rights that is put before a court’s judgment. This qualification does not mean that when a court takes a decision on abortion that it is only acting on the question of rights; its
decision has consequences in other areas as well: it also implies an idea of morality, a model of democracy, a model for the state, and a model of citizenship (Márquez Murrieta, 2007).

From the sociopolitical perspective, abortion is disputed territory between positions favorable to the decriminalization of abortion that find expression in determined moments as pro sexual and reproductive rights coalitions, generally comprised by the feminist movement and women in conjunction with other progressive actors (human rights movements, political parties, intellectuals, scientists, etc) and positions favorable to the criminalization of abortion that in determined moments find expression in pro life coalitions – as they refer to themselves – in general led by the most conservative Catholic sectors, the political parties closest to them, intellectuals, and other government workers. The high level of conflict that the issue generates often results in its delegation to the judiciary for resolution.

Here it must not be forgotten that the defense of calls to legalizing abortion has been long and loudly vindicated by the feminist movement since the 60s and 70s (Lamas, 2008). It was considered a concrete example of slogans such as “what is personal is political,” or the free exercise of sexuality.

In Latin America, abortion is illegal – at least is some of its forms – in most of the countries, the only exceptions being Cuba, Puerto Rico, and Guyana (Lamas 2006). The configuration is such that the dispute over the issue has been, and continues to be, politically characterized by demands for change, for decriminalization, by the feminist movement and the pro sexual and reproductive rights coalitions on one side, and by the attempt to maintain the status quo on the part of pro life groups, generally headed by the most conservative sectors of the Catholic Church, on the other. In recent years, however, it should be remembered that there have
been cases of regression with regard to the issue. El Salvador and Nicaragua are interesting examples in this sense. They are cases where the pro life coalition managed to change the status quo in a more restrictive sense of reproductive rights (Lamas, 2008).

The principal dispute over abortion in the region is thus relative to its legalization or more precisely its decriminalization. Despite this common denominator, however, the arguments that surround it are developed in many dimensions. One of them is that which opposes legalization to the clandestine abortions that are currently the common denominator. This is the equivalent of recognizing that abortions do occur, meaning that the dispute is between having them done legally or clandestinely, with the consequences that the latter has in terms of sexual and reproductive health for women in particular and public health in general (Klein, 2005; Lamas, 2006; Cook et. al, 2003).

Now, with this regional context as a backdrop, what has transpired in the countries studied? In both of them, in the first years of the 21st century, the highest courts took up the question and the decisions of each were favorable to the total or partial decriminalization of interrupting pregnancy. Beyond the differences we will soon analyze, the intervention of the judiciary favored decriminalization. In Mexico, the Supreme Court handed down two decisions in less than 10 years on the decriminalization of abortion arising from legislative actions in Mexico City. In 2000 the heard for the first time in its history a case on the issue, it was its initiation into this type of conflicts; in 2007 it heard the second case.
In August 2000\textsuperscript{2} the Legislative Assembly of the Federal District [Mexico City] (henceforth the ALDF)\textsuperscript{3} approved a law\textsuperscript{4} that:

1) **Decriminalized** abortion in cases of: a) fetal deformations, b) non-consensual artificial insemination, c) danger for the mother’s life; and

2) Included other relevant aspects for the development of effective public policies on the issue: a) it established a simple and fast procedure for processing pregnancy interruption, and b) forced the public health system to provide information and timely consultation.

The National Action Party (PAN)\textsuperscript{5} and the Green Ecology Party (PVEM)\textsuperscript{6} filed an action before the Supreme Court contesting the law’s constitutionality\textsuperscript{7} (Gire, 2008). The increasing pluralization of political representation generates new challenges for the highest court.

In this instance it is evident that both the local executive branch and the legislature were open to the influence of the women’s movement.

