

ACTION OF UNCONSTITUTIONALITY 146/2007 AND ITS CUMULATIVE 147/2007.

PLAINTIFFS: NATIONAL COMMISSION OF HUMAN RIGHTS AND ATTORNEY GENERAL

REPORTING JUDGE: JUDGE SERGIO SALVADOR AGUIRRE ANGUIANO.

MANAGER OF THE DRAFT JUDGMENT: MINISTRO JOSÉ RAMÓN COSSÍO DÍAZ.

**SECRETARIES: RAÚL MANUEL MEJÍA GARZA
LAURA PATRICIA ROJAS ZAMUDIO
MIGUEL ENRIQUE SÁNCHEZ FRIAS
ROBERTO LARA CHAGOYÁN**

México, Federal District. Ruling of the Supreme Court of Justice of the Nation, dated **twenty-eight of August two thousand and eight.**

FACTUAL FINDINGS:

FIRST. Filing of the claim and appealed laws.

José Luis Soberanes Fernández, Chairman of the National Commission of Human Rights, and Eduardo Medina-Mora Icaza, Attorney General, filed an action of unconstitutionality, requesting invalidity of the amendments made to articles 144, 145, 146 y 147 of the Penal Code for the Federal District, as well as that of the additions made to articles 16 Bis 6, third paragraph, and 16 Bis 8, last paragraph, of the General Health Law for the Federal District.

(...)

THIRD. Invalidity concepts.

I. Invalidity concepts asserted by the Chairman of the National Commission of Human Rights.

The Chairman of the National Commission of Human Rights states, in essence, the following invalidity concepts:

Right to life for the product of conception (POC)

He specifies some of the reasons that produced the amendments: ban on the death penalty, preservation of life as a limit to the Nations power in imposing sanctions adverse to human rights, deter the enforcement of uncommon and transcendent sanctions, eradicate penalties considered contrary to the Nations humanitarian feeling, correlate the objectives of human rights international instruments or mechanisms that preserve life and ban the death penalty, point out the inefficiency of the death penalty in the fight against crime.

The plaintiff continues his arguments specifying that the right to life recognized in the Constitution protects individuals from the moment of conception; furthermore the content of constitutional article 4° establishes a security framework for society and family; for physical and mental wellbeing, for adequate development and quality of life; precept that also contains rights of equality, health, housing and food.

This reform highlights that certain prerogatives are recognized in benefit of pregnant women to ensure the health of their child, whom even before birth possess the protection of the state. In the opinion of the House of Representatives it is mentioned that the right to protect health reaches mother and child since impregnation.

On the other hand the plaintiff underlines that the amendments to articles 144, 145, 146 and 147 of the Penal Code for the Federal District decreed and published on the Official Gazette for the Federal District April twenty-sixth two thousand seven come into conflict with the right to life for the product of conception, considering that they only penalize conduct that violates the product of conception after twelve weeks the embryo has been implanted in the uterus.

The Legislative Assembly weighs between fundamental rights, that of women's autonomy for reproduction and right of free, responsible maternity and the right of life of the product of conception.

SECOND INVALIDITY CONCEPT

Right to life

The plaintiff begins his arguments specifying that articles 144, 145, 146 and 147 of the Penal Code for the Federal District contravene the right to life, right to life before birth and right to life since conception recognized in the Convention on the Rights of the Child, the International Covenant on Political and Civil Rights and the American Convention on Human Rights, as well as article 133 of the Political Constitution of Mexico.

It is brought forth by the interpretative declaration that exceptions to generic circumstances can be made by virtue of justified cause. Nonetheless, this does not mean that the State can approve laws that contravene life since conception.

THIRD INVALIDITY CONCEPT

Right to protection of the process of gestation

He considers that there is evidence for protecting both women and the product, this protection dealing with the process of gestation, because the product has a right to protect its gestation process since conception, therefore he concludes that all stages of this process should be safeguarded because they are necessary for birth.

FOURTH CONCEPT OF INVALIDITY

Equal rights, procreation and paternity

Women's fundamental right to decide freely and responsibly on maternity is exercised before conception, after this moment, other obligations are generated for women and rights are created for the father, because otherwise the father would be alienated from his right to have children. This inequality is appreciated more if the woman is married.

