

**MOTION FOR CONSTITUTIONAL RELIEF
UNDER AMPARO PROCEEDINGS IN
REVIEW 1388/2015
PLAINTIFF: JANE DOE**

PRESIDING JUSTICE: ALFREDO GUTIÉRREZ ORTIZ MENA

COURT CLERK: M.G. ADRIANA ORTEGA ORTIZ

Mexico City. The First Chamber of the Mexican Supreme Court of Justice, in the session held on **May 15, 2019**, hereby enters the following ruling:

I. BACKGROUND

1. On September 24, 2013, JANE DOE was informed that she was pregnant by staff of the National Medical Center. Her team of doctors informed her that the pregnancy was considered high-risk because, months earlier, she had undergone gastric bypass surgery; she was 41 years old; and was overweight. For these reasons, JANE DOE remained hospitalized from September 25th to 28th, 2013. At the time, JANE DOE was at risk of having a miscarriage¹.
2. At 15.5 weeks gestation, a genetic amniocentesis test was administered to JANE DOE to uncover whether the fetus had any hereditary condition. The procedure involved introducing a needle to obtain amniotic fluid, so the sac containing the fetus was at risk of bursting².
3. On October 14, 2013, JANE DOE presented discomfort, bleeding and contractions. She was then hospitalized again due to another threat of miscarriage. The next day she was discharged³.

¹ Sworn statement given by the plaintiff in the motion for constitutional relief under amparo proceedings, which was considered proven by the district judge. Ruling in the amparo proceedings ***** , page 5.

² *Ibidem*, page 5.

³ *Ibidem*, page 6.

AMPARO UNDER REVIEW 1388/2015

4. On October 30, 2013, JANE DOE received the results of the genetic amniocentesis, informing that the fetus had Klinefelter Syndrome⁴. This syndrome inhibits the development of genitals at puberty, but it would not prevent the fetus from being self-sufficient.
5. Given all these complications that put her physical and emotional health at risk, JANE DOE verbally asked the hospital doctors to terminate the pregnancy on several occasions⁵.
6. JANE DOE was constantly refused the procedure, so on November 6, 2013, she submitted a written request to interrupt her pregnancy, in exercise of her right to health and in light of the high risk nature of her pregnancy, which put at risk her health and life - because of her age and weight problem⁶. JANE DOE submitted various documents, including the technical opinion of Dr. X, a surgeon specializing in gynecology and obstetrics. The doctor detailed therein that JANE DOE had a high risk pregnancy, due to morbid obesity, which caused a higher maternal risk of diabetes, thromboembolism and pre-eclampsia. At the same time, due to the gastric bypass surgery, he pointed out that JANE DOE faced the risk of suffering malnutrition and obstruction of the small intestine due to internal hernia. Consequently, the doctor recommended terminating the pregnancy⁷.
7. As a result of the the care provided by the hospital that performed the procedure to interrupt the pregnancy, on November 19, 2013 she was hospitalized urgently in medical unit P with post-abortion⁸puerperium mediatus. She was discharged on November 21, 2013.

⁴ Cytogenetic prenatal study dated October 23, 2013, submitted as evidence by the plaintiff in her motion for constitutional relief under amparo proceedings. Ruling in the amparo proceedings ***** , page 88-89.

⁵ Sworn statement given by the plaintiff in the motion for constitutional relief under amparo proceedings, which was considered proven by the district judge. Amparo Proceeding Case Record ***** , pp. 6-7.

⁶ Written request for termination of pregnancy submitted as evidence by the plaintiff in her motion for constitutional relief under amparo proceedings. Amparo Proceeding Case Record ***** , pp. 85-87.

⁷ Technical opinion submitted as evidence by the plaintiff in her motion for constitutional relief under amparo proceedings. Amparo Proceeding Case Record ***** , pp. 90-91.

⁸ Sworn statement given by the plaintiff in the motion for constitutional relief under amparo proceedings, which was considered proven by the district judge. Amparo Proceeding Case Record ***** , pp. 6-7

8. Finally, on November 20, 2013, JANE DOE received in the mail, the reply of the responsible authorities dated November 7, 2013. Her request was denied on the ground that the fetus could be self-sufficient even if it had Klinefelter Syndrome. In addition, it was indicated that the Institute for Security and Social Services for State Workers (ISSSTE) is a federal health institution, which is governed by the General Health Law and does not provide for the legal interruption of pregnancy⁹.

II. PRELIMINARY ISSUES

9. **Motion for Constitutional Relief under Amparo Proceedings.** The plaintiff argued the following:
- a) The refusal of the authorities to carry out the legal interruption of pregnancy directly affected the right to health afforded to JANE DOE, by preventing her from reaching an overall physical, psychological and social state of health. The authority replied that the termination of pregnancy, based on health grounds, did not apply because the laws governing the ISSSTE do not consider risks to the mother's health as sufficient cause. On the contrary, they consider that the cause is related to the fetus, pointing out that the Klinefelter Syndrome is not not incompatible with life.
 - b) The authority breached its obligation to guarantee the right to health, since it ignored the conditions in which the pregnancy occurred, consisting of the multiple threats of miscarriage, the age of the plaintiff, her morbid obesity, primiparous condition, as well as the information that the fetus had Klinefelter Syndrome, which implies lifelong submission to medical treatment and supply of hormones and drugs that definitively diminishes the quality of life of any human being. In light of these challenges, termination of pregnancy was an option. Thus, it is evident that by denying

⁹ Written response supporting the refusal of the authorities responsible for terminating the pregnancy, submitted as evidence by the plaintiff in her motion for constitutional relief under amparo proceedings. Amparo Proceeding Case Record *****, pp. 92-93

AMPARO UNDER REVIEW 1388/2015

her the interruption of her pregnancy, the medical personnel did not take into consideration the imminent danger to the health of JANE DOE. A risk is considered to exist and, with it, a health problem when a person's health could be compromised. Therefore, termination of pregnancy for health reasons is an option when facing these risks.

- c) *JANE DOE's* right to health was denied to her because the legal framework governing the responsible authority's purview does not provide for the termination of pregnancy when it endangers the woman's health. Additionally, medical personnel did not comprehensively assess, within the framework of human rights, the risks to her physical and mental health if pregnancy continued.
- d) The authority did not abide by its obligations to respect, protect and guarantee that as a state entity human rights fall within its purview and that it must provide health protection based on the principles of equality and non-discrimination. The responsible authority denied access to abortion when it was a way of respecting, protecting and guaranteeing the right to health. Thus, the responsible authority failed in its duty to protect *JANE DOE's* health and physical and mental integrity, because it did not take into account her decision not to carry the pregnancy to term because it harms her health.
- e) In this case, constitutional control falls upon whether the interruption of pregnancy when a woman's health is at risk implies a necessary measure to guarantee the right to health recognized both in the Constitution and in various international human rights conventions.
- f) The ISSSTE health authorities had to adjust their actions to a broad interpretation of the right to health. To this end, the provisions of both the Constitution and international treaties should have been taken into consideration.

AMPARO UNDER REVIEW 1388/2015

- g) The contested action contained a series human rights violations demonstrating a history of systematic discrimination against women, by ignoring the effects on their health when they have high-risk pregnancies and denying reproductive healthcare services, under the argument that federal penal and health regulations prevent them from satisfying this constitutional right.
- h) The refusal of the authorities to provide the service lawfully requested seriously violates JANE DOE's right to reproductive health, causing grave consequences for her personal integrity, both physical and psychological, as well as in her personal finances, which continue to have effects to this day.
- i) Her right to health was denied on the grounds that the legal framework governing the responsible authorities did not provide for the termination of pregnancy when it endangered the woman's health, as well as the indifference of the medical personnel who assessed her.
- j) The responsible authorities violate the principle of *pro persona* and the principle of progressivity by considering that the legal interruption of pregnancy is excluded from a comprehensive interpretation of the right to health, since although the General Health Law does not expressly establish authorization to carry out this procedure, the fact is that there are sufficient elements of the federal legal order itself to conclude that, in compliance with the aforementioned principles, the responsible authorities were obliged to grant to the request made by the plaintiff.
- k) It was incorrect for the responsible authority to argue that the syndrome detected in the fetus was not incompatible with a healthy life, since this reply is inconsistent with the request made. In this sense, the authority had to rule on women's right to health, which is a right expressly protected by the Constitution and international human rights conventions. Above all, since JANE DOE had a high-risk pregnancy because she was 40 years

AMPARO UNDER REVIEW 1388/2015

old, had previously undergone gastric bypass surgery and had suffered a prior threatened miscarriage. It is constitutionally unacceptable that a woman's health should be put at risk by the continuity of a pregnancy at an advanced age and with a medical history of that nature. The decision to terminate a pregnancy rests solely and exclusively with the woman without the State being able to intervene by establishing a *priori* a restriction or preventing access to reproductive healthcare services.

- l) The refusal of the authorities to provide her with comprehensive service that would promptly and effectively address to her demand for access to health translated into the need for JANE DOE to seek private institution to interrupt her pregnancy and thus have her right to health, both physical, psychological and social, restored. If these actions had been duly satisfied by the responsible authorities, JANE DOE would not have found it necessary to carry them out on her own. This situation worsened the damage caused to JANE DOE. Having to resort to private services to access the right to health generated a severe and disproportionate burden for the plaintiff, since she had to obtain a bank loan of approximately \$35,000.00 and subsequently pay for the medication required also with private resources.

- m) The decision of the authorities not to allow *JANE DOE* to terminate her pregnancy for health reasons was an arbitrary interference by the State in a person private life because it implied an unjustified invasion of her personal sphere. This decision contravenes reproductive freedom and autonomy.

- n) JANE DOE was repeatedly the victim of psychological mistreatment by the authorities who treated her at the National Medical Center, since on several occasions she expressed concern and anguish for the implications on her health and quality of life caused by a pregnancy of a fetus with the diagnosed syndrome would have, the doctors responded with arguments

AMPARO UNDER REVIEW 1388/2015

that disqualified what she referred to and even questioned the exercise of her sexual freedom.

- o) JANE DOE was subjected to cruel and inhuman treatment due to the refusal to provide pregnancy termination services. This has caused her a psychological impact that continues and obligates her to receive the corresponding psychological attention to restore her state of mental health. This implies significant and measurable cost.

10. **Ruling on the Motion for Constitutional Relief under Amparo Proceedings.** The legal grounds for dismissal expressed by the District Court hearing the case were the following:

- a) The merits of the case cannot be studied because granting motion for constitutional relief would have no effect whatsoever because the subject matter of government action being challenged ceased to exist. The plaintiff herself acknowledges that her pregnancy was terminated in a private hospital.
- b) Thus, if the refusal to terminate the pregnancy of the plaintiff were to prove unconstitutional, it would be legally impossible for the constitutional protection to have any effect whatsoever, since it would undoubtedly be that of obliging the responsible authority to perform the denied abortion.

11. **Motion for Review.** The plaintiff challenged the decision in the following terms:

- a) The motion for constitutional relief originated from the refusal to interrupt the pregnancy, which caused JANE DOE's health to continue to be at risk. In light of this situation, JANE DOE's health was given priority and the pregnancy was interrupted in a private hospital acting in good faith.

AMPARO UNDER REVIEW 1388/2015

- b) The judge was wrong to dismiss the motion in terms of the government action being contested, which consisted in the official notice issued by the responsible authorities because the purpose of the motion for constitutional relief was not to oblige the authority to perform an abortion on the plaintiff. The purpose sought was not the interruption of the pregnancy, but to declare the contested action as unconstitutional and repair in full of the harm caused by the violation of her human rights.
- c) As long as her pregnancy affected her health, she should not be required to decide whether to continue with the motion for constitutional relief while continuing with the pregnancy as the subject of the trial or to interrupt the pregnancy in order to safeguard her health and even her life.
- d) To leave human rights violations unexamined solely because the pregnancy has already been terminated would mean voiding one of the central duties of the motion for constitutional relief in terms of human rights: to seek the broadest protection possible.

VII. IN-DEPTH STUDY

- 12. Regarding the subject matter of this case, first it is necessary to assess whether the judge's decision to dismiss the case without examining its merits was correct. Secondly, in the event of considering that merit exists, we must determine whether the authorities failed to comply with their obligation under the constitutional right to health protection when they refused to interrupt the plaintiff's pregnancy for health reasons.
- 13. With respect to the judgment under appeal, the district court considered that it would be legally impossible for the constitutional relief to have any effect, since the subject matter of that government action ceased to exist, while the plaintiff herself expressly stated in her motion that on November 11, 2013 her pregnancy was terminated in a private hospital.