In November 2006, six years after the previous experience, and immediately following the closest presidential election in the country’s history, a new decriminalization initiative was brought forth in the ALDF. At this moment, although the political environment was marked by a majority in the ALDF and control of the local executive branch, the confrontation between the

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\textsuperscript{2} A un mes de las primeras elecciones presidenciales que marcaron la alternancia política en 70 años. Momento que para muchos autores, marca el fin de la transición democrática mexicana (Woldemberg, Salazar y Becerra, 2001)

\textsuperscript{3} No puede dejar de señalarse la incidencia fuerte del movimiento de mujeres en la iniciativa (GIRE, 2008)

\textsuperscript{4} Conocida como Ley Robles, dado que Rosario Robles era la jefa de Gobierno de la Ciudad de México en ese momento y fue quien presentó la iniciativa poco tiempo después de haberse llevado a cabo las elecciones presidenciales del año 2000, en las que compitió, y perdió, su antecesor en la ciudad, El Ingeniero Cuautemoc Cárdenas.

\textsuperscript{5} The party in federal government that, although part of the minority in Mexico, is the only one whose platform defends the concept of life beginning at conception.

\textsuperscript{6} The only ecologist party that maintains an antiabortion position.

\textsuperscript{7} An appeal that can be brought to the Supreme Court if 33% of the legislature vote to have a law undergo judicial review. If the Court vote by majority of 8 votes in favor of the unconstitutionality of the norm, the law is annulled.
two institutions was deep as the leaders of each belonged to different factions of the Democratic Revolutionary Party (PRD). In April 2007 the law decriminalizing abortions performed in the first 12 weeks of pregnancy and furthermore specifying criteria for health center was approved (Gire, 2008). Two actions contesting the bill’s constitutionality were brought before the Court. This time they were not lodged by legislative minorities, but instead by the National Commission for Human Rights (CNDH) and the Solicitor General of the Republic (PJR). The primary institution for the protection of human rights in the country and the judicial arm of the Executive office were responsible for the Court’s being asked to decide the issue. They were looking to maintain the status quo, that is, to annul the legislation. For a second time the Court was obliged to make a determination in the dispute.

For its part, until 2006 Colombia was the only country in Latin America where there lacked any grounds whatsoever for legal abortion (González Vélez, 2006). Unlike Mexico in this aspect, judicialization was not initiated by the pro life coalition, but rather by the women’s movement. It was a feminist lawyer, Mónica Roa, who in the framework of a high impact litigation project (LAICA), and supported by the Women’s Link Worldwide in Colombia (González Vélez, 2006), coordinated the lawsuit asking that an article of the criminal code be declared unenforceable or that abortion be considered constitutionally permissible in specific situations: rape or nonconsensual artificial insemination, fetal deformation, danger to the mother’s life. It was not the first time a lawsuit had been brought before the court, but it is interesting to note that the initiative came from the women’s movement who chose to pursue the matter directly in the courts, probably in the hopes of propelling legislative changes.8 The configuration of the political and legal opportunity structure favored the enterprise of broadening

8 This is not strange given the characteristics of the Colombian Constitutional Court, which since its creation in 1991 has been characterized by its pro rights activism.
rights through the constitutional court’s intervention. Facing a conservative government with majorities in both legislative chambers, an appeal was made for the court to intervene as a progressive arbiter in a key moment before changes could be made to the composition of the court that would render the initiative’s goals more difficult to achieve.

As for the legal opportunity structures in a strict sense of the term, the existence of legal support structures can be seen, that groups of lawyers from the movement or sympathetic to it that participate in the processes. In the opinion of those who participated in the Mexican process, however, distinction should be made regarding the existence of support structures controlled by the movement and those that lent the movement assistance. While in Colombia the legal support structure was its own, in Mexico the structure was basically borrowed. In addition, it seems that the strategy chosen in both cases was incrementalist, that is, it started by requesting decriminalization for the least controversial aspects of abortion (and in the case of Mexico also establishing procedures to correctly orient public policies), to later broaden the efforts. In Colombia, the video produced as a testimony to the experience states that it is the first step and that the court’s decision opens the door for new progress. Furthermore, in both cases the legal support structure includes collaboration between national and international organizations, especially evident in the case of Colombia, where the high impact litigation was part of a project by Women’s Link Worldwide.