Free and responsible maternity cannot in any way limit the father's right to procreation, let alone the right to life of the product. Rights must be weighed, in order to solve the conflict between both rights (abortion and father's right to procreation).

FIFTH CONCEPT OF INVALIDITY

Right to equality and non-discrimination

Article 1° recognizes equality for all, including the life and gestation process of the product. Regulation concerning particular situations must be based on objective, reasonable and considered thinking.

SIXTH CONCEPT OF INVALIDITY

Right to equality and non-discrimination based on age

Minors case was not regulated, therefore objectiveness, reasonability and proportionality were not taken into account. Minors cannot give their consent to terminate pregnancy.

SEVENTH CONCEPT OF INVALIDITY

Imprecise Penal Law application

Avoid putting the governed in a position of uncertainty, and at the same time avert the arbitrary performance of law interpreters.

EIGHT CONCEPT OF INVALIDITY

Competence infringement

The Legislative Assembly utilized a different "pregnancy" definition to the one utilized in the General Health Law and its Regulations. The first one considers pregnancy the fertilization of the egg, meanwhile the other one considers it the insertion of the embryo in the uterus. Because of this it is considered that the Legislative Assembly of the Federal District infringes the Unions Congress competence. The definition of pregnancy that should prevail is the one established by the General Law of Health.

NINTH CONCEPT OF INVALIDITY

Right to conscientious objection

The plaintiff infers that conscientious objection to any authority's order is permitted, if such order is contrary to personal beliefs or convictions, resulting, in his opinion, that the emergency clause on therapeutical abortions is a limit to conscientious objection.

TENTH CONCEPT OF INVALIDITY

Right to health in a social dimension and principle of rule of law

The Commissioner illustrates that the amendment made in 1983 to article 4°, procures health and wellbeing to humans.

He pointed out the fact that whether or not there is a penalty imposed to a certain conduct, public institutions cannot terminate pregnancies, because it is contrary to the principle of rule of law and the states obligation to procure public health.

II. Invalidity concepts expressed by the Attorney General.

FIRST CONCEPT OF INVALIDITY

He points out that the right to life is a necessary base and condition to all other rights. Therefore its preservation becomes essential for human development, evolution and reproduction; therefore, the State has the duty to protect such right from the moment of conception, encourage respect for human life and the rights that derive from it.

SECOND CONCEPT OF INVALIDITY

The Legislative Assembly has exceeded its capabilities by defining, in the second paragraph of article 144 of the Penal Code for the Federal District, pregnancy as " ... part of the reproductive human cycle which starts with the fixation of the embryo in the uterus."

THIRD CONCEPT OF INVALIDITY

The right to procreate is a right of both men and women and it is subject to free, responsible and informed decisions.

FOURTH CONCEPT OF INVALIDITY

Article 144 of the Penal Code for the Federal District and additional refuted laws violate Constitutional article 14, by not satisfying the supreme principle of legal certainty in penal subject, its prohibits the imposition of penalties that are not specifically applicable to the determined crime and which is not circumscribed to the applicable conduct. Rather it considers the law itself, which is to be conceived in specific ways that specify the crime and penalty in the clearest way, keeping in mind the objective is to avoid confusion between jurisdictional authorities.

FIFTH CONCEPT OF INVALIDITY

Contested article 144 establishes as a crime of abortion the conduct that terminates pregnancy after the twelfth week of gestation; therefore, it protects the product after the aforementioned week, leaving human beings in formation before such week defenseless, in contravention of the non-discrimination and equality before the law principles. In addition specifying that international law mechanisms constrain the signatory States to introduce in their legal framework, means to avoid discriminatory practices, instruments such as Universal Declaration of Human Rights and the American Convention on Human Rights.

SIXTH CONCEPT OF INVALIDITY

Article 16 bis 6 of the General Health Law for the Federal District, establishes the obligation for public authorities to meet the requests of women for pregnancy termination, even though they

might have other private or public service providers, resulting controversial with the Supreme Law and in consequence article 144 of the Penal Code for the Federal District is unconstitutional.

SEVENTH CONCEPT OF INVALIDITY

Impugned article 146 states that forced abortion is the termination of pregnancy, at any moment, without the consent of the pregnant woman, meanwhile the second paragraph of the aforesaid article mentions that pregnancy is the segment of the reproductive cycle in which the embryo is implanted in the uterus.