AMPARO UNDER REVIEW 1388/2015

14. Thus, the district judge concluded that it would be legally impossible for any constitutional protection to have any effect, since it would undoubtedly consist of forcing the responsible authority to perform the abortion that had been denied.
15. The plaintiff was dissatisfied with this judgment. The first objection consisted, in general terms, in the fact that the refusal constitutes a direct violation by the authorities to the obligations and duties imposed on them by the constitutional right to health and its protection, as enshrined in the Constitution and international treaties. This violation must be examined and ruled upon even though the pregnancy had already been interrupted; otherwise, it would mean voiding the motion for constitutional relief of its principal element: to seek the broadest protection possible for human rights.
16. Second, the plaintiff argues that the decision taken by the judge to reject the contested action was incorrect, since the purpose of the filing a motion for constitutional relief was not to oblige the authorities to perform an abortion on the plaintiff. The objective pursued was no longer the interruption of pregnancy, but rather the comprehensive reparation of the damage suffered by the violation of human rights.
17. Thirdly, the plaintiff argues that in the motion for constitutional relief it had to be assessed, regardless of other grievances, whether her human rights had been violated, since her pregnancy harmed her health and she could not be required to decide between continuing with the motion for constitutional relief while continuing with the pregnancy as the subject of the trial or interrupting the pregnancy in order to safeguard her health and, possibly, her life.
18. This First Chamber considers that the grievances set forth by the plaintiff are essentially well-founded with sufficient merit to uphold that the district judge should not have declared inadmissible the motion for constitutional relief with respect of the contested action consisting of the refusal to terminate the pregnancy on health grounds.

19. Firstly, the plaintiff is correct when stating that the constitutional judge must determine if the administrative government action¹⁰ challenged and issued by competent authority affected substantive rights and if it constituted direct violation of the obligations that the constitutional right to health imposes on that authority. The constitutionality of the reasons given for denying the service requested must also be established, and if these satisfy the constitutional requirement to be duly grounded in law and fact, and to respond, in its terms, to the request made. All decisions correspond to an in-depth study based on the constitutional parameter of the right to health and its protection¹¹.....

¹⁰ **Federal Law of Administrative Procedure.** Article 3.- The elements and requirements of the administrative government action include that it must: I. be issued by a competent agency, through a public servant, and if said agency is collegiate, it must meet the formalities required by law or decree to issue it; II. its objective must fall within the authorized subject matter; determined or determinable; precise as to the circumstances of time and place, and provided for by law; III. comply with the public interest purpose regulated by the rules in which it is specified, without other purposes being pursued; IV. be recorded in writing and must contain the handwritten signature of the issuing authority, except in cases where the law authorizes another form of issuance; V. be duly grounded in law and fact; VI.- (repealed) repealed section DOF 24-12-1996; VII. be issued subject to the provisions relating to administrative procedure set forth in this Law; VIII. be issued without any error in its objective, cause or reason, or as to the purpose of the action; IX. be issued without willful misconduct or violence; X. Must mention the organ from which it emanates; XI.- (repealed) Derogated fraction DOF 24-12-1996 XII. be issued without error with respect to the specific reference to file identification, documents or full name of persons; XIII. be issued indicating place and date; XIV. in the case of administrative actions that should be notified, the office where its file is located and may be consulted must be mentioned; XV. in the case of administrative actions that may be challenged, mention must be made of the remedies available, and XVI. be issued expressly deciding all points proposed by the parties, or established by law.

¹¹ **EFFECTIVE JUDICIAL PROTECTION. IN INTERPRETING THE REQUIREMENTS AND FORMALITIES ESTABLISHED BY LAW FOR THE ADMISSIBILITY AND MERITS OF LAWSUITS, THE AGENCIES RESPONSIBLE FOR ADMINISTERING JUSTICE MUST BEAR IN MIND THE RATIO OF THE RULE IN ORDER TO AVOID FORMALITIES THAT IMPEDE A SUBSTANTIVE PROSECUTION OF THE CASE.** Effective judicial protection, enshrined as a human right in Article 17 of the Mexican Constitution and Article 8, paragraphs 1 and 25, paragraph 1 of the American Convention on Human Rights, as an effective remedy, implies the obligation of the courts to resolve disputes brought before them without unnecessary obstacles or delays and avoiding unreasonable formalisms or interpretations that prevent or hinder substantive prosecution and genuine judicial protection. Therefore, when interpreting the requirements and procedural formalities provided for by law, the agencies responsible for administering justice should bear in mind the ratio of the norm in order to avoid that mere formalisms prevent a substantive prosecution of the case. Consequently, the requirements for admitting trials, ancillary proceedings or any appeals filed, established by the legislator, are of strict interpretation so as not to limit the fundamental right to effective judicial protection, making possible, in essence, the exercise of said right. Therefore, with the support of the principles *pro homine* and *in dubio pro actione*, the most favorable interpretation for the exercise of this human right must be sought, without overlooking the essential assumptions concerning admissibility and origin of lawsuits, ancillary proceedings allowed therein or appeals filed. Motion for direct constitutional relief under revision 1080/2014. Héctor Javier Liñan García. May 28, 2014. Five votes by Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Alfredo Gutiérrez Ortiz Mena, Olga Sánchez Cordero de García Villegas and Jorge Mario Pardo Rebolledo. Presiding Justice: Olga Sánchez Cordero de García Villegas. Court Clerk: Ricardo Manuel Martínez Opinion:

20. The plaintiff is also partially right when she affirms that the authorization to interrupt pregnancy is not the only outcome that can be granted under the protection, especially since what is alleged is not only the refusal, but that the plaintiff's right to health was harmed because of said refusal. In this regard, it must be said that health is a process - a *continuum* - involving a series of habits to enjoy wellbeing. Health conditions that are not adequately and timely treated cause repercussions that, in turn, damage the right to health. In addition, this First Chamber has upheld that the alleged initial impossibility of assigning outcome to the motion for constitutional relief does not *per se* render this motion inadmissible nor can it render the constitutional proceeding ineffective in protecting and restoring human rights that have been violated.¹²

1a. CCXCI/2014 (10a.) **INADMISSIBILITY OF THE MOTION FOR CONSTITUTIONAL RELIEF UNDER AMPARO PROCEEDINGS. IF A GRIEVANCE INVOLVING THE SUBSTANTIVE STUDY OF THE MATTER IS ASSERTED, IT MUST BE DISMISSED.** The grounds for the impropriety of the motion for constitutional relief must be clear and unobjectionable, from which it follows that if an argument intimately related to the substance of the business is asserted, it must be dismissed. This criterion has integrated the jurisprudence P./J. 135/2001, published in the Weekly Federal Court Report and its Gazette, Ninth Period, Tome XV, January 2002, page 5, under the heading "INADMISSIBILITY OF THE MOTION FOR CONSTITUTIONAL RELIEF UNDER AMPARO PROCEEDINGS. IF A GRIEVANCE INVOLVING THE SUBSTANTIVE STUDY OF THE MATTER IS ASSERTED, IT MUST BE DISMISSED."

¹² Isolated opinion P. XVIII/2011 of the Plenary Session of the Mexican Supreme Court, page 32 of Volume XXXIV (August 2011) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. CLXXIV/2015 (10a.) of the First Chamber of the Mexican Supreme Court, page 440 of Volume I of Book 18 (May 2015) of the Weekly Federal Court Report and its Gazette, under the heading: "INADMISSIBILITY OF THE MOTION FOR CONSTITUTIONAL RELIEF UNDER AMPARO PROCEEDINGS. A VIOLATION OF THE PRINCIPLE OF THE RELATIVITY OF RULINGS CANNOT BE ALLEGED AND, THEREFORE, A LAWSUIT CANNOT BE DISMISSED WHEN A LAWFUL INTEREST EXISTS IN THE DEFENSE OF A COLLECTIVE RIGHT"; as well as in the Isolated Opinion 1a. CLXXIII/2015 (10a.) of the First Chamber of the Mexican Supreme Court, page 441 of Volume I of Book 18 (May 2015) of the Weekly Federal Court Report and its Gazette, under the heading: "INADMISSIBILITY OF THE MOTION FOR CONSTITUTIONAL RELIEF UNDER AMPARO PROCEEDINGS. THE GROUNDS CONCERNING THE IMPOSSIBILITY OF REPAIRING ALLEGATE VIOLATION DOES NOT OCCUR IF A LEGITIMATE INTEREST IS DETERMINED FOR A NON-GOVERNMENT ORGANIZATION IN DEFENSE OF THE RIGHT TO EDUCATION"; Isolated Opinion 1a. CLXVII/2015 (10a.) of the First Chamber of the Mexican Supreme Court, page 442 of Volume I of Book 18 (May 2015) of the Weekly Federal Court Report and its Gazette, under the heading: "LEGITIME INTEREST OF NON-GOVERNMENT ORGANIZATIONS IN DEFENSE OF THE RIGHT TO EDUCATION. THE JUDGE MUST ANALYZE THE RIGHT QUESTIONED IN THE LIGHT OF THE ALLEGED CLAIMS TO DETERMINE THE ADMISSIBILITY OF THE MOTION FOR CONSTITUTIONAL RELIEF UNDER AMPARO PROCEEDINGS"; Isolated Opinion : 1a. XXI/2018 (10a.) of the First Chamber of the Mexican Supreme Court, page 1101 of Volume I of Book 52 (March 2018) of the Weekly Federal Court Report and its Gazette, under the heading: "PRINCIPLE OF RELATIVITY. ITS REINTERPRETATION IN LIGHT OF THE CONSTITUTIONAL AMENDMENT DATED JUNE 10, 2011."

AMPARO UNDER REVIEW 1388/2015

21. An abortion performed for health reasons essentially aims at restoring and protecting the health of the mother. Her health is being affected not only by pregnancy, but by the physical or mental illness that appears or worsens if it continues; which may also complicate the pregnancy. Thus, the interruption of pregnancy caused by a health complication is the beginning of a process to recover health and not its completion, which makes critical and presumably violating human rights any deliberate denial or delay of medical care services aimed at resolving such medical conditions. Thus, if what the responsible authorities are accused of is a refusal to provide a health service - a medical care service recommended as an appropriate therapeutic intervention to positively affect the recovery of the plaintiff's health - it can be confirmed whether this attitude violated the plaintiff's right to health and its protection, and a pertinent form of restitution can be indicated after an in-depth study concluding that such a violation did occur. This is the necessary health protection that does not cease because the abortion was performed in a private hospital; rather, her state of health must be monitored, especially because her medical history indicates the complications caused to the plaintiff as a result of said refusal.
22. The plaintiff is also right when she argues that the restricted interpretation of the legal provisions hinders a women's access to justice when it comes to the interruption of pregnancy. In fact, this First Chamber has already repeatedly upheld that investigation and adjudication processes in different matters: civil, family and penal, should incorporate the gender perspective to avoid the historical disadvantage due to sex or gender from adversely affecting the legitimate claims of justice, especially for women and people of various sexual orientation.¹³

¹³ Resolved in the motion for constitutional relief under amparo proceedings in reivew 554/2013, resolved in session held on March 23, 2015, presided by Justice Alfredo Gutiérrez Ortiz Mena, approved unanimously by 5 votes; Direct motion for constitutional relief under amparo proceedings in reivew 4811/2015, resolved in session held on May 25, 2016, presided by Justice Arturo Zaldívar Lelo de Larrea, approved unanimously by 4 votes. Absent: Justice Norma Lucía Piña Hernández; Direct motion for constitutional relief under amparo proceedings in reivew 912/2014, resolved in session held on November 5, 2014, presided by Justice José Ramón Cossío Díaz, approved unanimously by 5 votes; Direct motion for constitutional relief under amparo proceedings in reivew 2655/2013, resolved in session held on November 6, 2013, presided by Justice Alfredo Gutiérrez Ortiz Mena, approved by a majority of 4 votes. Vote against Justice Jorge Mario Pardo Rebolledo;

23. Following this consistent line of jurisprudence, this First Chamber considers that the suitability of motion for constitutional relief in cases in which women¹⁴ seek to combat an alleged authoritarian action by the authorities in charge of facilitating their access or providing them with pregnancy-related services should also be studied from a gender perspective. An approximation of this nature to the legal provisions governing the motion for constitutional relief, especially with respect to the *disappearance* of the purpose for the trial, would prevent the vicissitudes of a biological process such as pregnancy, which can only be experienced by persons with a female reproductive system, from determining their access to the restitution of rights and the correction of the authorities that corresponds to the motion for constitutional relief under Amparo proceedings.

Direct protection 12/2012, resolved in session held on 12 June 2013, presided by Justice José Ramón Cossío Díaz, approved band a majority of 3 votes. Votes against those issued by Justices Alfredo Gutiérrez Ortiz Mena and Justice Olga Sánchez Cordero de García Villegas; Direct motion for constitutional relief under amparo proceedings in reivew 6181/2013, resolved in session held on March 7, 2018, presided by Justice Arturo Zaldívar Lelo de Larrea, approved unanimously by 5 votes; Direct motion for constitutional relief under amparo proceedings in review 4906/2017, resolved in session held on March 7, 2018, presided by Justice José Ramón Cossío Díaz, approved unanimously by 5 votes; Motion for constitutional relief under amparo proceedings 5490/2016, resolved in session held on March 7, 2018, presided by Justice Arturo Zaldívar Lelo de Larrea, approved unanimously by 5 votes; Motion for constitutional relief under amparo proceedings in review 601/2017, resolved in session held on April 4, 2018, presided by Justice José Fernando Franco González Salas, approved unanimously by 5 votes.