The greatest discrepancy, however, between the two cases is found in the possibilities regarding access to the jurisdiction of the respective constitutional tribunals. While the jurisdiction of the Colombian court is open, broadly accessible to citizens and groups for

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9 GIRE, the primary Mexican organization for the promotion of sexual and reproductive rights only had one specialist lawyer on the issue on its staff. The rest of the professional participants were recruited by a strategy allying legal actors and academy.
10 http://www.womenslinkworldwide.org/prog_rr_laicia.html
declarations on the constitutionality of norms, in this case, the criminal code; the Mexican one is closed, its exclusive jurisdiction is reserved for resolving political conflicts, it is more a court for politicians than for citizens (Ansolabehere, 2008; Magaloni and Saldívar, 2006).

The second important difference is the starting point. In Mexico, this was a change in the legal status quo regarding abortion. The delegation of the matter for resolution by the judiciary was due to a conservative lawsuit. In both cases, efforts were made to rescind advances made in the area of sexual and reproductive rights for women. Legitimate actors favorable to the pro life coalition were the ones who brought the lawsuit questioning constitutionality in the attempt to annul the change. The delegation to the judiciary was a conservative initiative.

For its part, in Colombia the delegation of the conflict to the judiciary was a progressive initiative seeking a change in the legal status quo. The women’s movement is what propelled it. A strategy was developed to take advantage of the particularities of the constitutional court then in existence. In the Mexican case the actors appealed to the court to maintain and restrict sexual and reproductive rights, in the Colombian one the appeal was to change and broaden those rights.

In both cases access, strictly speaking, to the court structure was complemented with consultation by interested third parties. In Colombia, part of the action plan of the organization that brought the appeal for unconstitutionality was to encourage the filing of amicus curae supporting decriminalization. In 2008 in Mexico, given the high level of visibility of the court’s decision over abortion (and given the discredit it had fallen into following a very controversial decision concerning the severe violation of the guarantees of individual freedom of a journalist who after exposing a child sex ring was detained with no regard for the rules of due process), the court institutionalized a technique that had been used in another controversial case (concerning
discrimination against HIV-positive individuals in the military). Using its accord 2/2008 it
established guidelines\textsuperscript{11} for convoking public hearings when it considers them pertinent because
of the case’s nature. Public hearings were hence called for the conflict we are studying. Six
hearings were carried out,\textsuperscript{12} in which more than 40 speakers (individuals and institutions)
participated in accordance to the positions they registered regarding the constitutionality (or
unconstitutionality) of the measures. Beyond the conservative judicialization in Mexico between
2002 and 2007 there was thus a period of learning. Although the jurisdiction remains closed, a
change has occurred in that the court became less impermeable to society. Before an issue as
disputed as abortion, the high court preferred hearing an exchange of arguments. The legal
decision did not begin and end with the letter of the law; the legal decision, at least formally, was
nourished with “knowledge from other sources.” These internal transformations can be seen as
part of a process of increased publicizing for the court’s decisions: with its ruling on
transparency and access to public information of 2003 that makes public final sentences and
more concretely since 2006 when the court channel was inaugurated on television and the
debates of the plenary were made public.

In both of our cases, we find similarities: the intervention of support structures for legal
mobilization linked to the women’s movement or for sexual and reproductive rights. As for the
differences, important ones exist, as the jurisdiction of the Colombian court is open to citizens,
while the Mexican is not. In accordance with what we have noted thus far, together with the fact
that the representative institutions were reticent to pay heed to the demands of the women’s
movement, a \textbf{progressive judicialization} resulted. In this first case it was the women’s

\textsuperscript{11} No obstante estos lineamientos establecen el requisito de acuerdo del pleno para convocar a estas audiencias, esto
es quedan supeditadas a la decisión discrecional de éstas, constituyen un cambio por lo menos simbólico en cuanto a la relación, entre la corte y diferentes actores sociales.