EIGHT CONCEPT OF INVALIDITY

The Attorney General pleads that articles 144 of the Penal Code for the Federal District and 16 Bis 6 and 16 Bis 8 of the General Health Law contravene Constitutional articles 1° y 25, first paragraph, by being discriminatory provisions that infringe on human dignity and have the intent of nullifying the rights for the unborn conceived children before the twelfth week of gestation.

NINTH CONCEPT OF INVALIDITY

Articles 144, 145 and 146 of the Penal Code for the Federal District and 16 Bis 6, third paragraph and 16 Bis 8, last paragraph, of the General Health Law and Third Transitory of the Amendment Decree, contravene Constitutional articles 16 and 133.

[...]

FIFTH. Issuing authority's report concerning the refuted norms in relation with the presented claim by the National Commission of Human Rights

The President of the Commission of Government of the Legislative Assembly for the Federal district, issued the report in relation to the claim presented by the National Commission of Human Rights in which the following was pointed out:

Cause of inadmissibility

The National Commission of Human Rights is authorized to promote an action of unconstitutionality, but not its President acting on his discretion.

General Considerations

Concerning fundamental rights, constitutional interpretation must be based on the pro homine principle, in other words, looking for the more human rights adhering solution, since women have been a vulnerable group that has historically been an object of discrimination and prejudice.

On other matters, pointing out that life is a fundamental right that is implicit in the Constitution, but in it there is no recognized right to life for the product of conception, and in the same list of fundamental rights we can find freedom, dignity, equality, integrity, health and education.

Rejection of the invalidity concepts.

a) Pertaining to the first concept of invalidity, he states that the plaintiff makes incorrect considerations, by pointing out that the right to life is contained in the Constitution even before the amendments made on December nine two thousand five, and asserts such right was incorporated on such amendment.

The refuted norms do not encourage pregnancy termination as eliminating a deterrent does not constitute establishing an incentive.

Right to procreation as the plaintiff understands, does not recognize woman's fundamental right to bodily determination.

The assertion made by the plaintiff is imprecise, because the right to procreate is exercised jointly or in a couple, also it excludes cases of artificial insemination and other reproductive techniques, furthermore it does not take into account adoption as a mechanism to constitute a family.

Fundamental rights should not be ranked, they all have Constitutional ranking, so in case of conflict between them the problem should be solved in the light of the specific circumstances of the case.

The fundamental right of health protection would be contravened if the State, knowing that even though abortion is prohibited it is still being carried out, would prevent women who choose to practice pregnancy termination access to effective and timely medical attention, when it is known a problem exists on this specific issue. In this line of thought, it is constitutional to guaranty women's right to health.

b) Pertaining to the second invalidity concept, it must be pointed out that the Mexican State was very explicit and specific by not regulating the protection of life since conception.

The Convention on the Rights of the Child recognizes a child's right to life, not so the embryo, and the plaintiff unfairly extends such right by manipulating a passage that establishes "special care and protection", but not right to life.

c) In accordance with the third invalidity concept, it must be stated that the established measures in the norm constitute a work-related privilege with the objective of women taking care of their own health during gestation, the work amendment sought equality for women.

d) The plaintiff errs by arguing in the fourth invalidity concept that the refuted amendment contravenes the right to equality before the law, the right to procreate and the right to men's paternity.

e) The appealed norms do not violate the right to equality and non-discrimination based on age of the product of conception, because it is protected by the constitution, but it is not considered a person, therefore it is not entitled to rights.

f) The appealed norms do not contravene right to equality or non-discrimination based on the age of the woman, by not regulating the specific case of female minors, as claimed by the

plaintiff, because by restricting minors from terminating their pregnancies in equal circumstances as those of legal age, there would be a transgression made against their fundamental rights to life, health, bodily integrity, self-determination, free reproduction, intimacy and privacy.

g) The refuted laws do not violate the principle of exact application of the law in penal subject, because the margin of error in determining the moment of embryos implantation in the uterus is very small, and it is more difficult to determine the moment of conception.

h) The refuted laws do not contravene the competence granted by the Constitution to the Federation in legislating on health subjects. The Legislative Assembly is entitled to legislate on penal and health subjects, both in local and general health jointly with the Federation.

i) Article 16 Bis 7 of the Health Law for the Federal District does not contravene the right to contentious objection, because it deals with all cases of pregnancy termination, legislation must be understood as a whole and not by layers of entry into force.