Also by Jurisprudence 1a./J. 22/2016 (10a.) of the First Chamber of the Mexican Supreme Court, page 836 of Volume II of Book 29 (April 2016) of the Weekly Federal Court Report and its Gazette, under the heading: "ACCESS TO JUSTICE IN CONDITIONS OF EQUALITY. ELEMENTS TO JUDGE WITH A GENDER PERSPECTIVE. "Isolated Opinion 1a. CLX/2015 (10a.) of the First Chamber of the Mexican Supreme Court, page 431 of Volume I of Book 18 (May 2015) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT OF WOMEN TO A LIFE FREE FROM DISCRIMINATION AND VIOLENCE. AUTHORITIES ARE OBLIGATED TO TAKE COMPREHENSIVE MEASURES WITH GENDER PERSPECTIVE TO COMPLY WITH DUE DILIGENCE IN THEIR ACTION"; Isolated Opinion 1a. LXXIX/2015 (10th.) of the First Chamber of the Mexican Supreme Court, page 1397 of Volume II of Book 15 (February 2015) of the Weekly Federal Court Report and its Gazette, under the heading: "IMPARTITION OF JUSTICE FROM A GENDER PERSPECTIVE. THIS ANALYTICAL METHOD MUST BE APPLIED IN ALL CASES INVOLVING ASYMETRIC RELATIONS, PREJUDICES AND STEREOTIC PATTERNS, INDEPENDENTLY OF THE GENDER OF INVOLVED PEOPLE"; Isolated Opinion 1a. XCIX/2014 (10a.) of the First Chamber of the Mexican Supreme Court, page 524 of Volume I of Book 4 (March 2014) of the Weekly Federal Court Report and its Gazette, under the heading: "ACCESS TO JUSTICE IN CONDITIONS OF EQUALITY. ALL JURISDICTIONAL AGENCIES IN THE COUNTRY MUST PROVIDE JUSTICE FROM A GENDER PERSPECTIVE"; Isolated Opinion 1a. XXIII/2014 (10a.) of the First Chamber of the Mexican Supreme Court, page 677 of Volume I of Book 3 (February 2014) of the Weekly Federal Court Report and its Gazette, under the heading: "PERSPECTIVE OF GENDER IN THE ADMINISTRATION OF JUSTICE. ITS MEANING AND SCOPE. "

¹⁴ The term women is used because it is the language used by the plaintiff and because international instruments use it to refer to a common experience of oppression. However, it is not unknown that pregnancy may also be experienced by transgender men.

AMPARO UNDER REVIEW 1388/2015

24. In this regard, it is important to recall that this First Chamber has already ruled that the constitutional regularity parameter of the right to equality and non-discrimination¹⁵ recognizes that non-discrimination occurs not only when rules, policies, practices and programs explicitly invoke a prohibited factor of discrimination - a suspicious category¹⁶- but also when they are apparently neutral but the result of their content or application generates a disproportionate impact on historically disadvantaged individuals or groups, without objective and reasonable justification¹⁷.
25. This means, among other things, that interpretations of legal provisions may be discriminatory when they do not respond reasonably to differences, whether inherent in individuals or created by the social order, particularly when these differences are associated with social, political or economic marginalization, as is the case with gender identity differences that tend to disadvantage women and people of various sexual orientation.
26. Pregnancy is a biological process only experienced by people with a female reproductive system. This process has a fixed period time, even when there is no intervention in its development. Additionally - as is the case - when

¹⁵ Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 1.2 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; and Article 1 of the Federal Law to Prevent and Eliminate Discrimination. Also see: Inter-American Court of Human Rights, OC-18/03, and the cases: *Venezuela, Reverón Trujillo vs. Venezuela*, *Niñas Yean and Bosico vs. Dominican Republic*, *Yatama vs. Nicaragua*, *Nadege Dorzema and others vs. Dominican Republic*, *Comunidad Indígena Sawhoyamaxa vs. Paraguay*, and *Castañeda Gutman vs. Mexico*; among others. Similarly, Human Rights Committee, General Comment 18 and General Comment 28; Committee on Economic, Social and Cultural Rights, General Comment 28; and Committee against Discrimination against Women, General Recommendation 25.

¹⁶ This First Chamber, when ruling on the direct motion for constitutional relief under amparo proceedings in review 6606/2015, said that the suspicious categories mean classifying criteria based on traits of a person that they cannot take away without at the risk of losing their identity; that is, traits that persons cannot change or that it would not be lawful to ask them to change. Suspicious categories - enshrined in the Constitution and international human rights law as prohibited areas of discrimination - are associated with cultural devaluation, social disadvantage and political marginalization. Therefore, they are not criteria on the basis of which it is possible to rationally and equitably distribute assets, rights or social burdens, unless the purpose of such distribution is to resolve or overcome the causes and consequences of such devaluation, disadvantage or marginalization.

¹⁷ Direct motion for constitutional relief under amparo proceedings in review 1464/2013, resolved in session held on November 13, 2013, presided by Justice Alfredo Gutiérrez Ortiz Mena, by unanimity of 5 votes.

AMPARO UNDER REVIEW 1388/2015

pregnancy produces or worsens risks to a person's health, these tend to increase as gestation progresses.

27. Thus, as the plaintiff argues, if the cause of cessation of effects or when the subject matter of the claim cease to exist were to be strictly applied in all cases where this remedy is used to challenge human rights violations committed by the authorities in matters related to pregnancy, the result would be that protection and the restitution of rights provided by it, would be - more often than not - inaccessible to women when the authorities hinder them or deny them access to a health service that only they need. ¹⁸ For example, the refusal to provide medicines that prevent perinatal transmission of HIV-AIDS; the refusal to provide prenatal care services; obstetric abuse during childbirth or during an abortion procedure; refusal to provide abortion services; discriminatory regulations for access to prenatal care services, among other scenarios in which pregnant women and public authorities of different affiliations interact.
28. These presumably arbitrary and human rights-violating actions by the authorities responsible for respecting, protecting and guaranteeing these rights - in terms of our Constitution - would most likely be beyond constitutional scrutiny, by virtue of an uncontrollable event which, moreover, significantly increases people's vulnerability, and this despite the fact that the rights at stake in these cases can evidently be restored, especially if one takes into account that health is a process and that the interruption of pregnancy for health reasons is only part of the process by which a woman initiates the path towards recovery in light of a complication that appears or is exacerbated with pregnancy.
29. The plaintiff is also right when she argues that in cases of refusal to provide abortion services, these matters would soon become devoid of subject matter, either because the pregnancy completed its natural cycle or because the woman decides not to submit herself heroically to the risk - in the case of

¹⁸ General Recommendation No. 24 of the Committee on the Elimination of All Forms of Discrimination against Women.

AMPARO UNDER REVIEW 1388/2015

health or danger of death; to the violence of continuing - in the case of rape¹⁹- or to the physical and mental suffering²⁰ of a pregnancy with congenital malformations, with the mere purpose of preserving the matter of judgment. This means that the protection and restitution of rights pursued in it would be inaccessible to women because of a biological difference, unless they opt for heroic behavior, which does not even guarantee that the matter of the trial will continue because the pregnancy will terminate either way and - not infrequently - this will occur before a substantive ruling.

30. In this case, if the judge is considered to be right when dismissing the lawsuit, the constitutional protection and the remedies therein would inevitably be inaccessible to women who seek to overcome arbitrary actions by the health authorities consisting of the refusal to provide them with medical care to interrupt risky pregnancies, unless they accept to submit heroically to the risk of continuing the pregnancy.
31. Thus, an alleged violation of the constitutional and conventional right to health and its protection would be beyond the scrutiny of the constitutional motion, when the authorities responsible for guaranteeing that constitutional right refused to provide services to terminate a pregnancy for health reasons, even though women are entitled to health and they are in a preferential situation to be afforded such right.
32. Therefore, this Court considers that -in this case- a possible violation of constitutional rights by the responsible authorities should not be ruled out *a priori* and without a substantive ruling²¹, by merely arguing that the only

¹⁹ Amparo in review 601/2017, decided by the Second Chamber on April 4, 2018

²⁰ Case KL v. Peru, Human Rights Committee.

²¹ *Cfr.*, as a mere reference, ruling T-314/11 of the Colombian Constitutional Court: Ruling SU-667/98, indicated that the inadmissibility of the protective action according to numeral 4 of Article 6 of Decree 2591 of 1991 is summarized in the elimination of all factual possibility of re-establishing the violated rights. The Court, in this decision, reiterated that in view of the violation of a fundamental right, it is necessary for the judge verify the existence of the fact or actual damage based on the effectiveness that the order consigned in said action may have with respect to the specific case. In this regard, in the Court's opinion, it is clear that if the effects of the damage persist and are capable of being interrupted, so must the constitutional judge. It is essential to reiterate that when faced with an application for protection, the guardianship judge must establish which fundamental rights are alleged to have been violated and then define whether the effects of the harmful event persist, whether they are liable to be interrupted or, better, whether there is any factual possibility of re-establishing the fundamental rights that have been violated.

AMPARO UNDER REVIEW 1388/2015

restitutorial effect of the motion for constitutional relief under Amparo proceedings would be to order the termination of the pregnancy. The protection - in these cases - can have effects other than this unique possibility, without altering its purpose.

33. First, it is incorrect to determine - as will be detailed in the in-depth study - that the refusal of the authorities responsible for carrying out the medically indicated abortion on health grounds only constitutes a violation of a possible right of the plaintiff to terminate a pregnancy when it puts her health at risk, and that authorizing the procedure is the only effect that can be imposed as restitution for the violation consisting of the refusal.
34. If the authorities were found responsible for a violation of the plaintiff's right to health, the effect of the motion for constitutional relief could be to order the restitution of that right and the provision of medical care services to combat the consequences of the negative impact on the plaintiff's health, while - despite being an ISSSTE beneficiary – the plaintiff was forced to postpone the termination of a pregnancy that jeopardized her health and demanded, for that reason, a prompt resolution. Although the pregnancy was terminated, it cannot be ignored that the refusal had dilatory effects that increased the risk of health suffered by the plaintiff, and that caused repercussions and various complications.
35. The proper provision of medical care to resolve the consequences is not only directly and immediately related to the claim, but falls within the purview of the responsible authority and constitutes an adequate restitution of the right to health, the possible violation of which must be examined on the merits.

See also Judgment T-170/2009, of the same Court: *"The lack of object for consummated damage means that the violation of the right was not repaired, but on the contrary, as a result of its lack of guarantee, the damage that was sought to be avoided with the order of the guardianship judge has been caused. In these cases, it is imperative that the amparo judge, both at trial and in the venue of the Review, rule on the violation of the rights invoked in the lawsuit, and on the scope of the same. It must also inform the plaintiff or the plaintiff's next of kin of the legal actions of any kind to which they may seek redress for the damage, and order that copies of the file be certified by the authorities it considers obliged to investigate the conduct of the defendants whose action or omission caused the aforementioned damage. In some cases, in which there has been a lack of object for consummated damage, the Constitutional Court has ordered the imposition of sanctions on defendants whose conduct culminated in the violation of fundamental rights, from which the damage in turn resulted.*

II. Study of the Constitutional Validity of the Contested Action

36. Once the contested action has been identified, the authorities to whom it is attributed and the technical obstacles have been overcome, this First Chamber is in a position to study of the allegations made by the plaintiff insofar as the contested action violated her right to health, by denying her a medical care service to which she had the right as a beneficiary of the Institute of Security and Social Services for State Workers.
37. To this end, this First Chamber will begin by defining, in accordance with the precedents of this Supreme Court, the parameter of constitutional regularity of the right to health and its protection, and then decide on its application in the case of an interruption of pregnancy due to health risks. Third, on the basis of this parameter and the concepts of violation invoked by the plaintiff, it will be determined whether the responsible authorities breached their obligations under the right to health and its protection, committed a direct violation of the constitution by doing so, whether they sufficiently substantiated the contested administrative act, and whether they interpreted the General Health Law in a restrictive manner inconsistent with the right to health and its protection. Finally, if the violation is found in the terms alleged by the plaintiff, the corresponding effects will be assigned to the constitutional ruling.

Right to Health and its Protection

38. Article 4 of the Federal Constitution states that:

[...] Every person has the right to health protection. The Law shall define the bases and types access to healthcare services and shall establish the concurrence of the Federation and the states in matters of general health, according to the provisions of Article 73, section XVI of this Constitution.

39. In different precedents, both adopted in plenary sessions and in chambers, this Supreme Court of Justice has considered that the right to health should

AMPARO UNDER REVIEW 1388/2015

be interpreted in the light of Article 4 of the Constitution and with various international conventions²², for legal symmetry²³. The Supreme Court has also endorsed the general comments of the United Nations on the subject²⁴. This interpretation is in accordance with Article 1 of the Constitution and the parameter of constitutional regularity²⁵. The Supreme Court of Justice has also accepted therein that the right to health is the "right of every person to enjoy the highest attainable standard of physical and mental health"²⁶ and is justiciable in different categories of activity.