\textsuperscript{12} The hearings took place on April 11, 2008; April 25, 2008; May 23, 2008; May 30, 2008; June 13, 2008; and June
27, 2008.
movement who called for judicialization. As for Mexico, where the strategy for change on the part of the women’s movement had its center in the representative institutions of Mexico City, and where we face a closed jurisdiction, a **conservative jurisdiction** is had. The representatives of the antiabortion coalition are the ones who force delegation to the judicial branch for resolution of the conflict. Nevertheless, the changes between the court of 2000 and that of 2007 are so great that it is with difficulty that we can use the same name for them, not only because of the changes in the court’s composition, but also because of the changes in terms of the internal checks and balances internally adopted by the judiciary and the increase in public debate surrounding its decisions.

Therefore, with relation to the legal and political opportunity structure, what we have in the legal framework are differences in the legal system and in the access to legal and political institutions, but a fundamental political similarity does exist, the protagonist role of the women’s movement in various parts of the process.

4. Intervention and decision. Different court, different decision?

Sociologically, legal decisions regarding abortion can be understood, in terms of the moral and political factors they activate, as a critical conjuncture. The level of conflict and exposure that are normally harnessed can generate institutional, legal, and symbolical changes that burst inertia. In terms of legal history, they can be considered tragic (Vázquez, 2008) in that they involve genuine legal and moral dilemmas. Politically speaking, if we accept that judges in particular and courts in general are strategic actors (Epstein and Knight, 2000), these cases imply costly legal decisions in which the evaluation of what is gained and what is lost will be
determinant inasmuch as what is given priority as beneficial will be determined at that decisive moment.

Taking these particularities of decisions on abortion into account, the way by which constitutional courts intervene, as well as the substance of their resolutions, are not minor factors, since, somehow, they establish a model of social and political order. Intervening to resolve this conflict, and the subsequent adjudication, is riddled with tension. Because of this, typifying the manner in which this function is carried out is considered important.

In this aspect of the analysis, the following dimensions are addressed: a) the conflicts to be resolved and b) the way in which they were resolved, that is, what the court’s position regarding the conflicts was. In the latter case, an examination will be made of whether the courts intervened in maximalist manner, tackling the essential questions of the debate over sexual and reproductive rights; or if on the contrary they opted for a minimalist intervention by supporting their decision with formal arguments.

Beginning with the Mexican case, we will analyze two decisions, the Action Contesting Constitutionality 10/2000 and the Action Contesting Constitutionality 146/2007 with its corollary 147/2007.

The Mexican Supreme Court accepted the modifications of the criminal code of the federal district [Mexico City] regarding the decriminalization of eugenic abortion in the Action Contesting Constitutionality 10/2000, besides including guidelines for public policy on the topic (services to be available in public hospitals, access to information, and the possibility for conscientious objection by doctors) (Pou Jiménez, 2009), despite holding that the concept of life protected by the constitution began at conception. In this case there were two conflicts presented
to the court: one related to the constitutional right to life, and the other concerned the validity of allocating to public authorities the competence to approve interruptions of pregnancy.

Although the character of this decision of the court bestowed it with a high level of visibility, at the time there were no institutionalized means for representatives of the interested parties from society to participate in the trial. This does not mean that the work of the pro sexual and reproductive rights coalition and the pro life coalition, or better put pro and anti-decision, was without impact, but simply that participation was not regulated or public. Direct participants from the women’s movement refer to the process this way: “The trial was an experiment for the civil society organizations that backed the reform: the necessity to establish a dialogue with the highest instance of the Judiciary and, most difficult of all, with the intention of affecting the outcome. The task was not easy in the least, which is why the decision was made to limit ourselves to the sphere of information without putting pressure on civil society with demonstrations and sit-ins.” (Gire, 2008: 17). Beyond the questions abortions raises in terms of bioethics, medicine, and public health, that is, it appears that in this occasion, the conflict was entirely fought out in the legal arena. In the decision references to any other knowledge than legal are extremely scarce. Those who had been delegated the competence to resolve a complex conflict did not produce a complex response to it.