SIXTH. Issuing authority's report concerning the refuted norms in relation with the claim put forth by the Attorney General.

The President of the Commission of Government of the Legislative Assembly for the Federal district, issued the report in relation to the claim presented by the Attorney General, in which the following was pointed out:

General Considerations

The amendments made to the Penal Code and Health Law, were enacted by the authority that was Constitutionally established to issue laws that regulate life for citizens in the Federal District, that is part of the Federation, and even though it is not considered a state, it is entitled to sovereignty.

Human Rights

Abortion is related to human rights, which notion is correlative to that of a person's dignity. The Constitution and diverse international instruments signed by the Mexican State, as well as secondary legislation, recognize the right to equality, non-discrimination, reproduction, health protection and life free of violence.

SEVENTH. Enacting authority's report

The Mayor for the Federal District jointly answered the claims made by the Attorney General and the National Commission of Human Rights, pointing out the following:

1. Pertaining the legal capabilities of the National Commission of Human Rights:

a) It legally lacks capabilities to promote an action of unconstitutionality

b) The President of the National Commission of Human Rights lacks capabilities to put forth this action of unconstitutionality on his own, representing the aforesaid Commission.

2. Regarding the concepts of invalidity:

I. The Legislative Assembly has the capabilities to legislate in penal and civil subjects.

It is a fact in the Federal District that abortion has been de facto decriminalized, since there are no complaints of the commission of the crime of abortion, rather there are records of pleas concerning high rates of death and accidents from clandestine abortions.

The aforesaid being exposed it is brought forth that:

a) The refuted precepts do not contravene the right to life, as this right is only ascribed with birth. For a person to be able to be subject to rights and duties requires "legal capacity," be it for enjoyment or exercise of the rights.

Article 1° of the Convention on Rights of the Child, establishes the need for protection of the child "before and after birth", but it does not express that the "product of conception" is a child, and therefore, entitled to the rights in such instrument, because in accordance with the same article "... the word child is understood as any human being who is under eighteen years of age...", and taking into account that age begins with birth, it is clear it uses a broad conception of being human only after birth.

b) The debated norms are duly motivated and justified.

It is necessary to ponder the rights embedded in the refuted norms, starting from the embryo's protection since the moment of conception, when women want the pregnancy, until the conclusion of the twelfth week of gestation, such protection remaining without the mentioned condition after this period. The aforementioned with the objective of reducing death and health accidents in women due to covert abortions.

The Legislative Assembly for the Federal District amended the norms so that pregnancy termination can be carried out in ideal conditions, establishing mechanisms that facilitate public health administrative organisms, to tend to this public health problem with full respect to the dignity and fundamental rights of women.

II. Concerning the second concept of invalidity:

a) The Legislative Assembly for the Federal District has competence to legislate on health issues.

Termination of pregnancy implactes a positive obligation on the State to respect the right to protection of health, reproductive freedom and the victim's right to torts.

In consequence, the Legislative Assembly for the Federal District has express powers to legislate on the subject of health, and therefore is competent to enact the Federal District's Health Law, as well as reform it so that public health institutions in the Federal District address the requests for pregnancy termination by the women who want it even if they have some other public or private health service; determine that care for sexual and reproductive health is a priority;

impose the obligation on the Federal District's government on permanently promoting in an intensive way comprehensive policies aimed at the promotion of sexual health, reproductive rights, responsible maternity and paternity; and require the Federal District's government to provide medical and social counsel for sexual and reproductive health, in a permanent and free manner, plus providing any woman seeking pregnancy termination the information pertaining to the last paragraph of article 148 of the Penal Code for the Federal District, as well as medical support for family planning and contraception.

It is accurate to note that services for pregnancy termination are part of the subject of "health" as referred to in Article 122 of the Constitution and not of general health of the Republic, since it is not a family planning method, nor is it related to maternal and child pregnancy.

b) The Legislative Assembly for the Federal District is competent to legislate on penal matters, regarding pregnancy termination, which involves defining abortion as a crime.