²² The Plenary has stressed that, together with Article 4 of the Constitution, the right to health is integrated, among others, with the various provisions of Article 12 of the International Covenant on Economic, Social and Cultural Rights and, consequently, acquires an interpretative meaning with General Comment 14 adopted by the Committee on Economic, Social and Cultural Rights, as the authoritative interpretation of the international body in charge of its implementation is the result. See Motion for Constitutional Relief under Amparo Proceedings in revision 315/2010, op. cit. Moreover, the First Chamber has stated that the right to health also includes the authorized interpretation of both the Constitution and international treaties, namely the Supreme Court of Justice and the agencies authorized to interpret each international organization.

Regarding the First Chamber, the opinion LXB/2008, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND SUPPLEMENTED BY INTERNATIONAL HUMAN RIGHTS TREATIES."

With respect to the Second Chamber, see opinion CVIII/2014, page 1192 of Book 12 (November 2014) Volume I of the Gazette of the Judicial Weekly of the Federation, under the heading: "HEALTH. AT THE HIGHEST POSSIBLE LEVEL. IT MAY INCLUDE IMMEDIATE OBLIGATIONS, SUCH AS PROGRESSIVE COMPLIANCE."

²³ See jurisprudence 20/2014, page 202, Book 5 (April 2014) Volume I of the Gazette of the Judicial Weekly of the Federation, under the heading: "HUMAN RIGHTS CONTAINED IN THE CONSTITUTION AND IN INTERNATIONAL TREATIES. CONSTITUTE THE PARAMETER OF CONTROL OF CONSTITUTIONAL REGULARITY, BUT WHEN THE CONSTITUTION INCLUDES AN EXPRESS RESTRICTION TO THEIR EXERCISE, THE CONSTITUTIONAL TEXT WILL PREVAIL".

See also jurisprudence 22/2014, page 94 of Book 5 (April 2014) Volume I of the Gazette of the Judicial Weekly of the Federation, under the heading: "CONSTITUTIONAL QUESTION. FOR THE PURPOSES OF THE ORIGIN OF THE APPEAL FOR REVIEW IN DIRECT AMPARO, IS FURNISHED WHEN ITS SUBJECT MATTER DEALS WITH THE COLLISION BETWEEN A SECONDARY LAW AND AN INTERNATIONAL TREATY, OR THE INTERPRETATION OF A CONVENCONAL SOURCE NORM, AND IT IS OBSERVED PRIMA FACIE THAT THERE IS A HUMAN RIGHT AT STAKE."

²⁴ Isolated opinion XVI/2011 of the Plenary Session of the Mexican Supreme Court, page 29 of Volume XXXIV (August 2011) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. IMPOSES ON THE STATE THE OBLIGATIONS TO ENSURE THAT IT IS EXERCISED WITHOUT ANY DISCRIMINATION AND TO ADOPT MEASURES FOR ITS FULL REALIZATION".

²⁵ Contradiction of Opinion 293/2011, decided by the Plenary Session held on September 3, 2013, by the office of Justice Arturo Zaldivar Lelo de Larrea. Court Clerk: Arturo Bárcena Zubieta. Contradiction of Opinion 21/2011, resolved by the Plenary Session held on September 9, 2013, by the office of Justice Alfredo Gutiérrez Ortiz Mena. Court Clerks: David García Sarubbi, Miguel Antonio Núñez and Karla I. Quintana Osuna.

²⁶ Isolated opinion CVIII/2014 of the Second Chamber of the Mexican Supreme Court, page 1192 of Book 12 (November 2014) Volume I of the Gazette of the Judicial Weekly of the Federation, under the heading: "HEALTH. AT THE HIGHEST POSSIBLE LEVEL. IT MAY INCLUDE IMMEDIATE OBLIGATIONS, SUCH AS PROGRESSIVE COMPLIANCE." See also opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND SUPPLEMENTED BY INTERNATIONAL HUMAN RIGHTS TREATIES."

40. Article 12 of the International Covenant on Economic, Social and Cultural Rights states:

1, The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

2, The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

41. According to General Comment 14, issued by the Committee on Economic, Social and Cultural Rights, Article 12, paragraph 2 (a), of the International Covenant on Economic, Social and Cultural Rights should be interpreted as meaning that measures must be taken to improve child and maternal health, sexual and reproductive healthcare services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as the resources needed to act on that information.

42. Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights -Protocol of San Salvador- states that:

Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social wellbeing

43. Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women provides:

AMPARO UNDER REVIEW 1388/2015

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

44. In resolving the motion for constitutional relief under Amparo proceedings in review 237/2014, this First Chamber upheld, in the opinion derived from the matter in question, that health protection is an objective that the State may legitimately pursue. It is a fundamental right recognized in Article 4 of the Constitution, which expressly establishes that everyone has the right to health protection. It is, therefore clear that the State has a constitutional interest in providing individuals with the proper state of health and wellbeing²⁷
45. On the content and scope of the fundamental right to health, the First Chamber has also upheld that:

²⁷ 1st CCLXVII/2016 (10th) RIGHT TO HEALTH PROTECTION. INDIVIDUAL AND SOCIAL DIMENSIONS: The protection of health is an objective that the State can legitimately pursue, since it is a fundamental right recognized in Article 4 of the Constitution, which expressly states that everyone has the right to health protection. In this regard, we must not lose sight of the fact that this right has an individual or personal effect, as well as a public or social one. With respect to the protection of the health of individual persons, the right to health translates into the attainment of a certain general wellbeing comprised of the physical, mental, emotional and social state of the person, from which derives another fundamental right, consisting of the right to physical-psychological integrity. It is therefore clear that the State has a constitutional interest in providing individuals with a proper state of health and wellbeing. Moreover, the social or public facet of the right to health consists of the duty of the State to address the health problems affecting society in general, as well as to establish the necessary programs so that all people have access to healthcare services. This includes the duty to take the necessary actions to achieve that end, such as the development of public policies, quality controls of healthcare services, identification of the main problems affecting the public health of the social conglomerate, among others.

Motion for constitutional relief under Amparo proceedings in review 237/2014. Josefina Ricaño Bandala and others. November 4, 2015. Majority of four votes of Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, who cast a concurrent vote, Olga Sánchez Cordero de García Villegas and Alfredo Gutiérrez Ortiz Mena, who cast a concurrent vote. Dissident: Jorge Mario Pardo Rebolledo, who cast an individual vote. Presiding Justice: Arturo Zaldívar Lelo de Larrea. Court Clerks: Arturo Bárcena Zubieta and Ana María Ibarra Olguín.

(...) in line with the United Nations Committee on Economic, Social and Cultural Rights, the right to health should be understood as a fundamental and indispensable guarantee for the exercise of other human rights and not only as the right to be healthy. Thus, the right to health entails freedoms and rights, including the right to control health and the body, including sexual and reproductive freedom, and the right to be free from interference, torture, treatment or non-consensual medical experimentation; and including, the right to a system of health protection that affords people equal opportunities to enjoy the highest attainable standard of health. Hence, the right to health should be understood as a right to the enjoyment of a full range of facilities, goods, services and conditions necessary to secure the highest attainable standard of health²⁸.

46. Article 1 of the Constitution provides that all authorities have the obligation to respect, guarantee and protect human rights. Specifically, the Plenary Session of this Supreme Court has concluded that the State has three types of obligations derived from the right to health: respect, protection and fulfillment (guarantee)²⁹. These obligations guarantee "claims in terms of availability, accessibility, non-discrimination, acceptability and quality of healthcare services"³⁰. In addition, under Article 1 of the Constitution, it must be remembered that the State is obligated to promote, prevent, investigate violations, punish and redress human rights violations.

²⁸ Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

²⁹ Isolated opinion XVI/2011 of this Plenary Court of the Mexican Supreme Court, page 29 of Volume XXXIV (August 2011) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. IMPOSES ON THE STATE THE OBLIGATIONS TO ENSURE THAT IT IS EXERCISED WITHOUT DISCRIMINATION OF ANY KIND AND TO TAKE STEPS TOWARDS ITS FULL REALIZATION." Motion for constitutional relief under Amparo proceedings in review 315/2010, *op cit*. In the same sense the Chambers have upheld, see motion for constitutional relief under Amparo proceedings in review 584/2013, ruled by the First Chamber in session of November 5, 2014, by unanimity of five votes, presided by Justice Olga Sánchez Cordero. Court Clerk: Ignacio Valdés Barreiro; motion for constitutional relief under Amparo proceedings in review 173/2008, ruled by the First Chamber in session held on April 30, 2008, by unanimous vote, by the office of Justice José Ramón Cossío. Court Clerk: Yaritza Lissete Reséndiz Estrada; motion for constitutional relief under Amparo proceedings in review 378/2014, ruled by the Second Chamber in session held on November 12, 2014, by a majority of three votes, by the office of Justice Alberto Pérez Dayán. Court Clerk: Georgina Laso de la Vega Romero, and the Inter-American Court of Human Rights. See, for example, IDH Court. *Case of Furlan and Relatives v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment dated 31 August 2012. Series C No. 246

³⁰ *Idem*.

AMPARO UNDER REVIEW 1388/2015

47. In relation also to life with dignity and health, the Inter-American Court - taking up the criteria of various United Nations Committees - has upheld that the fundamental right to life includes not only the right of every human being not to be arbitrarily deprived of life, but also the right not to be denied access to conditions that guarantee a dignified existence, including health care. In this regard, States have the obligation to ensure the creation of the conditions required to prevent violations of this right and, in particular, the duty to prevent their agents from violating it³¹.
48. However, clearly, the constitutional regularity parameter of the right to health requires the fulfilment of specific duties by the State authorities. This has been recognized by the First Chamber when it affirms that health is a public good whose protection is the responsibility of the State³². Based on this assertion, the First Chamber has established that it imposes, on the one hand, complex duties on all public powers within the State, from the legislator and the administration, public hospitals and their medical personnel, to the courts and, on the other hand, imposes duties on private individuals, such as doctors, private hospitals, employers, and pension and retirement fund administrators³³.
49. These specific mandates fall within the general obligations and duties assigned by the Constitution to all authorities within their purview with respect to human rights. According to general comment 14 of the Committee on

³¹ Cfr. *inter alia*, Corte IDH. *Case of García Ibarra et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment dated November 17, 2015. Series C No. 306. Corte IDH. *Caso de los "Niños de la Calle" (Villagrán Morales et al.) v. Guatemala*, *op. cit.* *Case of "Instituto de Reeducción del Menor" v. Paraguay*, *op. cit.* I.D.H. Court. *Case of the Xákmok Kásek Indigenous Community. Paraguay*, *op. cit.*, IACHR Court. *Case of the Yakye Axa Indigenous Community v. Paraguay*, *op. cit.* *Caso Comunidad Indígena Sawhoyamaya Vs. Paraguay*, *op. cit.* I.D.H. Court. *Case "Instituto de Reeducción del Menor" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment dated 2 September 2004. Series C No. 112 Corte IDH. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Background. Judgment dated November 19, 1999. Series C No. 63. PARRA, Oscar, "Protection of the right to health through contentious cases before the Inter-American Human Rights System", in Laura Clérico, Liliana Ronconi and Martín Aldao (coords.), *Tratado de Derecho a la Salud*, Buenos Aires, Abeledo Perrot, pp. 761-800.

³² Cfr. *inter alia*, Amparo directo 51/2013, resolved by the First Chamber in session of 2 December 2015, by unanimity of four votes presided by Justice Alfredo Gutiérrez Ortiz Mena. Court Clerk: Miguel Antonio Nuñez Valadez. I.D.H. Court. *Ximenes Lopes vs Brasil*, *op. cit.*

³³ Motion for constitutional relief under Amparo proceedings in review 476/2014, resolved by the First Chamber in session held on April 22, 2015, by the office of Justice Alfredo Gutiérrez Ortiz Mena. Court Clerk: Karla I. Quintana Osuna.

AMPARO UNDER REVIEW 1388/2015

Economic, Social and Cultural Rights, the obligation to respect the right to health entails not denying or limiting equal access to preventive, curative and palliative healthcare services for all, and refraining from imposing discriminatory practices with respect to women's health status and needs; States must also take into account acts of violence from a gender perspective. The obligation to guarantee the latter requires, in particular, that States take positive measures to enable and assist individuals and communities to enjoy the right to health; it requires States to take actions to promote, maintain and restore the health of the population; and it requires the authorities to take appropriate measures within their purview to enforce to the right to health³⁴. Specifically and applicable to this case, the obligation to guarantee the latter implies the obligation to provide safe maternity services.

50. The fulfillment of these obligations would, in turn, be qualified - as the doctrine of this Supreme Court, which enshrines General Comment 14 of the Committee on Economic, Social and Cultural Rights - by the following interrelated institutional elements in the area of the right to health:

i. AVAILABILITY: Each State shall have a sufficient number of public health facilities, goods and services and healthcare facilities [...] However, such services shall include basic determinants of health, such as clean drinking water and adequate sanitary conditions, hospitals, clinics and other health-related facilities, trained medical and professional personnel who are well remunerated having regard to the conditions prevailing in the country, as well as essential medicines as defined in the WHO Program of Action on Essential Medicines.