Lastly, closely related to what has just been said, the resolution of the principal conflicts regarding rights and criminal law share the common denominator of a failure to address the heart of the matter. On one hand, the court recognized that the Mexican constitution protects life from the moment of conception: “it can be thus concluded that the protection of the life of the product of conception derives from the constitutional precepts, the international treaties, and the federal and local laws that have been referred to” (AI10/2000:109). On the other, the court interpreted
that, as the change in the criminal code in question did not decriminalize abortion but instead concerned the sanction imposed and therefore did not mean that abortion was no longer a crime but rather that in certain scenarios it did not merit punishment, it was not denying protection to the unborn child: “[The reformulated article] does not hold that certain products of conception, because of their characteristics, may be deprived of life, which would be discriminatory, but rather that the substance of the section is that after an abortion is carried out . . . if the requirements listed in section III of Article 334, then the sanctions cannot be applied” (AI10/2000:112).13

Outside of the result, which was celebrated as a victory, the manner by which the court intervened in the conflict was clearly minimalist. In 2002, from a legal perspective, nothing in the arguments recognized rights sensitive to sex (Lamas, 2008) and the sexual and reproductive rights of women were not explicitly recognized. In its decision the court chose to avoid confrontation with the obligation to protect life from conception and with the criminal nature of abortion. Another aspect of this decision deserving attention is that it is not sustained by rigorous argumentation, either by any of the intervening parties or in the interpretative activity of the court itself. In 2007, however, every one of the intervening actors was seen making use of argumentation, the level of sophistication of which was much greater. In all appearance, the 5 years interceding between the two decisions were not innocuous in terms of litigation practices or the ways by which settlement for the conflict is sought.

In 2007, not only the scenario differs, but so does the court’s intervention. The political scenario is polarized, the divisions between the models for the country forwarded by the left and the right, to somehow define it, are very clear. Sexual and reproductive rights represented a new

13 For a meticulous legal analysis of the decision see Pou Giménez (2009)
opportunity for differentiation. For its part, the judicial context has also changed. The supreme court is aware that its decisions have unknown transcendence for Mexico, and are subject to the balance of negative and positive effects of public opinion. The decisions are no longer only of interest to lawyers, they are material for commentary in the media and by the citizens. A court may be loved or hated. In other words, the social context of exigency in the court has changed. Whether a cause or consequence of this is unimportant; the court has become more public – its decisions are available to the public and its sessions are broadcast on a television channel. Furthermore, the composition of the court itself has changed, as 4 of its 11 members have been replaced.

The institutionalization of public hearings, to which reference has already been made, and the calls to participate in them represent the first significant change with respect to the 2002 decision. On one hand, the task of examining impact was made explicit and an effort was made to sustain it during the debate. On the other hand, the diversity of participating actors in the hearings, where besides the organizations tied to the defense of sexual and reproductive rights there were health professionals, specialists in bioethics, etc., together with the requests for statistical data from various federal entities handling questions related to public health, make it possible to infer that a change was made in the way the problem was tackled. Its being a difficult problem, complex responses are required. Assembling an adequate response to the problem can not only rely on legal knowledge, it requires other expertise.

In this case the court was assigned a conflict articulated in three tracks: a) that of rights (the right to life from conception – the right to health and to life of women), b) that of the

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14 As in the case of the law Televisa
15 As in the case of Lidia Cacho.
jurisdiction between the federal government and the federal district, that is, there was a
dimension where conflict over the competences of the federal government and states was
arbitrated, and c) the court finally addressed the conflict tied to the characteristics of the criminal
law. Regarding the court’s intervention, the first thing that can be said is the only true decision in
the strict sense of the term was that the Mexico City legislation was constitutional. It is possible
to speak of a concurrence so thin that it is only possible to issue a decision on whether the
contested legislation was constitutional or not, but not on the reasons to sustain it. A majority of
8 votes were favorable to the constitutionality of the norm, and seven concurred with the
decision elaborated by the judge appointed to write the opinion of the court (José Ramón Cossío).