In the same line, the concept of pregnancy that the Legislative Assembly uses resembles that of the World Health Organization in its document "Mechanism of Action, Safety and Efficacy of Intrauterine Devices: Report of a WHO Scientific Group. Technical Report Series 753, Geneva: OMSs, 1987" and that of the International Federation of Gynecology and Obstetrics's document "Definition of Pregnancy, Recommendations on Ethical Issues in Obstetrics and Gynecology, London, FIGO, 2000".

Thus the definition is validated by medical science and distinguishes between conception and implantation.

III. As regards the third concept of invalidity, in which the violation is held by the contested provisions of Article 4 of the Constitution, it is stated that such an approach is unfounded by the following:

The freedom to procreate implies a dual obligation, on one side freedom to have as many children as desired and the spacing between them, on the other freedom to not have them.

Such approach that considers it a couple's right must be rejected, for if the women's decision to terminate the pregnancy affects a human right, the woman's right must take prevalence because the process of gestation takes place in her body.

IV. Pertaining the fourth invalidity concept, the one referring to the violation of Article 14 of the Constitution by stating that the possibility of error during the determination of weeks of pregnancy, the following is asserted.

The twelve week period is not random, but is based on scientific elements, since studies in the field of neurobiology support the view that one can only speak of a person from the third trimester of pregnancy and that an embryo of twelve weeks is not considered a biological individual.

V. The fifth concept of invalidity, which argues non-compliance with the guarantees of non-discrimination and equality enshrined in Articles 1, third paragraph, and 4, first paragraph, of the

Constitution for leaving embryo's before the twelfth week of gestation unprotected is unfounded, the described phenomenon of discrimination is associated only with born people, as it can only be given with respect to persons subject to rights and obligations and not for embryos that are exclusively protected.

VI. Pertaining to the sixth concept of invalidity, which establishes the obligation of public health institutions to respond to requests for pregnancy termination, it is noted first of all that the plaintiff does not specify the contravened constitutional provision.

VII. The seventh concept of invalidity controversial Article 146 creates a separate crime called forced abortion, called by the doctrine as abortion suffered, in which the abortion is performed without the consent of the pregnant woman, so that it affects the right of women to procreate and also the product of the conception..

VIII. The eight concept of invalidity is unfounded, pertaining to the concept of dignity portrayed in Articles 1, third paragraph, and 25, first paragraph, of the Constitution refer to people as born individuals, in full exercising of their rights and obligations, not embryos.

IX. The ninth concept of invalidity states is unfounded, implicating that the contested provisions contravene the principle of rule of law by not complying with due justification and motivation, implying the Legislative Assembly acted outside its competence and violated Articles 14 and 22 of the Constitution that prohibit the death penalty.

X. Finally, it is brought forth that the sixth concept claimed by the Chairman of the National Commission on Human Rights, by which he asserts that articles 145 to 147 of the Penal Code for the Federal District contravene the right to equality and non-discrimination based on age, of a minor women for not regulating their case. Such regulation is not needed because article 12 of the Penal Code for the Federal District establishes that its dispositions only apply to people over 18 years of age, so the lack of mention of minors in the challenged rules is precisely because they are not taken into account.

NINTH. Cierre de la instrucción.

WHEREAS:

[...]

THIRD. Dismissal and inadmissibility.

I. The case must be dismissed, because the claim containing the unconstitutionality action promoted by the National Commission of Human Rights, stating conflict between article 148 of the Penal Code and the General Health Law both of the Federal District, is untimely.

[...]

II. This high tribunal considers Third Transitory of the Amendment Decree by which the Penal Code and The General Health law both of the Federal District are changed, actualize the

inadmissibility cause contained in article 19 section V of the Regulatory Law on the Matter, because its effects have ceased.

[...]

SEVENTH.-Arguments concerning the incompetence of the Legislative Assembly for the Federal District.

It is argued that the Legislative Assembly in the process of amending the Penal Code and Health Law, both systems for the Federal District, established a definition of pregnancy that contradicts the one established by the Regulations of the General Health law in article 40.

Such contradiction, exposes an infringement in Federal competence.