³⁴ Motion for constitutional relief under Amparo proceedings in review 315/2010, op. cit. I.D.H. Court. Case of the Xákmok Kásek Indigenous Community. Vs. Paraguay. Background, Repairs and Costs. Judgment dated August 24, 2010 Series C No. 214, IACHR. Case of the Yakye Axa Indigenous Community v. Paraguay. Repairs and Costs Fund. Judgment dated June 17, 2005. Series C No. 125, Corte IDH. Case of the Sawhoyamaya Indigenous Community v. Paraguay. Background, Repairs and Costs. Judgment dated 29 March 2006. Series C No. 146 General Comment No. 14 of the Committee on Economic, Social and Cultural Rights.

AMPARO UNDER REVIEW 1388/2015

ii. ACCESSIBILITY: Health facilities, goods and services should be accessible to all, without discrimination, within the jurisdiction of the State.

Accessibility has four categories:

a. *Non-discrimination*: health facilities, goods and services must be accessible, **by law and fact**, to the most vulnerable and marginalized sectors of the population, without discrimination on any of the prohibited grounds.

b. *Physical accessibility*: health facilities, goods and services should be geographically accessible to all segments of the population, especially the vulnerable or marginalized groups such as ethnic minorities and indigenous populations, women, children, adolescents, the elderly, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and basic determinants of health, such as clean drinking water and adequate sanitation, are within reasonable geographical distance, even in rural areas. In addition, accessibility includes adequate access to buildings for people with disabilities.

c. *Economic accessibility (affordability)*: health facilities, goods and services should be accessible to all. Payments for healthcare services and services related to underlying determinants of health should be based on the principle of equity in order to ensure that such services, whether public or private, are available to all, including socially disadvantaged groups. Equity requires that the poorest households do not bear a disproportionate burden in terms of health expenditures compared to the richest households.

d. *Access to information*: this includes the right to seek, receive and impart information and ideas on health-related issues.

However, access to information should not undermine the right to have personal health data treated confidentially.

iii.ACCEPTABILITY: All health facilities, goods and services should, *inter alia*, be sensitive to gender and life-cycle requirements, and should be designed to improve the health status of the individuals concerned.

iv.QUALITY: In addition to being culturally acceptable, health facilities, goods and services should also be scientifically and medically appropriate and of good quality. This implies having trained medical personnel, scientifically approved and in good condition medicines and hospital equipment, clean drinking water and adequate sanitary conditions.

The right to health and termination of pregnancy for health reasons

51. As stated above, everyone has the right to health, understood as the enjoyment of the highest attainable standard of physical, mental and social wellbeing. The highest attainable standard of health refers to (i) the level of health that enables a person to live in dignity; (ii) the socio-economic factors that make it possible to lead a healthy life, including the basic determinants of health, i.e. not limited to health care; and (iii) access to healthcare services and health protection.
52. The latter means that everyone has the right to enjoy a full range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health.³⁵In this sense, although it is not possible to guarantee an adequate state of health, in terms of people being healthy and disease-free, it is necessary for the State and its agents, within their purview, to create the conditions that allow them to have better opportunities to enjoy wellbeing and good health.

³⁵ Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

AMPARO UNDER REVIEW 1388/2015

53. Therefore, the right to health imposes on the Mexican State and its agents - including public health institutions and those who work therein - the positive obligation to adopt all necessary and possible measures so that people reach that maximum level of wellbeing, including the provision of medical care services with the purpose of promoting, restoring and protecting people's health and the negative obligation to avoid any interference or arbitrary difference in order to have access to it. This service falls within its natural and special sphere of competence.
54. Thus, it can be argued that every woman has the right to benefit from every measure that will enable her to enjoy the best possible state of health, including universal access to the widest possible range of sexual and reproductive healthcare services³⁶, including those associated with pregnancy during all its stages and in all its vicissitudes, without any form of coercion or discrimination. This includes the State's obligation to reasonably prevent the risks associated with pregnancy and unsafe abortion, which, in turn, encompasses both an adequate, timely and comprehensive assessment of the risks that pregnancy poses to the restoration and protection of each person's health, and prompt access to abortion services that are necessary to preserve the health of the pregnant woman.
55. Since health is a right that protects physical, emotional and even social aspects, its adequate guarantee implies the adoption of measures to make the termination of pregnancy possible, available, safe and accessible when the continuation of the pregnancy endangers women's health in its broadest sense. This implies that public health institutions must provide and facilitate such services as well as refrain from preventing or hindering timely access to them.

³⁶ Reproductive health should be understood as a state of physical, mental and social wellbeing and not as the mere absence of disease in everything related to the reproductive system, its functions and processes. This understanding of reproductive health implies the recognition that people must be able to lead a satisfying and safe sex life and make decisions about whether and when they want to have children, from which comes their right to information and access to safe, effective, affordable and acceptable methods of planning and, at the same time, to access healthcare services that enable them to carry out pregnancy and childbirth safely and risk-free.

AMPARO UNDER REVIEW 1388/2015

56. In broad terms, health implies a proper understanding of the concepts of wellbeing and life project. From this perspective, the right to health is interdependent with the rights to life, dignity, autonomy, freedom, to freely develop one's personality, information, non-discrimination, equality, intimacy, privacy and the right to live without cruel, inhuman or degrading treatment.
57. The exercise of the right to health implies the elimination of all forms of discrimination and the recognition that the enjoyment of this right implies the emotional, social and physical wellbeing of individuals throughout their life cycle and, in the specific case of women, the right to sexual and reproductive health.
58. General Comment 14 of the Committee on Economic, Social and Cultural Rights states that States should incorporate a gender perspective in their health policies, planning, programs and research to better promote women's health. According to the Committee, a gender-based approach recognizes that biological and sociocultural factors - such as pregnancy, for example - have an important influence on the health of men and women. A primary objective of health policy - including health care - must be to reduce risks to women's health, in particular the reduction of maternal morbidity and mortality rates; that is, illness or death from causes related to or associated with pregnancy and childbirth.
59. Thus, eliminating discrimination against women requires the State to implement policies aimed at providing women with access to a full range of high-quality and affordable health care, including sexual and reproductive healthcare services, including healthcare services provided by the State aimed at promoting, restoring and protecting the health of pregnant women and controlling - to the extent possible - the risks associated with pregnancies, in particular those that compromise the preservation or attainment of women's physical, mental or social health.
60. According to General Recommendation 24 of the Committee on the Elimination of All Forms of Discrimination against Women, the obligation to

respect rights requires States - including Mexico - to refrain from obstructing measures taken by women to achieve their health objectives, which imposes an obligation on healthcare providers in the public and private sectors to respect women's right to health care. The duty to ensure women's access to health without discrimination imposes on the Mexican State the obligation to adopt appropriate legislative, judicial, administrative, budgetary, economic and other measures to enable women to enjoy their rights to health care, as well as to remove obstacles, requirements and conditions that impede women's access to health care.³⁷

61. Therefore, women's access to the healthcare services must be guaranteed, especially for those located in vulnerable groups. Non-discrimination within healthcare services requires that these ensure conditions so that women can effectively meet their health needs and so that services that are only required by women, such as the termination of a pregnancy because of the risks associated with it, are provided safely.
62. The First Chamber, therefore, considers that when women request specific services that they alone require, such as the termination of pregnancy for health reasons, the denial of such services and the barriers that restrict or limit their access, constitute acts of discrimination³⁸ and a violation of the right to equality under the law.
63. The relationship between the right to freedom, autonomy and to freely develop one's personality as well as the right to health is thus materialized in the rights to make decisions about one's own health and body.³⁹ Thus, for example, for the Special Rapporteur on the right of everyone to the enjoyment of the

³⁷ Since the adoption of the Optional Protocol to CEDAW, these obligations are the framework within which the actions of States in the area of women's health are monitored internationally.

³⁸ General Recommendation 24 of the Committee on the Elimination of All Forms of Discrimination against Women.

³⁹ "(...). *The right to health entails freedoms and rights. Freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right not to be subjected to torture or to non-consensual medical treatment and experimentation (...)*" General Comment No. 14 (2000). *The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*. Committee on Economic, Social and Cultural Rights. Twenty-second session. Geneva, April 25 -May 12, 2000. Item 3 on the agenda. E/C.12/2000/4; August 11, 2000.

highest attainable standard of physical and mental health: "*In the context of sexual and reproductive health, freedoms include the right to control one's own health and body*"⁴⁰. This means that when the continuation of the pregnancy affects the woman's health, in its physical, mental or social dimension, the possibility of opting for its termination is an exercise of her rights to freedom, autonomy and the right to freely develop one's personality. Just as⁴¹ in other fields of health when it comes to making decisions about other interventions: for example, invasive surgeries, where a patient's decision about the medical care he or she wishes to receive obligates health professionals to respect it, women's choice to terminate a pregnancy when it poses a risk to the preservation or attainment of her health also deserves respect.

64. With respect to sexual and reproductive rights⁴², based on the principle of the dignity of persons and their rights to autonomy and privacy, one of its essential components is the right of women to reproductive⁴³self-determination,

⁴⁰ The right of every person to enjoy the highest attainable standard of physical and mental health. Report of the Special Rapporteur, Mr. Paul Hunt. Human Rights Commission. Sixtieth session. Item 10 of the provisional agenda. E/CN.4/2004/49; February 16, 2004.

⁴¹ Direct motion for constitutional relief under Amparo proceedings 6/2008. January 6, 2009. Eleven votes. Presiding Justice: Sergio A. Valls Hernández. Court Clerk: Laura García Velasco. Approved by the Plenary Session held on October 19, 2009: **RIGHT TO THE RIGHT TO FREELY DEVELOP ONE'S PERSONALITY. ITSASPECTS**. Human dignity, as a superior fundamental right recognized by the Mexican legal order, derives, among other very personal rights, the right of every individual to freely and autonomously choose his or her life project. Thus, according to comparative doctrine and jurisprudence, such a right is the recognition by the State of the natural authority of every person to be individually as they want to be, without coercion or unjustified controls, in order to fulfill the goals or objectives they have set for themselves, according to their values, ideas, expectations, tastes, and so on. Therefore, to freely develop one's personality includes, among other expressions, the freedom to marry or not to marry; to procreate children and how many, or to decide not to have them; to choose one's personal appearance; one's profession or work, as well as free sexual choice, inasmuch as all these aspects are part of the way in which a persons wish to project themselves and live their life and so it is up to them alone to decide autonomously.

⁴² As has been widely pointed out in international documents, reproductive rights are based on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number of children and fundamentally to have all the information necessary to achieve this and also to achieve the highest level of sexual and reproductive health. These rights include the right to make decisions about reproduction without discrimination, coercion or violence of any kind and the right to control matters relating to sexuality, including sexual and reproductive health.

⁴³The CEDAW committee has determined that women's right to reproductive self-determination is violated when the means by which a woman can exercise her right to control her fertility are hindered. Thus, involuntary sterilization and contraceptive methods imposed without consent constitute serious violations of this right. The various United Nations committees have also pointed out that the right to decide the number of children is directly related to a woman's right to life when there is prohibitive or highly restrictive legislation on abortion, which generates high rates of maternal mortality or morbidity.

AMPARO UNDER REVIEW 1388/2015

essentially protected by Article 4 of the Mexican Constitution. The decision to be a mother or not has to be made in an informed manner, cannot be imposed externally nor cause a *disproportionate burden*.⁴⁴

65. However, according to the parameter of constitutional regularity of the right to health and its protection, it is not enough to have freedom to adopt, autonomously, decisions about one's own health; it is essential to be able to implement them properly. That is, the decision about one's own health, such as terminating a pregnancy, cannot be interfered with arbitrarily. Additionally, all the infrastructure must be in provided: safety, availability, accessibility, acceptability, affordability and quality medical services that are respectful.
66. In terms of the interpretations related to right to life, clearly the existence of positive obligations on the part of States to preserve life and create conditions for a dignified life. This notion exceeds the biological meaning of life and includes elements of wellbeing and subjective elements related to the determination of an individual life project.
67. The right to a dignified life must be understood not only as the right to the maintenance of life in its biological sense, but also as the right to (i) the autonomy or possibility of constructing the "life project" and determining its characteristics (to live as one wishes); (ii) certain concrete material conditions of existence (to live well), and (iii) the intangibles non-monetary assets, physical integrity and moral integrity (to live without humiliation).⁴⁵
68. The right to life, in its broadest sense, must be understood as a right interdependent with the right to health. As a general rule, the effects on health in its three categories are, in turn, effects on the right to life, understood both in a strictly biological sense and in terms of a dignified life. These

⁴⁴ There are rulings issued by various constitutional courts that demonstrate the undeniable relationship between the rights to liberty and the right to health with respect to decisions on the termination of pregnancy, and that point out, for example, that the free development of the personality of women prevails when pregnancy is an extraordinary and oppressive burden for women or when it affects their health, their economic conditions or those of their families.(French State Council, 1975); *Roe v. Wade and Planned Parenthood v. Casey*, (United States Supreme Court); German Constitutional Court, 1993; Spanish Constitutional Court, 1985; *Morgentaler Case*, Canadian Supreme Court of Justice, and Colombian Constitutional Court C335-06; among others.