As regards the first conflict, two arguments were put forward in the decision. The first is
that the Mexican constitution does not explicitly recognize the right to life, and that even if it
were recognized it clearly is not an absolute right with preeminence over all other rights, for
example equality and freedom: “If the right to life was found to be expressly recognized in the
constitution, by any manner this would be as a relative right, and in consequence would have to
be harmonized with another collection of rights” (AI 146/2007 and 147/2007:156). The second
argument involves the recognition of the differences entailed by sex in the exercise of sexual and
reproductive rights following the admission of the differing implications pregnancy has for the
mother and for the father. The law recognizes sex: “This tribunal considers that the means
employed by the legislator is in the end suitable for protecting the rights of women, as the non-
prosecution of pregnancy interruption has as counterpart the freedom of women to make
decisions regarding their bodies, their physical and mental health, and even their lives” (AI
146/2007 and 147/2007:181). In some way this interpretation represents a change from the way
the court decided in 2002, in that women appear as subjects.
The second conflict was of jurisdiction, and the court’s decision was a resounding affirmation regarding the competence of the Legislative Assembly of Mexico City to pass legislation on health issues.

The third conflict regarded the legislation on punishment for abortion, and here the court showed deference to a position, which would be the primary reason for the decision (Pou Giménez, 2009) and an important difference from the 2002 decision, in which punitive action is deemed the last recourse for use by the state, and even more rightly so when it restricts freedom: “Thus having found no specific constitutional mandate for the punishment for all of these behaviors, no legal reason appears to exist . . . indicating to us that there lacks sufficient legal authority to decriminalize those behaviors that in the judgment of a democratic legislator are no longer socially reproachable” (AI 146/2007 and 147/2007:180). In the end the measure, in the court’s judgment, is constitutional because the democratic legislature has the necessary authorization to pass it.

In 2007, we have a court that beyond the differences with the 2002 decision, still intervenes in minimalist manner.¹⁷ In the end the primary foundation of the resolution is the lack of any obstacle to prevent a democratic legislator from deciding whether to criminalize or stop criminalizing abortion. There are nonetheless differences with regards the 2002 court; the first is that women are present, although in the background they are still present. The second difference is that expertise from other areas was sought, for example from that of medicine, during the process of the decision’s construction. The third is the greater effort made in argumentation. In light of these characteristics we might define the court’s intervention as minimalist, but sensitive to sex, more informed and more rigorously argued. There is room to believe that the Mexican

¹⁷ Pou Giménez (200) concurs with this characterization of the court’s decision.
court, with its higher degree of visibility and presence in the public debates, has become more susceptible to political and social influence and consequently to the social and political costs its decisions entail, than to an exhaustive legal debate.

In the case of Colombia, whose court is held as a model of pro rights activism in the region (Uprimy, 2005; Ansolabehere, 2008), it is not surprising that the intervention was maximalist. The background of its decision included consultation with various types of organizations, ranging from organizations defending and promoting the sexual and reproductive rights of women to the Colombian Episcopalian conference, as well as scientists and government workers, both for and against the decriminalization of abortion. As for the decision itself, both the petition\textsuperscript{18} and the text of the decision rested not only on legal arguments but also made reference to health statistics and recommendations by committees monitoring the implementation of treaties covering the human rights of women.\textsuperscript{19}

The primary conflict in Colombia is related to the decriminalization of abortion in specific cases: therapeutic, eugenic, or following rape or nonconsensual artificial insemination. Nonetheless, both the lawsuit brought over the conflict as well as the intervention of the court are worded in terms of women’s rights. The lawsuit brought forward by the women’s movement maintains that Article 122 of the Criminal Code of that country is unconstitutional for infringement of the following rights of women: 1) the right to equality and the obligation of respecting the guidelines in international law for human rights; 2) women’s right to life, health, and safety; 3) the right to equality and to be free of discrimination; 4) the principle of human

\textsuperscript{18} On page 24, for example, of the petition of unconstitutionality of Art. 122 of Law 599 of 2000 of the Criminal Code filed by Mónica Roa.

