

**The Mexican Supreme Court's latest abortion ruling  
In between formalities, a path to decriminalization**  
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On May 15, 2019, the Mexican Supreme Court handed down its latest [ruling on abortion](#), now [available in English](#). The good news is that the Court's First Chamber held that denying women access to abortion violates their right to health. The bad news is that it still did not explicitly deem abortion *criminalization* unconstitutional —although it certainly laid the groundwork for it. Because of this, the ruling is worthy of revision, especially for an international audience, given its constant use of international law to underpin its arguments.

The case is related to a woman's petition to federal health authorities to terminate her pregnancy on the grounds that it posed a risk to her health. Her petition was denied by authorities, who argued that the General Health Law did not provide access to abortion. Although she opted for an abortion in Mexico City, where it is decriminalized and provided for as a free service, she nonetheless challenged their decision through an *amparo*, arguing that the authorities' denial violated her right to health.

The district court first dismissed the matter on a technicality, holding that, even if she were right on the merits, the ruling would have “no effect whatsoever because the subject matter of the government action being challenged had ceased to exist” Why? Because she had already terminated the pregnancy. If the point of an *amparo* is to stop or reverse an unjust ruling, there was nothing to reverse or to stop here. The deed was done. No justice could be served. The plaintiff challenged this decision too, finally reaching the Supreme Court, who thus had to decide on two issues: could she challenge the health authorities' refusal even though she had terminated her pregnancy? And if she could, was she right about the merits?

In Mexico, the procedural question was of paramount importance. The *amparo* has a [long history](#) of being interpreted in quite restrictive terms, allowing form to take precedence over substance. In the case of abortion, this interpretation made it impossible for women to ask for redress, given that no matter what they chose – ending or continuing the pregnancy – the *amparo* would always be rendered meaningless given that a ruling generally takes more than 9 months to materialize (the case at hand, for example, took a total of six years to be resolved).

On this first issue, the Court decided that procedural rules had to be interpreted from “a gender perspective,” which includes analyzing apparently *gender-neutral* provisions for the disparate impact they could have on men and women. The Court ruled, in other words, that we need to take CEDAW's prohibition of [indirect discrimination](#) seriously. Using this logic, it determined that

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adopting a restrictive interpretation of the *amparo* would hinder women's right to access justice in practically everything related to pregnancies, including their termination.

Regarding the merits, as mentioned, the Supreme Court held that denying women access to abortion violates their right to health. The Court conceptualized a robust right to health, relying both on constitutional and international law provisions to flesh it out. Following the [San Salvador Protocol](#), for instance, it held that this right guarantees people the "enjoyment of the highest level of physical, mental, and social wellbeing", which "includes what it means for each woman to *be well*", an "approach that recognizes the importance of women's perception and knowledge about themselves and what they may or may not assume or bear". Relying on CESCR's [General Comment No. 14](#), it repeatedly stated that this right does not only protect people's autonomy to make decisions regarding their health, but ensures they have access to the "full range of facilities, goods, services, and conditions" that are necessary to execute those decisions and attain the highest level of health possible.

Using this framework, the Court held that:

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.

Denying such a therapeutic action is denying women their right to health.

Now, for the Court –and this is crucial– it did not matter that the General Health Law did not explicitly contemplate access to abortion. Authorities needed to "apply and interpret the provisions of its regulatory framework to make them compatible" with the right to health, thus understood. Given that authorities failed to do so, and denied the plaintiff access to abortion, the Court deemed they violated her right to health.

What are the implications of this ruling? The first and obvious is that it unequivocally reframes access to abortion as a *right* that needs to be guaranteed for all women, something that thus far the Court had not done in such terms.

The second and most important is that, given its broad and woman-centered definition of health –physical, mental, and social well-being as defined by each individual woman–, and its understanding of abortion as a "therapeutic intervention" that can ensure a woman's well-being, it practically ensures that access to abortion is unfettered. Given the ruling's silence on limits to access (it says nothing about the State's interest in protecting "unborn life", for instance), it seems that, to access abortion, women must only "prove" that continuing with the pregnancy poses what *they* deem is a risk to their health.

What are the limits of the ruling? The most important one is that it is silent with regards to criminal law. The Court sidestepped ruling on the role criminalization played –and continues to

play— in abortion refusals. And it did so with a formalistic argument: given that the health authorities affirmed that they denied access to abortion because the General Health Law did not explicitly recognize it, [a majority](#) of the Justices deemed that the (Federal) Criminal Code had not been applied to this particular case. That criminal law *de facto* looms over health law made no difference. It seems that in order for the Court to apply its right-to-health framework to criminal law, it needs to be presented with a case in which criminal law is explicitly invoked.

In between formalities, however, the path to decriminalization of abortion seems to be paved.

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