⁴⁵ Colombian Constitutional Court, judgement C355/06

consequences affect personal integrity, social conditions or the possibility of building a life project.

69. The concept of "life project", which derives from a broad conception of the right to life, articulated with rights such as freedom and autonomy, has been developed by the Inter-American Court of Human Rights with regard to the future damages that may be caused to a person through the violation of his or her human rights:

"[...] the so-called "life project" addresses to the comprehensive realization of the affected person, considering his vocation, skills, circumstances, potential and aspirations, which allow him to reasonably fix certain expectations and to access them.

[...] The "life project" is associated with the concept of personal fulfillment, which in turn is based on the options that the subject may have to lead his life and reach the destiny he proposes. Strictly speaking, the options are the expression and guarantee of freedom. It would be difficult to say that a person is truly free if he lacks options to direct his existence and bring it to its natural culmination. These options have, in themselves, a high existential value. Therefore, its cancellation or impairment implies the objective reduction of freedom and the loss of a value that cannot be beyond the observation of this Court.⁴⁶

70. A life project addresses the integral realization of a person, considering his vocation, skills, circumstances, potential and aspirations, which allow him to reasonably set [...] expectations and to access them. A life project is associated with the concept of personal fulfillment based on the options that a persons have to lead their life and reach the destiny they have proposed.
71. The concept of life project demonstrates the importance of the expectations that each person has for their life according to their conditions and context, and is based on self-determination of how each wants to live their life. The life project can be affected by the continuation of a pregnancy that poses a risk to health by effectively damaging health or life, or simply because it is

⁴⁶ Inter-American Court of Human Rights. Case of Loayza Tamayo v. Peru. Judgment dated November 27, 1998. (Repairs and Costs)

incompatible with such a project. Therefore, denying access to pregnancy termination when there is a risk to women's health, in addition to the different types of harm it can cause, disrupts their expectations about their future wellbeing. In addition, the distortions of the individual life project also affect women's health.

72. The specific relationship between health, wellbeing and termination of pregnancy recognizes the possibility of access to a safe termination of pregnancy as a circumstance that contributes to women's wellbeing, not only in cases where their physical integrity is at risk, but also when the continuation of the pregnancy is presented as incompatible with their life project⁴⁷. If the definition of health were really taken into account as a matter of wellbeing, in this case for [women], welfare indicators would show the benefit of access to safe abortion over health.⁴⁸
73. The right to the highest attainable standard of health implies that the criteria for wellbeing is individual and cannot be defined by inflexible factors. The right to health is related to the right to autonomy by accepting that such standards of wellbeing should be defined by women, especially when it comes to the services they require, and having all the conditions available to enable them to access those standards: safe and quality services, information, respect and confidentiality.
74. In the opinion of this Chamber, observing the right to health from the perspective of wellbeing allows us to understand how pregnancy can affect the health of women not only in those cases in which it causes them a physical harm, but also in those cases in which their *wellbeing* is affected. This includes what it means for each woman to *be well*.⁴⁹ The concept of wellbeing includes not only the quantity of life, but particularly the quality of that life, and how

⁴⁷ Cook, Rebecca and Dickens Bernard M. Human Rights Dynamics in Abortion Law Reform. " III. Health and Welfare": (...) *forcing a woman to continue with a problematic pregnancy constitutes a form of violence that will affect her life plan and emotional wellbeing*".

⁴⁸ *Idem*. In countries where abortion is not criminalized and there is easy access to contraceptive methods, abortion mortality, morbidity and disability are dramatically reduced.

⁴⁹ Cook, Rebecca and Dickens Bernard M. Human Rights Dynamics in Abortion Law Reform. Op, cit. P, 10 et seq. "III. Health and Welfare".

women feel about their wellbeing.⁵⁰This approach recognizes the importance of women's perception and knowledge about themselves and what they may or may not assume or bear. This recognition is based on respect for their rights to dignity and autonomy, which are expressed, among other things, in freely deciding about their health according to their life project.

75. Based on the foregoing considerations, this First Chamber concludes that abortion motivated by health risks, and its adequate and timely provision, constitute the normative scope of the right to health and its protection- as contemplated by the Constitution, international treaties, the constitutional doctrine of this First Chamber, and the jurisprudence of the Inter-American Court. It is an action whose primary objective is to promote, to preserve or restore the health of the pregnant person, including the attainment of a state of physical, mental and social⁵¹wellbeing, and which is also configured as the fulfilment and effective guarantee of the rights to be free from discrimination,

⁵⁰ Cook, Rebecca and Dickens Bernard M. Human Rights Dynamics in Abortion Law Reform. Op, cit. P, 10 et seq. "III. Health and Welfare".

⁵¹ **RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY WITH INTERNATIONAL TREATIES IN THE FIELD OF HUMAN RIGHTS.** This High Court has upheld that the right to health protection provided for in the aforementioned constitutional provision has, among other purposes, that of guaranteeing the enjoyment of healthcare services and social assistance that meet the needs of the population, and that healthcare services are understood to be actions aimed at protecting, promoting and restoring the health of the individual and the community. Thus, this is compatible with a number of international human rights instruments, including Article 25, paragraph 1, of the Universal Declaration of Human Rights, which states that everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing, medical care and necessary social services; Article 12 of the International Covenant on Economic, Social and Cultural Rights, which refers to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and states that States must adopt measures to ensure the full realization of this right; and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", according to which everyone has the right to health, understood as the enjoyment of the highest attainable standard of physical, mental and social wellbeing. In this sense, and in line with what has been established by the United Nations Committee on Economic, Social and Cultural Rights, the right to health should be understood as a fundamental and essential guarantee for the exercise of other human rights and not only as the right to be healthy. Thus, the right to health entails freedoms and rights, including the right to control health and the body, including sexual and reproductive freedom, and the right to be free from interference, torture, treatment or non-consensual medical experimentation; and among the rights, the right to a system of health protection that gives people equal opportunities to enjoy the highest attainable standard of health. The protection of the right to health also includes, *inter alia*, obligations to adopt laws or other measures to ensure equal access to health care and related services; to ensure that the privatization of the health sector does not pose a threat to the availability, accessibility, acceptability and quality of services; The right to health should therefore be understood as a right to the enjoyment of a full range of facilities, goods, services and conditions necessary for the attainment of the highest attainable standard of health. Motion for constitutional relief under Amparo proceedings in review 173/2008. Yaritza Lissete Reséndiz Estrada. April 30, 2008. Five votes. Presiding Justice: José Ramón Cossío Díaz. Court Clerk: Dolores Rueda Aguilar.

to enjoy a dignified life, to freedom - in its aspect of autonomy and to freely develop one's personality - and to be free from arbitrary interference in private life. Rights that - as has been explained - in their interrelationship with the right to health and its protection imply that women have access, without arbitrary distinctions, to healthcare services that only they need, with respect and guarantee of their decisions regarding their own health. life project and individual understandings of wellbeing.

76. Accordingly, it is incumbent upon the State, through public health institutions, to ensure timely access to these services when women face risks associated with pregnancy that compromise their physical, mental or social health, as part of the right to enjoy a full range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health⁵², including a health system that ensures that the circumstances and conditions that compromise that wellbeing are promptly detected and addressed.
77. This Court now proceeds, based on the grievances claimed by the plaintiff and on the parameter set forth, to review whether the government action that is challenged, consisting of whether the refusal to provide the pregnancy termination service requested by the plaintiff in light of her health complications, violated the obligations that the constitutional right to health and its protection imposes on the authorities, whether it had sufficient legal and factual grounds and whether the authorities interpreted the General Health Law in a restrictive manner, inconsistent with the right to health and its protection.

The contested government action and the obligations of the authorities responsible for the right to health and its protection in the field of abortion due to health reasons.

78. As stated above, everyone has the right to health, understood as the enjoyment of the highest attainable standard of physical, mental and social

⁵² Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

wellbeing. Furthermore, everyone has the right to enjoy a full range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health.⁵³ Although it is not possible to guarantee an perfect state of health in the sense that people will be healthy and disease free, it is necessary for States and their agents to create the conditions that allow them to have better opportunities to enjoy wellbeing and good health. Furthermore, in accordance with the constitutional regularity parameter of the right to health and its protection, this access must be guaranteed to all persons without discrimination, including discrimination on the basis of sex or gender.

79. It is clear from the previous chapter of this ruling, abortion motivated by health risks, and its adequate and timely provision, are comprised within the normative scope of the right to health and its protection, since it is a therapeutic intervention recommended to preserve or restore the health of the pregnant person, including the attainment of a state of physical, mental and social wellbeing⁵⁴. It is also the fulfilment and effective guarantee of the rights

⁵³ Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

⁵⁴ **RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY WITH INTERNATIONAL TREATIES IN THE FIELD OF HUMAN RIGHTS.** This High Court has upheld that the right to health protection provided for in the aforementioned constitutional provision has, among other purposes, that of guaranteeing the enjoyment of healthcare services and social assistance that meet the needs of the population, and that healthcare services are understood to be actions aimed at protecting, promoting and restoring the health of the individual and the community. Thus, this is compatible with a number of international human rights instruments, including Article 25, paragraph 1, of the Universal Declaration of Human Rights, which states that everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing, medical care and necessary social services; Article 12 of the International Covenant on Economic, Social and Cultural Rights, which refers to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and states that States must adopt measures to ensure the full realization of this right; and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", according to which everyone has the right to health, understood as the enjoyment of the highest attainable standard of physical, mental and social wellbeing. In this sense, and in line with what has been established by the United Nations Committee on Economic, Social and Cultural Rights, the right to health should be understood as a fundamental and essential guarantee for the exercise of other human rights and not only as the right to be healthy. Thus, the right to health entails freedoms and rights, including the right to control health and the body, including sexual and reproductive freedom, and the right to be free from interference, torture, treatment or non-consensual medical experimentation; and among the rights, the right to a system of health protection that gives people equal opportunities to enjoy the highest attainable standard of health. The protection of the right to health also includes, *inter alia*, obligations to adopt laws or other measures to ensure equal access to health care and related services; to ensure that the privatization of the health sector does not pose a threat to the availability, accessibility, acceptability and quality of services; The right to health should therefore be understood as a right to the enjoyment of a full range of facilities, goods, services and conditions necessary for the attainment of the highest

AMPARO UNDER REVIEW 1388/2015

to be free from discrimination, to enjoy a dignified life, to freedom - in its aspect of autonomy and free development of personality - and to be free from arbitrary interference in private life. Rights that, in their interrelation with the right to health and its protection, imply that women have access, without arbitrary distinctions, to healthcare services that only they need, with respect and guarantee of their decisions regarding their own health, life project and individual understandings of wellbeing.

80. This Court has already determined, in the same ruling, that it is within the purview of the State, through public health institutions, to guarantee timely access to these services when women face risks associated with pregnancy that compromise their physical, mental or social health, as part of the right to enjoy a full range of facilities, goods, services and conditions necessary to achieve the highest possible level of health⁵⁵. This includes a health system that guarantees that the circumstances and conditions that compromise wellbeing are detected and diligently attended to.
81. Thus, in accordance with the obligations to respect⁵⁶ and protect the right to health, the Mexican State -including all agents (both public and private sector) that make up the health system- has the obligation to refrain from directly or indirectly hindering the exercise of this right and to guarantee that third parties do not hinder these same rights.
82. Regarding the obligation to provide guarantees, the Mexican State acquires the duty to create the necessary conditions of infrastructure, regulation, human and economic resources, as well as supplies and sanitary conditions

attainable standard of health. Motion for constitutional relief under Amparo proceedings in review 173/2008. Yaritza Lisette Reséndiz Estrada. April 30, 2008. Five votes. Presiding Justice: José Ramón Cossío Díaz. Court Clerk: Dolores Rueda Aguilar.

⁵⁵ Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

⁵⁶ Violations to the obligations to respect are the actions, policies or laws of States that contravene the standards set out in Article 12 of the Covention and are likely to result in bodily injury, unnecessary morbidity and avoidable mortality. Examples include the denial of access to health facilities, goods and services to certain individuals or groups of individuals as a result of de jure or de facto discrimination.

AMPARO UNDER REVIEW 1388/2015

to have an institutional capacity to ensure that women have access to a medically recommended abortion as a necessary measure to preserve, restore or protect health. This obligation, therefore, encompasses providing and facilitating effective access to safe services for the termination of pregnancy for health reasons, as a measure to guarantee the right to protect health and other human rights.

83. Public and private hospitals, which exist as a consequence of the right to protect health and the need for an insurance system - as agents obliged to respect, protect and guarantee the human rights of individuals - cannot deny or hinder women's access to the interruption of pregnancy based on health because this procedure is necessary to preserve, restore or protect the latter.
84. In this regard, Article 5 of the General Health Law states that:

The National Health System is made up of public administration agencies and entities, both federal and local, and individuals or legal entities from the social and private sectors that provide healthcare services, as well as programs to coordinate actions, and its purpose is to satisfy the right to health protection.