I. ¿ARE HEALTH AND PUBLIC HEALTH DIFFRENT SUBJECTS?

There is no difference between public health and health: the first is the general field which comprises health services and sanitary controls, and between both is the complex system that comprises competent and organizational dimensions, that which corresponds to the fundamental right of access to health services.

[...]

III. IS THERE A DEFINITION OF PREGNANCY ON HEALTH MATTERS?

Form the contents of the General Health Law, it is evident that a definition of pregnancy is not contained or projected in its precepts, even though the word is used within the text, it is never defined.

EIGHT. - Arguments in relation to the existence and legal nature of the right to life.

I. IS THE RIGHT TO LIFE TAKEN INTO ACCOUNT BY THE MEXICAN CONSTITUTION?

To harmonize the points of view made on the concept “since the moment of conception”, and counting the objections from the Conference of Bogota pertaining to the legislative basis of American States that allow abortion, inter alia, to save the life of the mother and in case of rape, the Inter-American Commission on Human Rights rewrote Article 2 (right to life) and decided by a majority of votes to introduce before this concept the wording “in general”. This amendment originated the new text of article 2 “1. Every person has a right to life. This right will be protected by the Law, in general, since the moment of conception”¹.

By this measures, there are clear constrains of penalization in the Mexican Constitution, where it is mentioned that the legislator is obliged to enact penal laws that sanction certain conducts.

1 Ibid. p. 321.

The democratic legislator has the capability to evaluate which element to regulate, or not, in a determined conduct. The Legislative Assembly for the Federal District was endowed with such capabilities that allow it to determine which conducts are considered crimes.

The general justification of a measure that resulted from a democratic exercise carried out by the Assembly and concluded with the decriminalization of a conduct, was averting a public health issue derived from the practice of covert abortions, considering the decriminalization of abortion would allow women to voluntarily terminate their pregnancy in sanitary and secure conditions. As well as, guaranteeing an equal treatment of women, in particular those of lower incomes, recognizing the freedom to freely engage in sexual relations and their reproductive capabilities, recognizing that forced maternity should not exist and that women should be allowed to develop their life plan in terms they deem appropriate.

This Tribunal considers the utilized measures of the Legislator are ideal for safekeeping women's rights, because the decriminalization of pregnancy termination has as a counterpart women's right to bodily integrity and self-determination, physical and mental health and even life, as we cannot overlook as the Federal District Legislator clearly states in its justifying reasons, that there is maternal mortality.

II. ¿DO THE REFUTED NORMS CONTRAVEN THE PRINCIPLE OF EQUALITY?

The local legislator's decision to establish the rule where the final decision in this cases relies on the feminine sex, carrier of an unwanted embryo, is not discriminatory and not unreasonable, because it responds to the obvious disparity of her position with other people (i.e. one of male sex, that deems participated in the creation of that embryo, or any third party). Carrying out an unwanted pregnancy produces permanent and profound consequences on women, even when aid is given in the continuation of it, and then in the care and education of the child. It is this asymmetric disturbance to their life plan that is the basis for different treatment by which the legislator considers giving women the final decision about the termination of a pregnancy and what makes it reasonable to deny male participants the capacity to make the same decision.

This Tribunal considers there is no constitutional constrain for the local Legislator in the implementation of a special regime concerning pregnancy termination in minors.

NINTH. - Fundamental Premises in Relation to Penal Principles

It is asserted that the established timelines —twelve weeks of pregnancy— and the beginning of pregnancy —embryo's implantation in the uterus— are difficult to determine because the law does not provide a method for doctors to determine the lapse of pregnancy; furthermore, the gestation and pregnancy terms used in articles 144 and 145 are vague.

In the same line of thought, article 144 contains three stages to gestation (first stage from conception to "pregnancy", second stage until the twelfth week and third stage until birth). From which it follows that what is protected by the penal definition is the process of gestation not life itself.

I. VIOLATION OF THE PRINCIPLES OF LEGALITY CERTAINTY AND ACCURATE PENAL LAW ENFORCEMENT.

It is upheld that the amendment to articles 144 and 146 of the Penal Code for the Federal District, established as a core of the types of abortion and forced abortion an action that does not correspond with the legal protection, causing a state of uncertainty for those that are affected by such norms.