\textsuperscript{19} Pages 233 and 234 of the C-355, for example.
dignity and the right to reproductive autonomy and individual self-realization. Unlike the case in Mexico, women were present at all times.

In its decision, the court revises the constitutional protection of the various rights mentioned in the lawsuit and reaffirms the intimacy and limitations on state intervention in these areas stemming from the liberal nature of the 1991 constitution, stating: “... the State is at the service of man, the man is not at the service of the State. Under this new perspective, individual autonomy – understood as vital sphere of questions that only concern the individual – takes on the character of constitutional principle joining the public authorities to those who are forbidden from interfering in this protected area” (C-355:247).

Although the court affirms the state’s responsibility to protect the unborn child, it considers that “criminal regulations that punish abortion in any circumstance corresponds to a revocation of the basic rights of women, and inasmuch implies a complete disregard for their dignity, reducing women to the status of mere receptacles for the life in gestation, lacking rights or relevant interests which warrant protection” (C-355:271).

In addition, it is important to emphasize that the Colombian court finishes by making reference to the competence of the democratic legislator to further broaden the range of cases for decriminalization, which opens the door for greater amplification of sexual and reproductive rights.

The differences of manner in the interventions we have studied are obvious, beyond the differences between 2002 and 2007, the Mexican court remained marked by a minimalist approach. The Colombian court, however, accordingly with its well-known actions in other conflicts regarding rights, maintained its maximalist stamp on this issue.
Final Observations

We have seen that in Mexico as well as Colombia, the conflict surrounding the decriminalization of abortion reached the constitutional courts. And we have seen that in both cases, beyond the differences in the profile of each court, the decriminalization of abortion was upheld.

We have analyzed these processes of decriminalization in two phases, how they were remitted to the court system, and the nature of the court’s intervention in resolving the conflict.

Regarding the first process, we found fundamental differences in the legal opportunity structure, so much so that we can justifiably speak of a court open to citizens in Colombia and a closed one in Mexico.

The decisions in both cases, however, beyond the differences in structure, validated the decriminalization of abortion. This makes us think that perhaps the legal opportunity structure cannot be dissociated from the political opportunity structure. The timing, the publicity strategy devised for the problem and the political mobilization implemented by the women’s movement, and that of the Catholic Church and the pro life groups, as well as the possibilities to form coalitions, are important.

The three decisions studied here altered the status quo with regards sexual and reproductive rights in each of the countries. Still, differences in the way each court resolved the conflicts can be observed. The Colombian court intervened in a maximalist way, issuing an opinion that addressed the core principles of the issue in a clear recognition of sexual and reproductive rights as well as the autonomy of women. The Mexican court, putting aside the differences that separate the 2002 court from the 2007 one, is characterized by a minimalist
intervention that resolves the conflict without confronting the deeper issues, although there is improvement. It seems that in this second case, the greater degree of visibility and public debate over its decisions, as well as the exigency in the social context, pressured for maintaining the contested norms, though not with sufficient force to change the terms of the legal debate. On this point there may be room for the idea that the degree of openness of legal institutions to the citizenry is important, and that it is important because of the decisions it entails. A lawsuit challenging constitutionality, as in the Mexican case, that can only be brought forward by political minorities or political institutions, transforms the decision regarding rights into an eminently political event. In Colombia, however, the openness to institutions appears to have contributed to the fact that a decision regarding rights was fundamentally an event regarding rights.

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