85. Moreover, the Plenary Session of the Mexican Supreme Court of Justice, in resolving the motion for constitutional review under Amparo proceedings in revision 315/2010, upheld that the obligations of the health authorities in matters of the right to health have as their primary source the Constitution and, therefore, are susceptible to direct supervision by constitutional judges.⁵⁷

⁵⁷ **Opinion: P. XV/2011 RIGHT TO HEALTH. ITS NORMATIVE NATURE.** Our country is going through a stage of intense transformation in terms of identifying the normative substance of the Mexican Constitution and its consequences for the operating mechanics of the motion for constitutional relief. One of the specific manifestations of this phenomenon is the alteration of the hitherto traditional understanding of rights such as those relating to health or education. That is, despite their enshrinement in the Magna Carta, these rights have traditionally been understood as mere declarations of intent, without real binding power over the action of citizens and public powers. It has been understood that its effective achievement was subordinated to specific legislative actions and administrations, in whose absence the Constitutional Judges could do little. Now, on the other hand, the premise is that, although in a democratic constitutional state the regular legislator and the governmental and administrative authorities have a very wide margin to express their vision of the Constitution and, in particular, to deploy in one direction or another the public policies and regulations that must give body to the effective guarantee of rights, the Constitutional Judge can contrast his work with the standards contained in the Supreme Law itself and in the human rights treaties that form part of the regulations and bind all state authorities. Amparo in review 315/2010. Jorge Francisco Balderas Woolrich. March 28, 2011. Sergio Salvador Aguirre Anguiano, Margarita Beatriz Luna

AMPARO UNDER REVIEW 1388/2015

86. Thus, in the opinion of this First Chamber, the plaintiff is right when she alleges that the refusal of the responsible authorities damaged her right to health. In fact, the refusal of the authorities to respond to JANE DOE's request meant that they deprived her of the medical care that is part of the regulatory scope of the right to health protection. *JANE DOE* wanted to have access to the health service necessary to restore her health, because a series of previous ailments worsened with pregnancy, or put her in a situation of suffering repercussions.
87. The plaintiff is also right when she states that the responsible authorities did not evaluate her health comprehensively and that they concentrated on emphasizing that the Klinefelter Syndrome detected in the fetus was not incompatible with an independent life, ignoring the importance of JANE DOE's physical, emotional and social health. This reply did not correspond to the request made by the plaintiff, who argued that her health was at risk if the pregnancy continued. Therefore, said authorities did not adequately provide legal and factual grounds for their refusal. In any case, the authorities had to base their reply -as stated in the claim- on a medical and scientific assessment of her health conditions in relation to their pregnancy without diverting their arguments towards the future life of the fetus with the syndrome that was diagnosed. This was not the central reason why the plaintiff was requesting the medically supervised interruption of her pregnancy.
88. It is equally true that the refusal infringed upon her rights to freedom - in its aspect autonomy and free development of personality - and to privacy because the authorities ignored JANE DOE's decision on her health objectives and the preservation of her physical, mental and social wellbeing, in accordance with her own understanding of wellbeing and a medical opinion documenting the dangers imposed on her health by the continuation of pregnancy.

Ramos, Jorge Mario Pardo Rebolledo, Luis María Aguilar Morales and Guillermo I voted against. Ortiz Mayagoitia. Presiding Justice: José Ramón Cossío Díaz. Court Clerks: Francisca María Pou Giménez, Fabiana Estrada Tena and Paula María García Villegas Sánchez Cordero.

89. Similarly, the plaintiff is right when she states that termination of pregnancy for health reasons is a therapeutic intervention recommended in many cases to resolve risks to people's health either because the pregnancy exacerbates or worsens a pre-existing health condition or because a health condition acquired during pregnancy has repercussions that affect the patient's quality of life, or cause morbidity or mortality, or because pregnancy is a contraindication to adequate and reasonable treatment. This criteria applies to her case where because of her weight problem bordering on morbid obesity, age, primiparous condition, recent gastric *bypass* surgery could be considered as precipitating or consolidating factors affecting her physical and

emotional health⁵⁸, according to the medical opinion that was added to the record⁵⁹.

⁵⁸According to Sarah Romans and Lori Ross, both psychiatrists specializing in mental disorders associated with pregnancy at the Women's Health Research Center at the University of Toronto, mental health must be evaluated beyond the observation of the present existence of a mental health disorder to include at least three operational categories and an analysis of the presence of risk factors that condition or are likely to condition the presence of these operational categories.

In its concept, the operational categories are:

a) Risk of suicide: The risk of suicide is a clear criterion for the legal termination of a pregnancy. Traditionally, this risk is considered to exist whether the patient has tried to harm herself or has a specific plan in mind. The risk of suicide, thus considered, would even satisfy the cause of danger of death. Therefore, in order to be included as a health cause within its the legal scope, it is necessary to introduce the following two categories.

b) Severe or chronic mental illness such as depressive disorder, schizophrenia, bipolar disorder, among others. These types of illnesses or disorders can limit a number of social functions, including those related to parenting. When a woman suffers from a serious mental disorder, her ability to take on parenting should be assessed in light of said woman's assessment of that ability, in order to avoid prejudicial or discriminatory actions. In other words, if a woman suffering from schizophrenia finds the continuation of the pregnancy very distressing because she supposes that she will be unable to cope with parenting and counselling in this regard is not enough to overcome her distress, the termination of the pregnancy would be medically and legally indicated.

Mental illnesses are diagnosed according to the World Health Organization's International Classification of Diseases. In cases of diagnosed mental disorders, the continuation of a pregnancy may be a contraindication to receiving appropriate and reasonable treatment. In addition, a sudden discontinuation of treatment can generate or increase symptoms of the disease, even producing psychotic episodes. On the other hand, the ability of a woman affected by a serious mental health disorder to produce her consent to the continuation or termination of a pregnancy must be very carefully evaluated.

(c) Adverse mental health outcomes in the future: This criterion states that in order to satisfy the health cause for termination of a pregnancy, it is not necessary for the woman to have a chronic or serious mental health disorder or to have suicidal thoughts, it is sufficient that there are reasons for a prognosis that the woman's mental health will be adversely affected by the continuation of a pregnancy, due to the presence of certain risk factors. In making these assessments, attention should be paid to a woman's personal conception of wellbeing, since this conception also determines her capacity to accept changing or non-changing circumstances and, with it, her levels of frustration and distress. It is possible to foresee, adopting as supporting evidence, proof that comes from clinical observation, sociological or psychological studies practiced on the patient herself or documented by the literature of the different disciplines, that a woman's mental health will be negatively affected if her pregnancy is the result of rape, if she has been diagnosed with an illness of her own or fetal nature, or if she faces adverse social or economic circumstances, including unwanted or early pregnancy. All of these circumstances are capable of generating sufficient levels of distress to seriously impact a woman's mental health or trigger depression or other psychiatric disorders.

"For the analysis and understanding of the risk or affectation of the categories of health, understood in its broadest sense, the following program has been adopted, which although originally used to study mental health, [...] adapts [...] to all categories of health:

Vulnerability factors, those that predispose risk or impact on the woman's health. These may be physical, mental/emotional or social.

Precipitation factors, those that can trigger risk or impact on the woman's health. These may be physical, mental/emotional or social.

Consolidation factors, those situations of irreversible, chronic nature or that can generate consequences that impact health chronically or in the long term. These may be physical, mental/emotional or social.

These categories cannot be used to force a woman to terminate a pregnancy against her will; and, if the woman decides to continue with the pregnancy despite the risk factors, it is necessary for the state to guarantee all the infrastructure to carry out the pregnancy in the best conditions. In all cases,

90. This First Chamber coincides with the plaintiff when she states that the risk is the possible harm to her health, which needed immediate action and resolution. Health risk is generally defined as the probability that an adverse outcome will occur⁶⁰ or as a factor that increases that probability⁶¹. From the definition of health risk, it is fundamental to emphasize that it excludes the completion of the damage or a specific health impact. In this sense, risk alludes to the possibility or probability of the damage occurring.
91. It had to be understood, then, that there is a risk to the woman's health, and consequently a termination of pregnancy would be justified for health reasons, when there is a probability that an adverse result will be generated for the woman's wellbeing or when there is a factor that increases this probability. In this sense, termination of pregnancy for health reasons seeks to avoid affecting the woman's health or causing her harm. Consequently, the determination of when there is a risk of health impairment is a medical discussion, and the choice of whether or not to face it is a personal decision that requires scientific and medical information in order to be taken.
92. JANE DOE was prevented from having prompt and timely access to a health service that only women need with the consequent impairment of her right to the highest possible level of health and wellbeing and to enjoy the assurance provided by the State despite being entitled a public institution. According to

women should receive comprehensive care for any of the factors that may affect their health, including prevention and risk diagnosis.

Causal Salud, Interrupción legal del embarazo, ética y derechos humanos, page 41, Colombia, 2008, Mesa por la Vida y la Salud de las Mujeres y la Alianza Nacional por el Derecho a Decidir, and Rebecca Cook, Adriana Ortega Ortiz, et al, *Consideraciones éticas y legales en salud reproductiva: la salud mental de la mujer como indicación para el aborto legal*, en *Aborto y Justicia Reproductiva*, Paola Bergallo, editora, Buenos Aires, Editores del Puerto pp. 356-357. ,

⁵⁹ Technical opinion submitted as evidence by the plaintiff in her motion for constitutional relief under amparo proceedings. Amparo Proceeding Case Record 1298/2013, pp 90-91.

⁶⁰ World Health Report 2002, Reducing Risks and Promoting Healthy Living. WHO. 2002. On this point, also see: Gaután Duarte, Hernando Guillermo and Gómez Sánchez, Pío Iván. Medical Aspects. Ethical, Legal and Medical Implications of Judgement C-355 of the Constitutional Court. Progress in the Exercise of the Human, Sexual and Reproductive Rights of Colombian Women. Ministry of Social Protection. National University of Colombia. Colombia 2007

⁶¹ World Health Report 2002, Reducing Risks and Promoting Healthy Living. P. 12

the Committee on the Elimination of All Forms of Discrimination against Women⁶² and the Committee on Economic, Social and Cultural Rights⁶³, this intensifies the exclusion that women suffer⁶⁴ for gender reasons in different areas of life, with the area of health being particularly critical.

93. When the authorities act beyond the obligations imposed on them by the right to health and its protection, they incur in structural discrimination, pursuant to the Judgement, *González and others vs. Mexico*, issued by the Inter-American Court of Human Rights. Their attitude arises from and fosters a stereotypical gender-based view of women as disposable persons - their health, personal integrity or life do not matter - or incapable of making free and ethical decisions - that is, of being ethical agents - about how they want to face the risks of pregnancy that compromises their health and wellbeing.
94. The plaintiff's argument is shared that the refusal and subsequent delay of the authorities identified as responsible constituted forms of cruel, inhuman and degrading treatment. Indeed, these authorities forced her to face the risk that her pregnancy posed to her physical and emotional health; ignored her status as an autonomous person capable of deciding on her health objectives; deprived her of the certainty of being able to achieve those objectives in a safe and medically supervised manner; and increased her anguish and anxiety about the stage of her pregnancy and her future wellbeing. Attitudes that violated their right to personal integrity and freedom from cruel, inhuman and degrading treatment.⁶⁵

⁶² General Recommendation 24

⁶³ General Comment 14.

⁶⁴ According to the American political scientist Nancy Fraser, structural discrimination occurs when historically disadvantaged groups are not recognized or valued in their specificity; they do not have access to redistribution channels or receive a precarious distribution of the goods necessary for a dignified life; and when they do not participate in the spaces where the decisions that affect them are made (absence of representation). Sandra Serrano and Adriana Ortega, *Guía sobre el derecho a la igualdad*, Flacso, México, 2016.

⁶⁵ Opinion of the Human Rights Committee in the case of *Karen Noelia Llantoy Huamán v. Peru*. United Nations Human Rights Committee. Communication No. 1153/2003. October 17 to November 3, 2005. In that case, it was recognized that the refusal of healthcare services to seek therapeutic abortion led to pain and suffering. *Cfr.* also Cook, Rebecca and Dockens Bernard M. *Human Rights Dynamics in Abortion Law Reform*. Op. cit. P, 28 et seq. This document reports several cases of violations to the right to dignity and to be free from cruel, inhuman and degrading treatment, thus considered by different international management and justice entities.