None the less, by comparing the previous and current text of article 144, it is noted that there has been no change in the sought legal protection, i.e. the legal protection is still life during gestation.

Refuted articles 144 and 146 do not contravene the principle of certainty and exact application of law principles, after analyzing article 144, which does not constitute a penal definition itself, rather that it fulfills another function, that is to give certain meanings to the concepts of abortion and pregnancy, which in turn constitute legal criteria for penal definitions:

1. Self-induced abortion, contained in article 145 first paragraph
2. Consensual abortion, as exposed in article 145 second paragraph
3. Forced abortion, as exposed in article 146

By these means there is consistency between prohibited conducts in penal legislation and the protected right intended to protect the same; in other words, life during gestation pertaining to penal definitions of self-induced abortion, consensual abortion and freedom of self-determination in relation to life in gestation in case of forced abortion.

II. PENALTY PROPORTIONALITY.

In first place, it must be noticed that in the amendments to the Penal Code for the Federal District on April two thousand seven, and specifically in relation to the imposed sanctions for abortion, the distinction is maintained between abortions carried out with and without women's consent; likewise, punishment remains in the same terms for those who abort with a woman's consent (one to three years in prison), as well as for those who perform it without consent (five to eight years in prison and eight to ten years if done by means of physical or moral violence). The only change in regulation is the reduction in the sanction imposed to women who performs an abortion, after the twelfth week of gestation, or consents to having one performed, in which case was previously sanctioned with one to three years of prison and is now amended by article 145 to an alternative sanction of three to six months of prison or a hundred to three hundred days of community service.

Exceptional situations exist where the legislator cannot apply the maximum constraints —penal sanctions— to certain conducts, which under other circumstances would be mandatory; but this cannot happen in particular situations, such as the one in reference. On basis of the previous arguments it is considered that the refuted norm dose not contravene the penalty proportionality principle.

Henceforth, it is considered that the arguments contained in the concepts of invalidity in the pursued claims are inadmissible.

For all the foregoing reasons, the following is resolved:

FIRST. The present unconstitutionality action is partially accepted and is regarded as groundless.

SECOND. The present unconstitutionality action pertaining articles 148 of the Penal Code, 16 Bis 7 of the General Health Law both of the Federal District and Third Transitory of the refuted Amendment Decree is dismissed.

THIRD. We recognize the validity of articles 144, 145, 146 and 147 of the Penal Code of the Federal District, as well as articles 16 Bis 6, third paragraph and 16 Bis 8, last paragraph, of the Health Law of the Federal District.

FOURTH. This ruling is to be published in the Weekly Newspaper of the Federation and its Gazette.

Notify; the parties by official means and when able archive the case record.

Since the project was approved by a unanimous decision of eleven votes, which declare the unconstitutionality actions partially accepted; dismissal of the unconstitutionality actions in relation to articles 148 of the Penal Code and article 16 Bis 7 of the Health Law both of the Federal District, as well as that made against Third Transitory of the refuted Amendment Decree; Efficacy of articles 16 Bis 6, third paragraph and 16 Bis 8, last paragraph of the Health Law for the Federal District is recognized; efficacy of articles 144, 145, 146 and 147 of the Penal Code for the Federal District is recognized, since they do not contravene the certainty and exact application of law principles, it is resolved to declare inadmissible the previously mentioned actions of unconstitutionality and that the efficacy of articles 144, 145, 146 and 147 of the Penal Code of the Federal District, and that the resolution be published in the Weekly Newspaper of the Federation, published in the Official Journal of the Federation, and in the Official Gazette of the Federal District and the Weekly Newspaper of the Federation.

Tribunal Chairman Guillermo I. Ortiz Mayagoitia declared that the case was resolved on the aforementioned terms.

Signed by the Tribunal Chairman and Tribunal Rapporteur, with the General Secretary of Rulings whom approves and gives certainty.

TRIBUNAL CHAIRMAN:

GULLERMO I. ORTIZ MAYAGOITIA.

TRIBUNAL RAPPORTEUR:

JOSÉ RAMÓN COSSÍO DÍAZ.

GENERAL SECRETARY OF RULINGS:

LIC. JOSÉ JAVIER AGUILAR DOMÍNGUEZ.