AMPARO UNDER REVIEW 1388/2015

95. Indeed, in the view of this Chamber, forcing women to make decisions on reproductive health against their will, which occurs, *inter alia*, when women are denied access to certain medical services or when the conditions necessary for the decisions to be effective do not exist, violates human dignity. As opposed to the health system, which is primarily responsible for providing healthcare services, women are in a situation of dependency and vulnerability. Their health objectives can only be achieved if this system provides them with such services. Therefore, healthcare providers have the final decision about women's personal integrity; especially in the case of therapeutic abortion where forcing a woman to continue a pregnancy causes *per se* harm to the woman's health, regardless of when it is interrupted.
96. Finally, the plaintiff is right to argue that federal legislation could have been interpreted in a manner compatible with the right to health and its protection insofar as interpreting that said legislation establishes adequate and timely provision of abortion services for health reasons, and that it was incorrect for the responsible authorities to attribute to the General Health Law a categorical prohibition that would prevent them from properly and timely fulfilling their obligations to respect and guarantee the right to health, directly imposed by the Constitution and the constitutional regularity parameter for said right.
97. As the plaintiff points out, a systematic understanding of the provisions of the General Health Law and the Regulations of the General Health Law on the Provision of Healthcare Services would make it possible to understand that abortion services for health reasons must be provided by health institutions regulated by the General Health Law, which includes ISSSTE. Not only to properly fulfill the constitutional right to health and its protection, but because these services can be clearly characterized as healthcare services, as defined and understood by the relevant legal provisions.
98. In the preceding paragraph, it was already mentioned that the right to health protection is a fundamental constitutional and human right. In this regard, the General Health Law itself contemplates as part of the obligations derived from the right to the protection of health, the attainment of the physical and mental

wellbeing of individuals. In⁶⁶ addition, the General Health Law provides that the provision of healthcare services is one of the duties imposed on the State by the right to health protection⁶⁷. According to the same law, healthcare services include any action aimed at protecting, promoting or restoring individual and social health.⁶⁸

99. Healthcare services include, but are not limited to preventive, curative and rehabilitative actions, and maternal and child care⁶⁹. Maternal and child care includes the care of women during pregnancy, childbirth and puerperium.⁷⁰ Preventive actions include general promotion and specific protection; curative actions aim to make an early diagnosis and provide timely treatment; and rehabilitative actions are actions to correct physical or mental disabilities.⁷¹
100. Medical care is described as the "[...] a series of services provided to the individual for the purpose of protecting, restoring and promoting his or her health"⁷². In addition, the General Health Law establishes that users shall have the right to obtain timely health benefits of suitable quality and to receive

⁶⁶ Article 2, section I, of the General Health Law.

⁶⁷ Article 3, sections II and IV, of the General Health Law.

⁶⁸ General Health Law, Article 23. Law on Institute for Security and Social Services for State Workers. Article 3: The following insurances are established as mandatory: I. Health, including: (a) preventive healthcare; (b) maternity and curative healthcare; and (c) physical and mental rehabilitation; ii. occupational hazards; iii. retirement, retirement, unemployment in old age and for the elderly, and iv. disability and life. Article 27: The Institute shall establish health insurance to protect, promote and restore the health of its beneficiaries, providing healthcare services with quality, timeliness and equity. Health insurance includes the components of preventive health care, curative and maternity health care, and physical and mental rehabilitation. Article 29: The Institute shall develop a health service provider function through which the actions covered by this insurance shall be carried out through the health service provider units, in accordance with the service classifications provided in Sections III and IV of this Chapter. This function shall ensure that the Institute provides the rightful claimant with adequate, timely and quality healthcare services that contribute to preventing or improving his or her health and wellbeing. Article 33: The Institute shall provide preventive health care services aimed at protecting the health of the Beneficiaries. Article 34: Preventive medical care, in accordance with the programs authorized by the Institute on the subject, shall be provided: I. control of vaccine-preventable diseases; II. control of communicable diseases; III. self-care and early detection programs; IV. health education; V. programs to combat drug addiction, alcoholism and smoking; VI. reproductive health and family planning; VII. maternal and child care; VIII. oral health; IX. nutrition education; X. mental health; XI. primary health care; XII. healthy aging; XIII. prevention and rehabilitation of disabled patients, and XIV. other activities determined by the Board of Directors according to the financial possibilities of health insurance.

⁶⁹ Article 27, section III and IV, of the General Health Law.

⁷⁰ Article 61, section I, of the General Health Law.

⁷¹ Article 33 of the General Health Law.

⁷² Article 32 of the General Health Law; Article 7 of the Regulations of the General Health Law on the Provision of Medical Care Services.

AMPARO UNDER REVIEW 1388/2015

professional and ethically responsible care, as well as respectful and dignified treatment of professionals, technicians and auxiliaries.⁷³

101. Consequently, with respect to universal access to health care services and their timely and equitable provision, the public health system and facilities have an institutional duty⁷⁴. For their part, women who require pregnancy termination services because it poses a threat to their health seek access to a service whose essential purpose is to promote, protect or restore their health. Thus, access to pregnancy terminations for this reason, performed by trained personnel under acceptable quality conditions, safeguards women's health by preventing them from facing greater risks or suffering repercussions. In other words, women in these circumstances are attempting to access healthcare service.

102. It is important to note that - as the plaintiff argues - a health risk also encompasses those circumstances in which a woman's health is seriously compromised without this implying that her life is in danger or in imminent danger. A health risk does not require women to go to the extreme of risking their lives in order to be able to terminate a pregnancy, but makes it possible to practice an abortion as a therapeutic intervention in cases where their physical, mental or social wellbeing may be compromised.⁷⁵

103. Therefore, if a health condition - be it physical, mental or social - appears or worsens with the pregnancy for causes directly or indirectly related to it, this state of health is sufficient to consider the interruption of the pregnancy as a therapeutic action aimed at solving the risk of a pregnant woman progressing towards a more serious health condition. In assessing the condition and health status of a pregnant woman, attention should be paid to circumstances and factors that may increase the risk that a woman faces given her health status,

⁷³ Articles 51 and 89 of the General Health Law; Articles 21 and 48 of the Regulations of the General Health Law on the Provision of Health Care Services. .

⁷⁴ In this regard, Article 5 of the General Health Law states that the National Health System is comprised of federal and local public administration agencies and entities, as well as natural persons or legal entities from the social and private sectors who provide healthcare services, as well as programs for coordinating actions, and its purpose is to satisfy the right to health protection.

⁷⁵ *Health Cause: Legal Abortion, Ethics and Human Rights*. Bogotá, August 2008 Federación Latinoamericana de Ginecología; La Mesa and Andar. Pp 121-158.

such as age, schooling, social or economic limitations, or lack of access to adequate healthcare services.

104. Therefore, in the specific case of termination of pregnancy for health reasons, the State has the obligation to provide healthcare services and appropriate medical treatment to prevent women from continuing - against her will - with a pregnancy that places her at risk of suffering a health impairment. This access must be guaranteed as a healthcare service to which women are entitled in cases where the practice of termination of pregnancy is necessary to resolve a health issue. Access to a pregnancy termination for health risk includes both access to an appropriate risk assessment associated with pregnancy and appropriate procedures for terminating risky pregnancies, when requested by the woman.

105. In conclusion, this Chamber finds that the provisions of the General Health Law can be interpreted as guaranteeing access to pregnancy termination services for health reasons, given that these can clearly be understood as priority healthcare services (protecting women in pregnancy, childbirth and the postpartum period) and as an appropriate therapeutic action to preserve, restore and protect women's health in all its stages.

106. Evidently, with the actions described above, the responsible authorities failed to comply with their constitutional obligations resulting from the content and scope of the right to health protected by the Constitution and international treaties, such as the right to enjoy the highest attainable standard of physical, mental and social wellbeing; to a health protection system that provides equal opportunities for persons to enjoy the highest attainable standard of health; and the right to enjoy a full range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health⁷⁶. That is to say, not only did her attitude hinder the exercise of the options that were necessary by the plaintiff – in light of her sufferings, life project and personal

⁷⁶ Isolated opinion LXV/2008 of the First Chamber of the Mexican Supreme Court, page 457 of Volume XXVIII (July 2008) of the Weekly Federal Court Report and its Gazette, under the heading: "RIGHT TO HEALTH. ITS REGULATION IN ARTICLE 4 OF THE MEXICAN CONSTITUTION AND COMPLEMENTARY INTERNATIONAL HUMAN RIGHTS TREATIES."

decision regarding the risks that she could and wished to face - but, by denying the provision, they increased the possibility that these risks would be exacerbated and their most dire consequences might occur. In addition, mere delay could generate repercussions that can be prolonged over time, regardless of whether the pregnancy has finally been terminated. This occurred despite JANE DOE being a beneficiary of healthcare from the ISSSTE, the public health institution directly obliged to provide her with services as a result of the right to health and its protection.

107. In this regard, the plaintiff is correct when she points out that the responsible authorities had to adjust their actions to the parameter of constitutional regularity of the right to health and its protection, and, in this sense, apply and interpret the provisions of its regulatory framework (the General Health Law) to make them compatible with that parameter and to understand that abortion for health reasons requested by the plaintiff was a healthcare service that they were obliged to provide not only on the basis of the obligations established by that parameter, but even on the basis of a systematic and consistent interpretation of the secondary framework that regulates them.

IV. Consequences

108. Once the violation of the plaintiff's right to health has been evidenced, which occurred after the refusal to interrupt the pregnancy, this First Chamber must determine the consequences for granting constitutional relief.

109. In theory, as stated herein, the refusal by the authorities to allow the plaintiff to terminate the pregnancy meant that she was deprived of a healthcare service, which falls within the regulatory scope of the right to health protection. The responsible authorities ignored that the essential purpose of the abortion for health reasons is to restore and protect the health of the pregnant person. Health that is being harmed not only by pregnancy, but by the physical or mental illness that appears or worsens because pregnancy continues.

AMPARO UNDER REVIEW 1388/2015

110. Therefore, this First Chamber orders the annulment, plain and simple, for lack of legal and factual grounding, of the official notice dated November 7, 2013, signed by the head of the Maternal-Fetal Medicine Service and the Coordinator of Obstetrics and Gynecology of the Institute of Security and Social Services for State Workers, and orders the State to provide proper legal and factual grounds for their actions.
111. This First Chamber orders the responsible authorities to properly and exhaustively assess the plaintiff's current state of health – since her the risk diagnosed could have changed or increased because of the illegal refusal to terminate the pregnancy; to inform the plaintiff about the result of the evaluation and to provide her with timely and quality treatment to combat the consequences of the refusal, because – despite being a beneficiary of the ISSSTE - she was forced to postpone the termination of a pregnancy that jeopardized her health. It should have been treated promptly. Although the pregnancy was terminated, it cannot be ignored that the refusal had delayed effects that increased the health risk suffered by the plaintiff.
112. In fact, the evidence in the file shows the technical opinion of doctor *********, a surgeon specializing in gynecology and obstetrics, in which he explained that JANE DOE was at high risk pregnancy, due to morbid obesity, which caused a greater maternal risk of diabetes, thromboembolism and pre-eclampsia. At the same time, due to the gastric bypass surgery, he pointed out that JANE DOE faced the risk of suffering malnutrition and obstruction of the small intestine due to internal hernia. For these reasons, the termination of pregnancy was considered an appropriate measure.
113. It should be noted that the proper healthcare services to resolve these consequences is not only directly and immediately related to the act complained of, but falls within the purview of the responsible authority and constitutes adequate restitution of the right to health.

VIII. DECISION

It is hereby decided to revoke the ineffective resolution entered by the District Judge; therefore, to assume jurisdiction to analyze the merits of the case, finally, to declare duly founded the grievances claimed by the plaintiff taking into account the parameter of constitutional regularity related to the right to health, argued throughout the decision. Plaintiff is granted protection so that she will be restored to the enjoyment of her right to health and the responsible authority will take charge – in light of the beneficiary relationship and the grievance claim - of providing her with the necessary medical and psychological care to restore the damages that the refusal to provide her with a service to which she was entitled caused her.

Pursuant to the foregoing based on law and fact, the following is hereby decided:

FIRST: The contested judgment is amended.

The Supreme Court of Justice protects and safeguards JANE DOE, according to the legal considerations and with the consequences specified herein.

LET IT BE KNOWN. With official transcript of this final ruling, return the corresponding court orders to their origin; and, in due course, file the court dossier as a matter finally adjudged.

This was the decision of the First Chamber of this Mexican Supreme Court of Justice, unanimously by five votes of Justice Norma Lucía Piña Hernández, who voted in this sense but diverged from the legal considerations and reserved the right to formulate concurrent vote and Justices Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena (Presiding Justice), and Juan Luis González Alcántara Carrancá, President of this First Chamber, who reserved the right to cast a concurring vote.

Signed by the President of the Chamber and the Presiding Justice, with the Head of the Office of Court Clerks, who authorizes and attests.

AMPARO UNDER REVIEW 1388/2015

PRESIDENT OF THE FIRST CHAMBER

JUSTICE JUAN LUIS GONZÁLEZ ALCÁNTARA CARRANCÁ

PRESIDING JUSTICE

JUSTICE ALFREDO GUTIERREZ ORTIZ MENA

**HEAD OF THE OFFICE OF THE COURT CLERK ASSIGNED TO THE
FIRST CHAMBER**

LIC. MARIA DE LOS ÁNGELES GUTIÉRREZ GATICA

In terms of Articles 113 and 116 of the General Law of Transparency and Access to Public Information; 110 and 113 of the Federal Law of Transparency and Access to Public Information, as well as General Agreement 11/2017 of the Plenary Session of the Mexican Supreme Court of Justice, published on September 18, 2017 in the Official Gazette of the Federation, this public version suppresses the information legally considered as reserved or confidential that falls within these legal provisions.